
THE NEED TO HARMONISE TRADE-RELATED LAWS WITHIN COUNTRIES OF THE AFRICAN UNION: AN INTRODUCTION TO THE PROBLEMS POSED BY LEGAL DIVERGENCE

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1 Introduction

It is widely accepted that inter-state relationships have entered an era of globalisation. The economic theory of convergence¹ explains that it is this phenomenon which has spearheaded, amongst others, the development of international rules in the field of trade, finance and taxation.²

There can be little doubt that the increase in inter-state trade promotes economic development and growth.³ In order to further economic growth, developed and developing countries alike have entered into relationships characterised by interdependence.⁴ This interdependence has prompted a move towards economic convergence.⁵ And this is where the idea of regionalism originates: It is rooted in the observation that small and fragmented markets hamper economic development and trade,⁶ and that economic

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1 Williamson "Globalization, convergence and history" 1996 *J of Economic History* 300-302 and also Forje "Facing the challenges of globalization and regional integration: Problems and prospects for Africa at the dawn of the new millennium" 2004 *African Identities* 16-17 who explains that in terms of the economic theory of convergence, globalization will ultimately lead to national economic practices and institutions converging towards a set of standards which are most conducive to growth. Globalisation will result "in the equalization of the macro-economic performance of national economies ... Trade, capital flows and diffusion of technology from industrial to non-industrial nations will lead to economic growth, levels of productivity, and the cost of production to equalize around the world".

2 Forje (n 1) 17.

3 Sempasa "Obstacles to international commercial arbitration in African countries" 1992 *ICLQ* at 405.

4 Ayee "Background paper, forum of directors of regional development institutions in Africa: Review of African development", Tangier, 4-7 Oct 1999 at 3: <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN007274.pdf> (11 Sep 2006).

5 Ayee (n 4) at 3, 14.

6 Olowu "Regional integration, development and the African Union Agenda: Challenges, gaps and opportunities" 2003 *Transnational Law and Contemporary Problems* 216. Ng'ong'ola "Regional integration and trade liberalisation in Africa" 1999 *J of World Trade* 147.

development is measured, *inter alia*, by the ability of a country to create a good environment for the private sector.⁷

Trade and investment can only prosper within a legal framework, which is suited to the needs of modern-day business practice. The establishment of a free trade area, and subsequently a common market (both part of the process of regional integration), aim to facilitate inter-state trade and require the participating states to harmonise their economic policies at both a regional and a continental level. However, this is only half of the effort. If one of the goals of regional integration is to *facilitate* trade and *encourage* foreign investment, then this legal framework must reflect consideration for the need of the individual foreign traders and investors who will have entered into commercial transactions governed by national laws with which they are not familiar, or which, by virtue of their domestic character, are not suited to govern cross-border business dealings.

Thus, the statement that “[i]t would be in the interest of developing countries having a comparable stage of economic development to adopt, on certain subjects, uniform provisions which should be especially geared to the requirements of their economies”⁸ rings true today more than ever. This article looks at the need to harmonise trade-related laws on the African continent. It focuses on the harmonisation process geared towards economic integration as an obligation in terms of the treaties discussed below. Thereafter it looks at the need to harmonise substantive provisions related to commercial law, which is a necessity if trade and investment are to be encouraged as part of the bigger aim of achieving the goal of economic integration, and fully to reap the benefits of such integration.

2 Harmonisation of the laws as an obligation and an aspiration

In June 1991 members of the Organisation of African Unity (OAU) signed the Treaty Establishing the African Economic Community. This treaty entered into force in 1994.⁹ The AEC is to be a continental economic bloc,¹⁰ and an integral

7 Ayee (n 4) 13.

8 “Progressive development of the law of international trade: Report of the Secretary-General of the United Nations, 1966”
<http://www.jus.uio.no/im/un.sg.report.itl.development.1966/portrait.pdf>
(4 Jan 2008) (hereafter “Progressive development of the law of international trade: Report of the Secretary-General”) par 198.

9 The text of the treaty is available at
http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf
(11 Sep 2006) (hereafter “the AEC Treaty”, whereas the African Economic Community will be referred to as “the Community”); Ng’ong’ola (n 6) 145; Asante in Asante, Nwonwu &

part of the OAU.¹¹ The AEC Treaty was entered into in pursuance of the provisions of article II (2) of the 1963 Charter Establishing the Organization of African States,¹² which obliged the OAU members to coordinate and harmonise their general policies in a number of fields.¹³ In addition, the AEC Treaty implemented the provisions of the Lagos Plan of Action and the Final Act of Lagos,¹⁴ which had African integration and the promotion of development both within and among African states as one of its central themes.¹⁵ By becoming parties to the AEC Treaty, the members of the Community set out to establish the legal framework within which the process of Africa's economic integration would take place.¹⁶

The AEC Treaty signatories declared that in their endeavour to achieve the objectives of the AEC Treaty, they would adhere to the principles of "[i]nterstate co-operation, *harmonisation* of policies and integration of programmes",¹⁷ the "[p]romotion of *harmonious* development of economic activities among member states",¹⁸ as well as the "[o]bservance of the legal system of the Community".¹⁹ The language used in the last-mentioned principle implies that ultimately the signatories envisaged the existence of a *single* legal system.

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- Muzvidziwa *Towards an African Economic Community* (2001) 2; Forje (n 1) 18; El-Agraa "The enigma of African economic integration" 2004 *J of Economic Integration* 20; Ndulo "African Economic Community and the promotion of intra-African trade" http://www.einaudi.cornell.edu/Africa/outreach/pdf/African_Economic_Community.pdf (11 Sep 2006) (hereafter "African Economic Community") 2; Naldi & Magliveras "The African economic community: Emancipation for African states or yet another glorious failure" 1999 *North Carolina J of International Law and Commercial Regulation* 604; Packer & Rukare "The new African Union and its Constitutive Act" 2002 *American J of International Law* 369-370; Ndulo "Harmonisation of trade laws in the African Economic Community" 1993 *ICLQ* (hereafter "Harmonisation of trade laws") 101-103; Udombana "A harmony or cacophony: The music of integration in the African Union Treaty and the New Partnership for Africa's Development" 2002 *Indiana International and Comparative LR* 197f. The terms "community" and "AEC" are used interchangeably in this article.
- 10 Musungu "Economic integration and human rights in Africa: A comment on conceptual linkages" 2003 *African Human Rights LJ* 88.
- 11 Heyns, Baimu & Killander "The African Union" 2003 *German Yearbook of International Law* 258.
- 12 The text of the Charter is available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/OAU_Charter_1963.pdf (6 Oct 2006) (hereafter "the OAU Charter"); Nwonwu "The formation of an African Economic Community: Problems and prospects" in Asante, Nwonwu & Muzvidziwa *Towards an African Economic Community* (2001) 22.
- 13 Art II (2) of the OAU Charter (n 12) enumerates the following fields of co-operation: political and diplomatic cooperation, economic cooperation including transport and communications, educational and cultural cooperation, health sanitation and nutritional cooperation, scientific and technical cooperation and cooperation for defence and security.
- 14 The text of the Lagos Plan of Action, including the Final Act of Lagos as Annex I is available at http://www.uneca.org/itca/ariportal/docs/lagos_plan.pdf (6 Oct 2006) Nwonwu (n 12) 22; Udombana (n 9) 194-197.
- 15 Lagos Plan of Action (n 14); Ndulo "African Economic Community" (n 9) 1; Ayee (n 4) 18; Nyirabu "Appraising regional integration in Southern Africa" 2004 *African Security Review* 122; Packer & Rukare (n 9) 367; Olowu (n 6) 217; Ng'ong'ola (n 6) 147; Johnson "Economic cooperation in Africa: Enhancing prospects for success" 1991 *J of Modern African Studies* 2; Ndulo "Harmonisation of trade laws" (n 9) 104.
- 16 Asante (n 9) 2.
- 17 Art 3(c) of the AEC Treaty (n 9), emphasis added. See Ndulo "African Economic Community" (n 9) 2.
- 18 Art 3(d) of the AEC Treaty (n 9), emphasis added.
- 19 Art 3(e) of the AEC Treaty (n 9), emphasis added.

4 The need to harmonise trade-related laws

The objectives of the Community include: the promotion of economic, social and cultural development and the integration of African economies,²⁰ as well as the co-ordination and harmonisation of policies among existing and future economic communities, all of which is to be undertaken in order to contribute to the development and economic integration of the African continent²¹ and to gradually establish an economic community on continental level.²²

The AEC Treaty stipulates that for the abovementioned objectives to be achieved, the Community must (amongst others) ensure “[t]he conclusion of agreements aimed at *harmonising and co-ordinating policies* among existing and future sub-regional and regional economic communities”,²³ “[t]he *harmonisation* of national policies in order to promote Community activities”,²⁴ “[t]he establishment of a common trade policy *vis-à-vis* third States”,²⁵ as well as “[t]he establishment of a common market”.²⁶

The duty of member states to harmonise their strategies and policies is buttressed by the general undertakings provided for in article 5(1): “Member states undertake to create favourable conditions for the development of the Community and the attainment of its objectives, *particularly by harmonising their strategies and policies.*”²⁷

And in terms of article 5(2), “[e]ach Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the *enactment and dissemination of such legislation* as may be necessary for the implementation of the provisions of this Treaty”.²⁸

Member states which do not fulfil these duties will be subjected to sanctions by the Assembly of the Heads of State and Government on recommendation of the Council of Ministers.²⁹

20 Art 4(1)(a) of the AEC Treaty (n 9); Ndulo “African Economic Community” (n 9) 2-3; Ndulo “Harmonisation of trade laws” (n 9) 102.

21 Art 4(1)(c) of the AEC Treaty (n 9). See Ndulo “Harmonisation of trade laws” (n 9) at 102.

22 Art 4(1)(d) of the AEC Treaty (n 9). See Ndulo “Harmonisation of trade laws” (n 9) at 102.

23 Art 4(2)(b) of the AEC Treaty (n 9), emphasis added. Cf Ndulo “Harmonisation of trade laws” (n 9) at 102.

24 Art 4(2)(e) of the AEC Treaty (n 1), emphasis added. Art 4(2)(b) of the AEC Treaty (n 9), emphasis added. See Ndulo “African Economic Community” (n 9) 3; Ndulo “Harmonisation of trade laws” (n 9) 102.

25 Art 4(2)(f) of the AEC Treaty (n 9); Art 4(2)(b) of the AEC Treaty (n 9), emphasis added. See Ndulo “Harmonisation of trade laws” (n 9) 102.

26 Art 4(2)(h) of the AEC Treaty (n 9); Art 4(2)(b) of the AEC Treaty (n 9), emphasis added. See Ndulo “Harmonisation of trade laws” (n 9) at 102.

27 Emphasis added.

28 Emphasis added. See also Asante (n 9) 6; Ndulo “African Economic Community” (n 9) 4.

29 Art 5(3) of the AEC Treaty (n 9). In terms of this article such sanctions may include the suspension of rights and privileges of membership. It must also be noted that the provision refers to the Assembly of Heads of State and Government of the OAU, as provided for in art 1(h) and art 7(1)(a) and to the Council of Ministers of the OAU (art 1(i) and art 7(1)(b) of

The Community must be established in six stages³⁰ through the co-ordination, harmonisation and eventual merging of the existing regional integration schemes, which are the Community's building blocs.³¹

The need for harmonisation in specific sectors is further reiterated in Chapter V of the AEC Treaty, setting out general guidelines as to the measures necessary in this regard.³²

In terms of article 88,

1. The Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of regional economic communities.
2. Member States undertake to promote the co-ordination and harmonisation of regional economic communities of which they are members with the activities of the Community, it being understood that the establishment of the latter is the final objective towards which the activities of existing and future regional economic communities shall be geared.
3. To this end, the Community shall be entrusted with the co-ordination, harmonisation and evaluation of the activities of existing and future regional economic communities.

The Protocol on Relations between the African Economic Community and the Regional Economic Communities³³ was prepared in pursuance of this article's provisions.³⁴ It establishes a framework for the horizontal integration of the regional economic communities (RECs) and formulates the terms of their vertical relationship with the AEC.³⁵ One of the objectives of the Protocol is to promote the harmonisation of the policies, measures, programmes and activities of the regional economic communities.³⁶ In terms of the Protocol, the

the AEC Treaty (n 9)). See also: Ng'ong'ola (n 6) 149,151-154; Naldi & Magliveras (n 9) 623. Cf "Pan-African Perspective: The African Economic Community" (statement prepared by the Economic Co-operation and Development Department) <http://www.panafricanperspective.com/aec.htm> (15 Sep 2007).

30 Art 6(1) of the AEC Treaty (n 9); Asante (n 9) 2; Nwonwu (n 12) 23; Economic Commission for Africa "Globalization, regionalism and Africa's development agenda", paper prepared for UNCTAD X, Bangkok, Thailand Feb 12-19, 2000:

http://www.unctad-10.org/pdfs/ux_id_ecapaper.en.pdf (11 Sep 2006) (hereafter "ECA") 10; Ndulo "African Economic Community" (n 9) 3; Naldi & Magliveras (n 9) 604.

31 See art 88(1) of AEC Treaty (n 9); Ng'ong'ola (n 6) 149; Maluwa "Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union" 2001 *African Yearbook of International Law* 5-16; Musungu (n 10) 91; Asante (n 9) 7; Heyns, Baimu & Killander (n 11) 257-258. The stages through which the AEC is to be established are discussed below.

32 Arts 29-42 of the AEC Treaty (n 9); Ng'ong'ola (n 6) 156.

33 Signed in Feb 1998 in Addis Ababa, Ethiopia. The text of the Protocol is available at www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/aec/recprotocol.pdf (11 Sep 2006) (hereafter "the REC Protocol").

34 Preamble of the REC Protocol (n 33). The term "protocol" has been defined as a "supplementary instrument to a treaty or an instrument extending its scope and interpretation". In this regard see Ajulo "Sources of the law of the economic community of West African states" 2001 *J of African Law* at 83. Therefore, the protocol contains provisions binding on the AEC member states.

35 Udombana (n 9) 199.

36 Art 3(b) of the REC Protocol (n 33).

parties undertake to abide by the provisions of article 88(1) of the AEC Treaty in order to achieve the integration of the regional economic communities into an African Common Market, “thus, envisioning a Community that shall commence operating at *harmonized continental framework* at stage five set-out in Article 6 of the Treaty”.³⁷

In addition, the Community is under an obligation to “discharge fully” its duty of co-ordinating and harmonising the activities of the regional communities.³⁸

However, the AEC Treaty and its related protocols are not the only binding international instruments which echo the obligation of African states to work towards harmonisation. Another such treaty is that of the African Union.

The creation of the African Union has been marked with eagerness and hope as it embodied the celebration of pan-Africanism, and was considered to be a step on the road towards solidarity, political stability, economic development and good governance.³⁹ The Constitutive Act, which established the African Union, was adopted at Lomé, Togo, in July 2000 and came into force in May 2001.⁴⁰ The decision to establish the African Union had been taken in 1999 and is set out in the Sirte Declaration.⁴¹ In terms of the Sirte Declaration the AU was established “in conformity with the ultimate objectives” of the OAU Charter and

37 Art 4(c) of the REC Protocol (n 33), emphasis added.

38 Art 5(2) of the REC Protocol (n 33).

39 Olowu (n 6) 214.

40 Constitutive Act of the African Union, 2000. The text is available at http://www.au2002.gov.za/docs/key_oau/au_act.htm (11 Sep 2006) (hereafter “the AU Constitutive Act”); Maluwa (n 31) 3; Sibanda “Integrating Africa into the World Trade Organisation: Constraints and challenges facing the African Union and the New Partnership for Africa’s Development (NEPAD)” 2004 *Codicillus* 48-51; Maluwa “The African Union, the Southern African Development Community, and the New Partnership for Africa’s Development: Some observations on South Africa’s contribution to international law-making and institution-building in Africa, 1994-2004” 2004 *SAYIL* 6-12, 16-31; Nmeihelle “The African Peer Review Mechanism under the African Union and its initiative: The New Partnership for Africa’s Development” 2004 *American Society of International Law Proceedings* 241-242; Cowling “The African Union – An evaluation” 2002 *SAYIL* 193; Heyns, Baimu & Killander (n 11); Olowu (n 6) 220-227; Udombana (n 9) 206-209; Udombana “The institutional structure of the African Union: A legal analysis” 2002 *California Western International LJ* 71-73.

41 Declaration adopted at the Fourth Extraordinary Session of the Assembly of Heads of State and Government at Sirte, Libya EAHG/Draft/Decl. (IV) Rev.1 (8-9 Sep 1999). The text of the Declaration is available at http://www.au2002.gov.za/docs/key_oau/sirte.htm (11 Sep 2006) (hereafter “the Sirte Declaration”); El-Agraa “The enigma of African economic integration” 2004 *J of Economic Integration* 20; Heyns, Baimu & Killander (n 11) 259; Olowu (n 6) 217. See Maluwa (n 31) 5 who points out that “[t]he Sirte Declaration is generally regarded as manifesting a collective commitment by African leaders for reinvigorating the search for the attainment of the vision espoused by the ‘founding fathers’ ... namely to forge a closer unity among African peoples and nations”. The author gives an extensive background to the declaration at 16-20.

the AEC Treaty.⁴² The declaration also espouses a decision to accelerate the latter treaty's implementation⁴³ (the determination to do so is echoed in the Preamble of the AU Constitutive Act) to ensure the speedy establishment of the institutions provided for in the AEC treaty⁴⁴ and to strengthen and consolidate the regional economic communities.⁴⁵

The AU's objectives include: The acceleration of Africa's political and socio-economic integration,⁴⁶ the promotion of sustainable development at the economic, social and cultural levels, and the integration of African economies,⁴⁷ coordination and harmonisation of the policies between existing and future Regional Economic Communities,⁴⁸ the latter being a necessary condition for the gradual attainment of the AU's objectives.⁴⁹ Furthermore, the Union is said to function in accordance with the principles of "sovereign equality and interdependence",⁵⁰ pointing to the fact that members are shifting their attention to common areas of cooperation, weakening the walls of sovereignty.⁵¹

42 Par 8(i) of the Sirte Declaration (n 41). Regarding the exact relationship between the AEC and the AU, Heyns, Baimu & Killander (n 11) 258 add the following: Originally, the AEC was envisaged to be an integral part of the OAU, as a result the AEC's organs and procedures were borrowed largely from those of the OAU and some bodies, such as the Assembly of Heads of State and Government, the Council of Ministers and the Economic and Social Commission were shared with the OAU. The authors further argue that "[t]he political and economic aspects of regional cooperation on the continent, which in the past, at least formally has been pursued separately through the OAU and the AEC respectively, converge in the African Union" (at 263). See also art 33 of the AU Constitutive Act (n 40) entitled "Transitional Arrangements and Final Provisions" which states: "(1). This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year ... following the entry into force of the Act, *for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.* (2) The provisions of this Act shall *take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community*" (my emphasis). Heyns, Baimu & Killander (n 11) at 278 state that the AEC Treaty remains operative to the extent that its provisions do not derogate from the AU Constitutive Act. Maluwa (n 31) 32-34 explains that the AEC had been established as an integral part of the OAU (art 98 of the AEC Treaty), and that although the OAU ceased to exist, the AEC was not abrogated. However, it would continue only as an integral part of the AU. Likewise El-Agraa (n 9) 22, argues that the AEC has been incorporated into the AU and that the objectives of the AU must therefore be added to the aims of the AEC. See also Packer & Ruckare (n 9) 372 who submit that "while the institution of the AEC has become defunct, the provisions of the AEC Treaty that are modified by, or additional to, the [Constitutive Act] remain legally binding". See also Naldi & Magliveras (n 9) 619. For a discussion of the divergence in their membership see Heyns, Baimu & Killander (n 11) 278.

43 Par 8(ii) of the Sirte Declaration (n 41); El-Agraa (n 9) 21; Maluwa (n 40) 12; Packer & Ruckare (n 9) 370-371; Udombana (n 9) 210-211.

44 Par 8(ii)(b) of the Sirte Declaration (n 41). These institutions include the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.

45 Par 8(ii)(c) of the Sirte Declaration (n 41).

46 Art 3(c) of the AU Constitutive Act (n 40); El-Agraa (n 9) 21; Heyns, Baimu & Killander (n 11) 252.

47 Art 3(j) of the AU Constitutive Act (n 40); El-Agraa (n 9) 21; Ndulo "African Economic Community" (n 9) 1; Cowling (n 40) 198 submits that the elaboration on the content of these provisions (they are more detailed than the corresponding provisions in the OAU Charter) "increases the obligation on the part of member states to cooperate and bring about unity in these particular fields".

48 Art 3(l) of the AU Constitutive Act (n 40); El-Agraa (n 9) 21.

49 Art 3(l) of the AU Constitutive Act (n 40); Maluwa (n 31) 25.

50 Art 4(a) of the AU Constitutive Act (n 40).

51 Cowling (n 40) 197.

The exposé of the extent to which the spirit of harmonisation has permeated the agenda of international relations on the African continent will not be complete without mentioning a very important, albeit non-binding, policy document: The New Partnership for Africa's Development (NEPAD).⁵²

NEPAD is a developmental agenda⁵³ whose document sets out the problems and challenges facing Africa, the reason for their existence, and the way in which Africa is planning to deal with them.⁵⁴ As Udombana states, "[i]t is a made-in-Africa prescription that is aimed at the sustainable development of Africa".⁵⁵

NEPAD is a "framework of interaction with the rest of the world based on Africans setting their own agenda".⁵⁶ It is a pledge by African leaders to eradicate poverty and place their countries on a path of sustainable growth and development and at the same time enable them to participate actively in the world economy and in the body politic.⁵⁷ There is commitment to strengthen democracy and the rule of law which are seen as preconditions for economic growth.

NEPAD contains a Programme of Action which delineates the problems facing the African continent today, as well as the objectives and the steps that need to be taken towards their resolution.⁵⁸ The issues listed in the Programme of

52 The NEPAD Framework Document (Oct 2001) is available at <http://www.nepad.org/2005/files/documents/inbrief.pdf> (20 Oct 2006). NEPAD has its origins in the Millennium Partnership for Africa's Recovery Action Plan (backed by South Africa, Nigeria and Algeria and dedicated to the terms of a partnership between Africa and countries of the North) and OMEGA Plan for Africa (backed by Senegal and aimed at assessing Africa's needs in an attempt to bridge the gap between the African countries and the developed world and to raise the funds needed for this purpose), which were consolidated and merged in 2001 to create the New African Initiative (NAI). The OAU Assembly of Heads of State and Government gave it its blessing on 11 Jul 2001. On 23 Oct 2001, the editing of the NAI document was complete and the initiative was given a new name: New Partnership for Africa's Development: NEPAD was born. See Udombana (n 9) at 186, 214f; Udombana "How should we then live? Globalization and the New Partnership for Africa's Development" 2002 *Boston University International LJ* 295; Baimu "Human rights mechanisms and structures under NEPAD and the African Union: Emerging trends towards proliferation and duplication" http://www.chr.up.ac.za/centre_publications/occ_papers/occ15.html (22 Sep 2006); Wade "Omega Plan for Africa: An African strategy for globalisation" 2003 *The African Economist* 36; El-Agraa (n 9) 20; Sibanda (n 40) 52-53; Maluwa (n 40) 13; Nmehielle (n 40) 242-244; Packer & Rukare (n 9) 365-372; Olowu (n 6) 226-229; Heyns, Baimu & Killander (n 11) 271-272, who approximate NEPAD to the Marshal Plan which had helped rebuild European economies after World War II and had provided the basis for future European economic integration. The authors submit that "[t]he implementation of the NEPAD project could create optimal conditions for economic cooperation and provide a foundation on which genuine and sustainable African-wide economic integration can be achieved".

53 Udombana "The unfinished business: Conflicts, the African Union and the New Partnership for Africa's Development" 2003 *George Washington International LR* 58.

54 Baimu (n 52).

55 Udombana (n 52) 295.

56 Mosoti "The New Partnership for Africa's Development: Institutional and legal challenges of investment promotion" 2004 *San Diego LJ* 146.

57 The NEPAD Framework Document (n 52) par 1.

58 *Idem* at pars 59-70; Mosoti (n 56) 153.

Action overlap to a large extent with the above-mentioned objectives of the AU⁵⁹ and some of its initiatives relate to economic and corporate governance,⁶⁰ as well as capital flows and market access.⁶¹ The Programme of Action identifies the need for “massive, heavy investment to bridge existing gaps”⁶² and lists “increased African integration” as one of its outcomes.⁶³ Paragraph 92 proclaims as follows:

The [NEPAD] focuses on the provision of essential regional public goods ... as well as the promotion of intra-African trade and investment. The focus will be on *rationalising the institutional framework for economic integration*, by identifying common projects compatible with integrated country and regional development programmes, and *on the harmonisation of economic and investment policies and practices*. There needs to be coordination of national sector policies and effective monitoring of regional decisions.⁶⁴

The NEPAD document points out that the efforts to improve the quality of life of the African people are to take the form of a global partnership not just between African leaders, but between Africa and other industrialised countries and multilateral organisations.⁶⁵ NEPAD’s Programme of Action includes, through the use of the existing RECs, the establishment of economic infrastructure and the implementation of policies which would advance and increase intra-regional trade and promote the rationalisation and harmonisation of the regional integration process.⁶⁶ It will play an important role in Africa’s socio-economic integration.⁶⁷

NEPAD also provides for the establishment of Public-Private Sector Partnership (PPP).⁶⁸

The regime created by the AU and NEPAD is expected to improve trade and investment and relocate Africa in the global economy,⁶⁹ and by working together with the various regional organisations, to progress towards the achievement of the objectives of good governance, peace, modernisation and

59 Eg, NEPAD’s long-term goals to eradicate poverty and halt the marginalisation of Africa (par 67) and its expected outcome to increase economic growth, reduce poverty and increase African integration (par 69) overlap with the AU objectives listed in the text above.

60 The NEPAD Framework Document (n 52) pars 79-89.

61 *Idem* pars 144-170.

62 *Idem* par 66. See also Mosoti (n 56) 157; Udombana (n 52) 328 (importance of FDI); Udombana (n 53) 56 (conflict and instability as a threat to economic development).

63 The NEPAD Framework Document (n 52) par 69.

64 My emphasis.

65 The terms of such a partnership and the responsibilities and benefits for all partners are listed in the document (par 171-185). In proposing a partnership, Africa recognises that she herself holds the key to her own development (par 203).

66 NEPAD Framework Document (n 52) par 90-95; Heyns, Baimu & Killander (n 11) 272.

67 Olivier & Olivier “Models of regional integration: The European Union and the African Union” 2004 *SAPR/PL* 358; Heyns, Baimu & Killander (n 11) 272.

68 Udombana (n 9) 221. *Cf* NEPAD Framework Document (n 52): eg, pars 163, 164 and 192.

69 Sibanda (n 40) 60-61.

democracy and economic development.⁷⁰ The next section takes a closer look at these regional organisations.

3 Regional economic integration

If Africa is to recover and survive economically she must strengthen her capacity to integrate her *regional* economy.⁷¹ Regional integration arrangements are intended to pave the way towards the creation of larger regional markets. A larger market benefits the participating countries in that it enhances domestic competition, encourages economic diversification, increases return on investment and thereby attracts more investment.⁷²

Economic integration on the continent entails the co-ordination, harmonisation and eventual merging of the existing regional schemes,⁷³ all of which share

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- 70 Olivier & Olivier (n 67) 363. Olowu (n 6) 230-231.
- 71 ECA (n 30) 2; Forje (n 1) 17-19, 23-24.
- 72 United Nations Conference on Trade and Development and United Nations Development Programme (2006) Trade Capacity Development for Africa: Trade Negotiations and Africa Series No. 3: Policy Issues for African Countries in Multilateral and Regional Trade Negotiations (UNCTAD/DITC/TNCD/2006/6) at 9: <http://www.unctad.org> (8 Dec 2006) (hereafter "UNCTAD & UNDP").
- 73 Art 88(1) of AEC Treaty (n 9); Ng'ong'ola (n 6) 149; Maluwa (n 31) 15-16. The regional economic communities include: (1) The Southern African Development Community (SADC), text of the Treaty Establishing the Southern African Development Community, 1992 as amended in 2001 available at http://www.sadc.int/english/documents/legal/treaties/amended_declaration_and_treaty_of_sadc.php (20 Oct 2006); (2) Southern African Customs Union (SACU), Final SACU Agreement, 2002: <http://www.tralac.org/scripts/content.php?id=961> (22 Nov 2006); (3) the Common Market for Eastern and Southern Africa (COMESA) (COMESA – founded in 1993 as a successor to the Preferential Trade Area for Eastern and Southern Africa (PTA), established 1981) COMESA Treaty, 1993: http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/comesa/2COMESA_Treaty.pdf and http://www.comesa.int/comesa%20treaty/comesa%20treaty/Multi-language_content.2005-07-01.3414/en (20 Oct 2006); (3) The Economic Community of West African States (ECOWAS), Treaty Establishing the Community of West African States (ECOWAS), 1975 as revised by Treaty of ECOWAS, 1993: www.ecowas.int (17 Nov 2006); (4) Intergovernmental Authority on Development (IGAD), Agreement establishing the Intergovernmental Authority on Development IGAD, 1996: http://www.igad.org/about/agreement_establishing_igad.pdf (17 Nov 2006); (5) East African Community (EAC), Treaty Establishing the East African Community, 1999: <http://www.eac.int/documents/EAC%20Treaty.pdf> (20 Oct 2006); (6) Economic Community of Central African States (ECCAS), Treaty Establishing the Economic Community of Central African States (ECCAS) (Communauté Économique des États de l'Afrique Centrale (CEEAC)), 1983: http://www.iss.co.za/af/regorg/unity_to_union/pdfs/eccas/eccastreaty.pdf (20 Oct 2006); (7) Arab Maghreb Union (AMU or UMA), Traite Instituant l'UMA (the Treaty Establishing the AMU), 1989: http://www.iss.co.za/af/regorg/unity_to_union/pdfs/amu/AMUTreaty.pdf (20 Oct 2006); (8) Community of Sahel-Saharan States (CENSAD, established 1998): http://www.iss.co.za/af/regorg/unity_to_union/censadprof.htm (20 Oct 2006); (9) Union Economique et Monétaire Ouest-Africaine (UEMOA) Le Traité Modifié l'UEMOA (UEMOA Treaty), 2003: <http://www.uemoa.int/actes/2003/TraitReviserUEMOA.pdf> (20 Oct 2006); (10) Economic Community of the Countries of the Great Lakes / Communauté Economique des Pays des Grands Lacs (CEPGL) now defunct, paralysed by the conflict in the Great Lakes Region: <http://www.inica.org/webdocuments/EN/DOC%20AND%20MEDIA%20CENTER/THEMATI C%20SHEETS/Heterogeneous%20region.pdf> (20 Oct 2006). Cf El-Agraa (n 9) 25-26; Musungu (n 10) 91; Forje (n 1) 18; Ndulo "African Economic Community" (n 9) 2; Ndulo "Harmonisation of trade laws" (n 9) 104; Nyirabu (n 15) 122; Maluwa (n 31) 14-16; Heyns, Baimu & Killander (n 11) 257; Udombana (n 9) 199-200; UNCTAD & UNDP (n 72) 5.

economic transformation and development as a goal.⁷⁴ The process of integration itself consists of both negative integration (which involves the elimination of discriminatory measures) and positive integration (which entails coordination of the various economic policies).⁷⁵

The end result of the envisaged African integration would be the establishment of the African Economic Community which would function on principles of trade liberalisation⁷⁶. This goal is supposed to be reached by means of a process spanning over a period of thirty four years. It is divided into six stages, and a particular time-period is set for each stage.⁷⁷

During stage one (which should have been completed within five years), the existing regional economic communities must be strengthened and economic communities must be established in the regions where there are none.⁷⁸ Member states are under a duty to work towards and achieve this goal.⁷⁹

The second stage (which must span no more than eight years) obliges members to work towards the stabilisation of tariff and non-tariff barriers, customs duties and internal taxes, and gradually to remove all tariff and non-tariff barriers to regional trade, as well as to harmonise their customs duties in relation to third states.⁸⁰ Also as part of this stage, member states must strengthen the integration of trade activities at both regional and continental levels.⁸¹ Finally, stage two must see the “[c]o-ordination and harmonisation of activities among the existing and future economic communities”.⁸² The duty to achieve this resonates in article 28(2).

74 El-Agraa (n 9) 25-26; Musungu (n 10) 91; Forje (n 1) 18; Ndulo “African Economic Community” (n 9) 2; Nyirabu (n 15) 122; Maluwa (n 31) 14-16; Heyns, Baimu & Killander (n 11) 257.

75 Van der Merwe “Economic cooperation in South Africa: Structures, policies, problems” 1991 *CILSA* 387; Udombana (n 9) 187. The author explains that positive integration involves the replacement of national policies with a common policy and the coordination of national policies, which is necessary, because in the absence of such coordination countries may further national policies which create distortions (eg, an anti-trust policy which can set out common rules that prevent individual countries from abusing state aids or public companies in order to favour local production).

76 Ayee (n 4) 18.

77 Art 6(1) of the AEC Treaty (n 9); Asante (n 9) 2; Nwonwu (n 12) 23; ECA (n 71) 10; Ndulo “African Economic Community” (n 9) 3; Ndulo “Harmonisation of trade laws” (n 9) 106; Naldi & Magliveras (n 9) 604; Udombana (n 9) 198f; UNCTAD & UNDP (n 72) 13-14.

78 Art 6(2)(a) of the AEC Treaty (n 9); Asante (n 9) 9.

79 Art 28(1) of the AEC Treaty (n 9).

80 Art 6(2)(b)(i) of the AEC Treaty (n 9); Naldi & Magliveras (n 9) 605-606.

81 Art 6(2)(b)(ii) of the AEC Treaty (n 9).

82 Art 6(2)(b)(iii) of the AEC Treaty (n 9).

Stage three (with a time-limit of ten years) involves the establishment of a Free Trade Area⁸³ at a regional level, achieved after the removal of tariff and non-tariff barriers to intra-community trade (such a duty is imposed on member states by virtue of article 31(1)), and the establishment of a Customs Union,⁸⁴ after the members within each respective regional economic community have adopted a common external tariff.⁸⁵ Once again, the obligation to achieve this goal is concretised in terms of articles 29⁸⁶ and 32.

Thereafter, the regional communities must adopt a common external tariff (operating amongst the various communities) and establish a Customs Union at a continental level as part of stage four. The latter is to be completed over a two-year period⁸⁷ and the duty for its completion is reiterated in article 30.

By the end of stage five, which is to be completed within four years, the members of the Community must establish an African Common Market.⁸⁸ In order to achieve this goal they must, *inter alia*, adopt common policies in a number of areas⁸⁹ and harmonise their monetary, financial and fiscal policies.⁹⁰

During the sixth and final stage, within a period of five years, the African Common Market must be strengthened. This would include the free movement of people, goods and services.⁹¹ A Pan-African Economic and Monetary Union⁹² and a single domestic market must be established through the

83 Free Trade Area (FTA), the lowest level of economic integration, entails a minimal amount of policy harmonisation, namely removal of tariffs and other restrictions to trade (such as quantitative restrictions) to ensure free movement of goods and services. However, each country retains the right to apply own tariffs / other restrictions to trade with states outside the FTA. Discrimination between the economies of the member states is thereby eliminated. See Ng'ong'ola (n 6) 153; Van der Merwe (n 75) 386; Udombana (n 9) 198.

84 Customs Union (CU): over and above establishing a FTA, the members of the CU adopt an agreed upon common external tariff towards non-participating states and divide customs revenue among themselves. See Ng'ong'ola (n 6) 153; Van der Merwe (n 75) 387; Udombana (n 9) 198.

85 Art 6(2)(c) of the AEC Treaty (n 9). See also Asante (n 9) 9.

86 Art 29 of the AEC Treaty (n 9). Art 29(a) elaborates that the establishment of a CU involves "[t]he elimination, among Member States of each regional economic community, of customs duties, quota restrictions, other restrictions or prohibitions and administrative trade barriers".

87 Art 6(2)(d) of the AEC Treaty (n 9).

88 Common Market (CM): In addition to the establishment of a CU there will be free movement of human resources, labour capital and services, and since members of the CM strive for the approximation of laws there needs to be a significant degree of policy harmonisation. Macro-economic policies are coordinated to ensure consistent "fiscal, monetary, external payments and exchange-rate policies of member states". See Ng'ong'ola (n 6) 153; Van der Merwe (n 75) 387; Udombana (n 9) 198; Johnson (n 15) 2.

89 Art 6(2)(e)(i) of the AEC Treaty (n 9). These areas include agriculture, transport and communications, industry, energy and scientific research.

90 Art 6(2)(e)(ii) of the AEC Treaty (n 9).

91 Art 6(2)(f)(i) of the AEC Treaty (n 9).

92 Economic Community (Economic Union) means that member states have a CM, but in addition they strive to approximate and coordinate their economic policies so as to adopt common policies on fiscal, monetary and industrial sectors, and/or other economic areas, eg, agriculture and transport. See Ng'ong'ola (n 6) 153; Van der Merwe (n 75) 387; Udombana (n 9) 198.

integration of economic, political, social and cultural sectors,⁹³ and in addition a single African currency must be created.⁹⁴

From the above, it is clear that African integration is to start at a sub-regional level (a bottom-up approach). This seems to be a sensible option: It is easier to overcome impediments to continental integration because, at a regional level, states are generally more socially, economically and culturally compatible and interdependent.⁹⁵ However, despite the enthusiasm surrounding the idea of regional integration (as manifested in the proliferation of regional and sub-regional organisations since the 1960s), there is very little evidence that the existing economic communities have made significant progress towards the coveted objective of achieving market integration.⁹⁶

For example, by 2004 UMA was yet to achieve a Free Trade Area, despite plans to have a Customs Union by 1995 and a Common Market by 2000, while CENSAD had at that stage no clear trade liberalisation strategy.⁹⁷ ECOWAS aimed to achieve a Customs Union by 2000. This was, however, delayed and by 2004 there was not even a Free Trade Area between some of the members, and neither ECOWAS nor COMESA had complied with their trade liberalisation schedules and implementation target dates.⁹⁸

Various reasons have been advanced as to why this is the case.⁹⁹ In general, the REC members lack clearly defined national plans and strategies necessary to achieve economic development.¹⁰⁰ Regional agreements are rarely incorporated into domestic law and/or policies.¹⁰¹ The monetary cost exacted towards REC membership may also be a discouraging factor for some states.¹⁰²

The regional schemes themselves may lack a proper regulatory framework,¹⁰³ and often there is duplication of activities between two or more institutions existing within the same region.¹⁰⁴

93 Art 6(2)(f)(ii) of the AEC Treaty (n 9).

94 Art 6(2)(f)(iii) of the AEC Treaty (n 9).

95 Olivier & Olivier (n 67) 362-363.

96 Ayee (n 4) 17; UNCTAD & UNDP (n 72) 7f; Ndulo "Harmonisation of trade laws" (n 9) 106.

97 El-Agraa (n 9) 26.

98 *Idem* 27; UNCTAD & UNDP (n 72) 7.

99 See n 106 below.

100 Udombana (n 9) 202.

101 Olowu (n 6) 242; UNCTAD & UNDP (n 72) 11.

102 *Idem* 11-12.

103 Udombana (n 9) 202-203.

104 Olowu (n 6) 242; UNCTAD & UNDP (n 72) 11.

Another important reason behind the general failure of RECs to make progress according to the provisions of the AEC Treaty is that there are no mechanisms which could be used to enforce compliance with the relevant timetables (eg, those dealing with tariff reductions).¹⁰⁵ Understandably, this undermines the readiness with which African states would otherwise comply with the provisions of their respective regional agreements. But lack of enforcement mechanisms is not the only hindrance in the process of integration.¹⁰⁶ Another, perhaps more consequential factor, is that RECs place competing demands on their members,¹⁰⁷ which may belong to more than one integration scheme.¹⁰⁸ Overlapping and replication of membership will in most instances lead to conflict of interests. States become participants in different uncoordinated

105 Udombana (n 9) 204; see also De Macedo & Kabbaj *Regional Integration in Africa* (2002) 28.
 106 See ECA (n 30) 10. Other factors hindering integration cited by the ECA include: Lack of compensating mechanisms for losers in the process of integration, unsuccessful implementation of agreed policies and programmes due to weak national commitment and/or weak capacity at a national and sub-regional levels, and regional conflicts. On conflict and instability as a threat to economic development see further Udombana (n 53) 56; Cowling (n 40) 205. See also El-Agraa (n 9) 32, 35; Packer & Rukare (n 9) 378 on the small possibility of generating intra-regional trade: "Most African states produce cash crops (such as coffee, cotton, tobacco and flowers), which are not in high demand on the continent". See further Olowu (n 6) 236, 240-241 who cites problems such as persistent zero-growth rates, balance of payment difficulties, lack of complementarities, weak industrial structures, low-ebb productivity, heavy debt burdens, poor infrastructural and transport facilities, and non-convertible currencies and the fact that commercial, political, communication and transport networks with Europe continue to be more important to African states than intra-regional African relations. Perhaps the strongest impediment to intraregional integration is the states' unwillingness to give up their sovereignty. In this regard see Ndulo "Harmonisation of trade laws" (n 9) 105; Udombana (n 9) 202; Olowu (n 6) 236, 238; Johnson (n 15) 4-5.

107 ECA (n 30) 10.

108 Eg, Angola belongs to COMESA and SADC; Benin to ECOWAS and UEMOA; Botswana to SADC and SACU; Comoros to COMESA and IOC; Burkina Faso to ECOWAS and UEMOA; Burundi to ECCAS and CEPGL; Cameroon to CEMAS and ECCAS; Central African Republic to CENSAD, CEMAC and ECCAS; Chad to CENSAD, CEMAS and ECCAS; Congo to CEMAS and ECCAS; Côte d'Ivoire to ECOWAS and UEMOA; Djibouti to COMESA and IGAD; DRC to COMESA and SADC; Ethiopia to COMESA and IGAD; Equatorial Guinea to CEMAS and ECCAS; Gabon to CEMAS and ECCAS; Guinea to ECOWAS and MRU; Guinea-Bissau to ECOWAS and UEMOA; Kenya to COMESA, EAC and IGAD; Lesotho to SADC and SACU; Liberia to ECOWAS and MRU; Libya to UMA and CENSAD; Madagascar to COMESA and SADC; Malawi to COMESA and SADC; Mali to CENSAD and ECOWAS; Mauritania to ECOWAS and UAM; Mauritius to COMESA and SADC; Morocco to UMA and CENSAD; Namibia to SACU, COMESA and SADC; Niger to CENSAD and ECOWAS; Nigeria to CENSAD and ECOWAS; Rwanda to COMESA, CEMAS and CEPGL; Senegal to UMA, ECOWAS and UEMOA; Seychelles to COMESA, IOC and SADC; Sierra Leone to ECOWAS and MRU; South Africa to SADC and SACU; Sudan to COMESA and IGAD; Swaziland to COMESA, SADC and SACU; Tanzania to EAC and SADC; Togo to ECOWAS and UEMOA; Tunisia to UMA and CENSAD; Uganda to COMESA and EAC; Zambia to COMESA and SADC; Zimbabwe to COMESA and SADC. See El-Agraa (n 9) 25-29. See also UNCTAD & UNDP (n 72) 5. For the text of the constitutive instruments of these regional organisations see n 73 above. Membership details of the various regional organisations available as follows: ECOWAS <http://www.ecowas.int> (17 Nov 2006); UEMOA <http://www.uemoa.int/index.htm> (20 Oct 2006); SADC http://www.iss.co.za/af/regorg/unity_to_union/sadcprof.htm (20 Oct 2006); IGAD http://www.iss.co.za/af/regorg/unity_to_union/igadprof.htm (20 Oct 2006); CEPGL <http://www.inica.org/webdocuments/EN/DOC%20AND%20MEDIA%20CENTER/THEMATI%20SHEETS/Heterogeneous%20region.pdf> (20 Oct 2006); ECCAS http://www.iss.co.za/af/regorg/unity_to_union/eccasprof.htm (20 Oct 2006); ECCAS/CEEAC http://www.iss.co.za/af/regorg/unity_to_union/eccasprof.htm (20 Oct 2006); AMU/UMA http://www.iss.co.za/af/regorg/unity_to_union/amuprof.htm (20 Oct 2006); COMESA http://www.iss.co.za/AF/RegOrg/unity_to_union/comesaprof.htm (20 Oct 2006); CEN-SAD http://www.iss.co.za/af/regorg/unity_to_union/censadprof.htm (20 Oct 2006); EAC http://www.iss.co.za/af/regorg/unity_to_union/eacprof.htm (20 Oct 2006). See also El-Agraa (n 9) 25-26; ECA (n 30) 10; Maluwa (n 40) 12.

programmes of integration and have to implement different (at times conflicting or incompatible with the varying levels of trade liberalisation achieved by the states concerned).¹⁰⁹ For example, UEMOA (consisting of French-speaking members of ECOWAS) has progressed to achieve a Customs Union, introducing common external tariffs in 2000 which are then applied to the rest of ECOWAS while some of their members have not yet established even a Free Trade Area.¹¹⁰

Compliance with the policies of one regional economic scheme may come at the expense of another. Since the African Economic Community will be created only if all regional economic communities have succeeded in their integration endeavours, it may be concluded that the reality of overlapping REC membership undermines the overall objective of achieving a continental union.¹¹¹

The obvious solution to the above problem would be the revision of various regional economic agreements, which is arguably an obligation in terms of the AEC Treaty. It may be recalled that the latter provides (as part of stage one which ought to have been completed by now) that the existing regional economic communities must be strengthened.¹¹² The treaty itself does not elaborate on the meaning of this vague and imprecise term.¹¹³ However, bearing in mind that it is crucial for the RECs to function towards the progressive realisation of their goals (and, ultimately, the establishment of the AEC) without being hindered by the problems of overlapping membership mentioned above, it stands to reason that the term “strengthening” may be interpreted as involving the revision of their constitutive documents so as to bring them in line with one another in areas where more than one REC exist.¹¹⁴ This however, would prove to be a complex, time-consuming process.¹¹⁵ Thus

109 De Macedo & Kabbaj (n 105) 28; Olowu (n 6) 242; UNCTAD & UNDP (n 72) 11. Eg, rules of origin differ among the regional arrangement, therefore developing the necessary criteria is difficult while implementing the agreements becomes costly; schedules and scope of liberalisation differ; customs procedures are multiplied, paper work is complicated; and the goals become slow to achieve. In other instances they are impossible to achieve: one country belonging to two different regional schemes cannot comply with *both* their requirements for establishing a common external tariff (CET) – provided that CET's differ – eg, in the case of Namibia and Swaziland who belong to SACU, COMESA and SADC. Solution has been found by ECOWAS (where non-UEMOA members have adopted the CET of UEMOA).

110 El-Agraa (n 9) 27; UNCTAD & UNDP (n 72) 7.

111 UNCTAD & UNDP (n 72) 10-11. One explanation why countries choose to belong to more than one regional schemes is that by pursuing integration on multiple tracks, they can take advantage of a smaller schemes that are able to progress faster. See also Udombana (n 9) 204-205.

112 AEC Treaty (n 9) above, art 6(2)(a) and art 28 (n 9).

113 Ng'ong'ola (n 6) 155.

114 *Ibid.*

115 *Ibid.*

a vexing question begs an answer: Under the auspices of which institution would such negotiation take place? And who will manage and facilitate such a process? At this stage, the relationship between the RECs and AEC is not clearly defined,¹¹⁶ despite the existence of the protocol,¹¹⁷ while the relationship between the AEC and AU is ambiguous.¹¹⁸

The rationalisation, or harmonisation, of the REC agreements and constitutive documents (which are agreements of international character) is but one aspect of the broad harmonisation process that ought to be undertaken. Economic integration both presupposes and necessitates the harmonisation of other economics-related laws.¹¹⁹ The eventual aim is to combine different national economies into a single economy.¹²⁰ Thus, a number of areas will be affected. The envisaged integration includes product market and trade integration, capital, monetary, as well as labour market integration.¹²¹

It will be recalled that the establishment of a common market entails that there will be free movement of capital, products and labour.¹²² AEC member states are under a duty gradually to secure for their nationals the rights of free movement, of residence, and of establishment within the Community.¹²³ As a result, laws governing issues such as rights of entry and residence, employment, social security rights; reciprocal recognition of qualifications; and the rights of legal persons must be clarified in the relevant Protocol.¹²⁴ The provisions of this Protocol *must* be implemented as national laws within African states – hence the relevant domestic laws will be harmonised. And for economic integration to become a reality, harmonisation must take place.

This is, of course, not the only example. The process of economic integration is impeded by the existing shortfalls of African financial institutions, inadequacy of

116 Eg, RECs deemed to be the building blocs of the African Economic Community are neither members, nor organs of the latter and are therefore not accountable to the AEC directly. Another problem is that some RECs predate the AEC Treaty and their objectives consequently do not coincide with those of the AEC. See UNCTAD & UNDP (n 72) at 14.

117 REC Protocol (n 33); UNCTAD & UNDP (n 72) 14.

118 See n 42 above.

119 See Allott "Towards the unification of laws in Africa" 1965 *International and Comparative Law in Africa* 373 who explains that integration involves the creation of a new legal system after separate legal systems have been combined into a self-consistent whole. He further elaborates that integration is a stage more advanced than mere harmonisation of laws, and that integration is implemented through the enactment of legislation.

120 Van der Merwe (n 75) 387; Marasinghe "A review of regional economic integration in Africa with particular reference to Equatorial Africa" 1984 *JCLQ* 51.

121 Van der Merwe (n 75) 387; Marasinghe (n 120) 51; Olowu (n 6) 234.

122 See n 88 above; Marasinghe (n 120) 49.

123 Art 43 (1) of the AEC Treaty (n 9).

124 Art 43(2) of the AEC Treaty (n 9) refers to the Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment; Naldi & Magliveras (n 9) 629.

payment, by the multiplicity of national (and not internationally convertible) currencies across the continent.¹²⁵ The AEC Treaty stipulates that in order to boost intra-community trade, member states must harmonise their monetary, financial and payment policies¹²⁶ and ensure the free movement of capital within the community by eliminating restrictions on the transfer of capital funds between member states.¹²⁷ As a result, it should become possible to open accounts and obtain loans from the financial institutions of other member states.¹²⁸ Fiscal, financial and banking practices among African states must therefore be harmonised and regulated.¹²⁹

Dissimilarities in national laws can lead to a distortion of the conditions of competition in areas such as taxation, corporations and intellectual property,¹³⁰ and economic integration is hindered thereby.¹³¹ Member states are under an obligation to co-operate on policies in the field of trade, investment, customs and excise laws, exchange control and taxation regulation in order to achieve the implementation of the AEC Treaty.¹³²

Therefore, in order to achieve the objectives of the AEC and the AU:

- The stagnation of economic integration caused by the incidence of overlapping REC membership must be eliminated, and steps must be taken to facilitate the RECs eventual consolidation.¹³³ Hence, the REC agreements must be harmonised and rationalised.
- RECs must be rationalised both institutionally (with respect to their structure) and with respect to their economic policies, strategies, and programmes.¹³⁴
- Agreements of the RECs will only be effective if their provisions are embodied in domestic normative rules¹³⁵ and successfully implemented on a national level. It is therefore necessary to clarify the international legal position concerning the RECs interaction with national

125 Bamodu "Transnational law, unification and harmonization of international commercial law in Africa" 1994 *J of African Law* 135; Ndulo "Harmonisation of trade laws" (n 9) 105.

126 Art 44(1) of the AEC Treaty (n 9).

127 Art 45(1) of the AEC Treaty (n 9). Naldi & Magliveras (n 9) 630.

128 Naldi & Magliveras (n 9) 630.

129 Udombana (n 9) 203, 218; Forje (n 1) 24, 34; Bamodu (n 125) 135; Ndulo "Harmonisation of trade laws" (n 9) 105.

130 Udombana (n 9) 218; Bamodu (n 125) 132-133. See also Van der Merwe (n 75) 401-402 who explains that when protection of intellectual property is regulated on a regional level, the ability of a state to abuse its patent practice by its refusal to register a patent in order to protect local industry is minimised.

131 Bamodu (n 125) 125; Ndulo "Harmonisation of trade laws" (n 9) 105.

132 Asante (n 9) 6.

133 Udombana (n 9) 221.

134 UNCTAD & UNDP (n 72) 14-15; Olowu (n 6) 245; Udombana (n 9) 218.

135 Ndulo "African Economic Community" (n 9) 4; Ndulo "Harmonisation of trade laws" (n 9) 103.

governments;¹³⁶ it is recommended that effective enforcement mechanisms on a regional level be created, to ensure that states comply with their applicable regional obligations.

- The goal is to achieve the harmonisation of national economic policies and related domestic laws among members of the RECs and eventually, the AEC. The achievement of this end is in the nature of a treaty obligation undertaken by all members of the AU and the AEC.
- The abovementioned processes of harmonisation must take place under the auspices of one or more institutions, which have both the international legitimacy and capacity to oversee and control them. The difficulty lies in the fact that the relationship between the existing African organisations and institutions (such as the RECs, the AEC, and the AU and its organs), as well as their roles, is not always clear.

The realisation of the goal of regional institutional harmonisation, described above, will not on its own contribute to an increase in inter-state trade. International trade, for the most part, exists because *individuals* act internationally.¹³⁷ The second half of this article focuses on the submission that in addition to the obligation to harmonise the national and intra-regional economic policies and trade laws (such as those related to tariffs and customs duties), there is also a need for African states to harmonise their national *private-law substantive rules* which operate in the field of business or commerce. I submit that this need exists because it will be easier for international trade to be conducted if “conflicts and divergences” found in the laws of the different states are eliminated.¹³⁸

136 Olowu (n 6) 245; Udombana (n 9) 218.

137 Booyen “International law as a legal system: The quest and need for a private-law leg” 1996 *SAYIL* 67.

138 “Progressive development of the law of international trade: Report of the Secretary-General” (n 8) par 14, par 211. To this end the United Nations Commission on International Trade Law (UNCITRAL) was established for the purpose of promoting the progressive harmonisation and unification of the law of international trade; see UN General Assembly Resolution Establishing the United Nations Commission on International Trade Law, 1966 (GA Res 2205 (XXI) of 17 Dec 1966): <http://www.jus.uio.no/lm/uncitral.2205-xxi/doc.html> (10 Nov 2006). See also Booyen *Principles of International Trade Law as Monistic System* (2003) 122-124; Van Niekerk & Schulze *The South African Law of International Trade: Selected Topics* (2000) 68-69. The laws in question include, but are not limited to, those governing the international sale of goods, formation of contracts, agency arrangements, negotiable instruments and banker’s commercial credits. International trade law further encompasses laws relating to business activities pertaining to insurance, transportation, carriage of goods (by sea, by air, by road and rail, by inland waterways), industrial property and commercial arbitration. To these one may add legal rules dealing with protection of investors, trademarks and franchising, licensing of technology, distribution agreements, bankruptcy, security interests, fields of company law, such as mergers and acquisitions (as espoused by Ndulo “Harmonisation of trade laws” (n 9) 105, 109 and contained in “Progressive development of the law of international trade: Report of the Secretary-General” (n 8) pars 10 and 184). See also Bamodu (n 125) 133-135.

4 The harmonisation of trade-related laws¹³⁹

As we have already seen, the establishment of a Common Market forms part of the African agenda to achieve economic integration, increased trade and, ultimately, economic growth. However, in order for a Common Market to function properly, the commercial laws in member states need to be harmonised.¹⁴⁰ At the outset it must be pointed out that the rest of the article is based on the premise that national laws in Africa differ from state to state. After a brief overview of the legal systems on the continent, I will proceed to examine the disadvantages arising from the diversity of national business laws. I submit, first, that it is impractical for the participants in commercial transactions to deal with differing legal rules, secondly that the lack of knowledge as to what the content of the relevant rules is, serves as a deterrent to trade, and thirdly that regional integration (and the harmonisation of economic policies, which as it will be recalled has been imposed as an obligation on the member states of the AEC), both presupposes and necessitates the harmonisation of certain substantive rules.

My point of departure is that the legal systems found in Africa are characterised by diversity. In order to illustrate this point I will name the different legal families and list some of the states which belong to them.

There are three main legal families: the common-law, civil-law and mixed legal families.¹⁴¹ And although the laws of states belonging to one legal family may share common characteristics, it must be borne in mind that each country has its own jurisprudence, law-making institutions and judicial processes.¹⁴² These laws were transplanted into the legal systems of the various African states as a result of European colonisation. After achieving independence, the new states

139 In this article the terms "trade-related laws", "commercial laws" and "business laws" are used interchangeably.

140 Van der Merwe (n 75) 401; Bamodu (n 125) 132-132; Goode "Rule, practice and pragmatism in transnational commercial law" 2005 *JCLQ* at 554-555. See also Date-Bah "The UNIDROIT Principles of International Commercial Contracts and the harmonisation of the principles of commercial contracts in West and Central Africa: Reflections of the OHADA project from the perspective of a common lawyer from West Africa" 2004 *Uniform LR* 271 who states: "The lessons of regional integrationist movements elsewhere, for instance in the European Union, teach that harmonization of business laws among the member states of the region is an important component of successful integration." Allott (n 119) 377 defines harmonisation as "the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law".

141 Ndulo "African Economic Community" (n 9) 3; Bamodu (n 125) 127; Ndulo "Harmonisation of trade laws" (n 9) 102; Joireman "Inherited legal systems and effective rule of law: Africa and the colonial legacy" 2001 *J of Modern African Studies* 576. Of course, within most states one may find the operation of other legal systems, such as the laws of the different indigenous communities, as well as religious legal systems.

142 Ndulo "African Economic Community" (n 9) 3-4; Sempasa (n 3) 390.

continued to use the respective languages of their formal colonisers (at least at governmental level) as well as their legal and political institutions.¹⁴³

Countries based on the common-law tradition¹⁴⁴ comprise of former British colonies and include Sierra Leone, the Gambia, Ghana (previously known as the Gold Coast), Uganda, Nigeria and Kenya.¹⁴⁵ The British colonisers imported the common law of England, equity and those statutes that were in force in England at the time of colonisation. As a result, these countries' legal systems share many basic similarities.¹⁴⁶ It must be pointed out that although Liberia is not a Commonwealth country, it has an Anglo-American legal system and "the sources of its law are traceable to the common law in force in the United States of America and Great Britain".¹⁴⁷ Tanzania (previously Tanganyika) was also a British colony.¹⁴⁸ However, its legal system has felt a certain German-law influence (although the importance of German law ceased when Germany lost Tanganyika as one of her colonial territories) which is still discernible mainly in the sphere of land rights.¹⁴⁹

Countries based on the civil-law tradition include former French, Belgian, Portuguese and Italian colonies. The influence of French law predominates in former French colonies in north, west and central Africa.¹⁵⁰ Other legal influences from the civil-law legal family are those of Belgian, Italian, Portuguese and Spanish law.¹⁵¹ The citizens of the French colonies in West Africa (Benin, previously Dahomey, Guinea, Ivory Coast (Côte d'Ivoire), Mali, Mauritania, Niger, Senegal, Togo and Burkina Faso, previously Upper Volta)¹⁵² were subjected to French law, which continued to be used even after these countries acquired independence, and has been preserved to the present day.¹⁵³ As of 1910, Congo (Brazzaville), Gabon, the Central African Republic and Chad formed part of the administrative federation of *Afrique Equatoriale Française* (AEF) or French Equatorial Africa.¹⁵⁴ These countries received

143 Joireman (n 141) 576.

144 See Allott (n 119) 367 who explains that there are three main common-law sources: the legal systems of England, British India and the United States. British West Africa has English law as the basis of its legal system, countries in the East Central African region have laws founded on the laws of British India, but subsequently the importance of English law has increased.

145 Bamudo (n 125) 127; Joireman (n 141) 577; Ajomo "Regional economic organisations: The African experience" 1976 *ICLQ* 58 74.

146 Ajulo (n 34) 79.

147 Ajulo (n 34) 80; Allott (n 119) 372 who points out that "the affiliation of the Liberian system is now more uniformly American than early legislators would appear to have envisaged".

148 Ajomo (n 145) 74.

149 Allott (n 119) 372; Joireman (n 141) 577. Such a German law influence is also present in Namibia (previously known as South West Africa), which actually has a mixed legal system.

150 Allott (n 119) 371.

151 *Ibid.*

152 Ajulo (n 34) 81; Joireman (n 141) 585; Bamudo (n 125) 127.

153 Ajulo (n 34) 81; Ajomo (n 145) 88. See also Joireman (n 141) 577.

154 Marasinghe (n 120) 45.

French civil law.¹⁵⁵ The Portuguese, who had colonised Guinea-Bissau and Cape Verde,¹⁵⁶ adopted an approach similar to that of the French, namely assimilation, which policy was pursued until 1975.¹⁵⁷ Another former Portuguese colony is Angola.¹⁵⁸ Ethiopian legislation contains a deliberate mixture of Swiss and French law (both from the civil-law legal family), although there are some perceivable common-law influences.¹⁵⁹

The third large subdivision of legal families found on the African continent encompasses the states which have mixed legal systems. For example, elements from two separate legal systems apply in Cameroon and Mauritania: English law and French law.¹⁶⁰ The Somali Republic (formed after the unification of British Somalia and Italian Somaliland) has English law applicable in its northern regions, whereas Italian law (part of the civil-law legal family) applies in the other regions.¹⁶¹

Roman-Dutch law, imported by the Dutch colonists at the Cape, dispersed over territories in Southern Africa,¹⁶² which eventually fell under the jurisdiction of the British crown.¹⁶³ The further importation of English statute and common-law principles has resulted in a legal system which Allot terms “Anglo-Roman-Dutch law”, which “is in many ways a bridge between the common and the civil law worlds”.¹⁶⁴ Thus, countries like South-West Africa / Namibia, Zimbabwe, Botswana, South Africa, Lesotho and Swaziland apply Roman-Dutch law as influenced by English law.¹⁶⁵

But even where two African countries belong to the same legal family, there may be material differences in the rules governing the same subject-matter. This may be due to a difference in the states’ socio-economic climates or the varying pace at which the law developed in the different states. Differences are also attributable to countries borrowing from the national laws of other states which subscribe to a legal system belonging to a different legal family.¹⁶⁶ Another factor which contributes to the diversity in the national laws of African states is the possible enactment of local indigenous laws into legislation, court

155 *Idem* 53.

156 Ajulo (n 34) 81.

157 *Ibid.*

158 Joireman (n 141) 581.

159 Allott (n 119) 373.

160 Van Niekerk “The convergence of legal systems in Southern Africa” 2002 *CILSA* 309; Bamodu (n 125) 127.

161 Allott (n 119) 373; Van Niekerk (n 160) 309.

162 Bamodu (n 125) 127.

163 Allott (n 119) 372.

164 *Ibid.*

165 Van Niekerk (n 160) 309-310.

166 Bamodu (n 125) 128.

judgments and rules of statutory interpretation.¹⁶⁷ This is far from conducive to a process of legal convergence. Convergence describes the situation where legal systems reach similar solutions by similar points of departure. National legal systems can converge spontaneously among states of similar socio-economic development.¹⁶⁸ The presence of different legal families and the further diversification of national laws brought about by the inclusion of particular indigenous legal rules¹⁶⁹ minimises the possibility of such spontaneous convergence on the African continent.

But why can convergence or deliberate harmonisation be considered beneficial? In order to answer this question, I will dedicate the rest of this discussion to the topic of diversity of national commercial laws as an obstacle to both regional integration and intra-regional trade, both of which are essential for economic development.¹⁷⁰ Therefore, I submit that such diversity must be minimised by way harmonisation (since the process of spontaneous convergence is unlikely to occur). I must also point out that by acting as an impediment to regional economic integration and intra-regional trade, national legal diversity becomes responsible for slowing down the achievement of the various economic integration objectives.¹⁷¹ As will be recalled, African states are under a duty to achieve these objectives. Furthermore, as was stated above, the substantive laws as they exist in the various African countries were imported during the period of colonisation, and in some instances have changed little since the African countries achieved their independence. Therefore, they have been labelled as “outdated” – a perception which may have a negative impact on transactions to which the one party is from an African state and the other one is not.¹⁷² In this case it is not only the divergence in national laws *per se* that may be blamed for discouraging trade, but also the possibility of a (however unfounded) suspicion that the legal system of the African state may be underdeveloped or inadequate to cater for

167 *Ibid.*

168 Such spontaneous convergence will, however, not be evident in areas of moral and religious norms, such as family law. See Herings & Kanning “Unifying commercial laws of Nation-States. Coordination of legal systems and economic growth” <http://www.personeel.unimaas.nl/p.herings/mrm02029.pdf> (22 Jun 2006) 8. Ogun “Competition between national legal systems: A contribution of economic analysis to comparative law” 1999 *ICLQ* 405; Özücü “Looking at convergence through the eyes of a comparative lawyer” 2005 *European J of Comparative Law*: <http://www.ejcl.org/92/art92-1.html> (22 Jun 2006).

169 Ndulo “Harmonisation of trade laws” (n 9) 102.

170 *Idem* 102, 105. See also Ndulo “African Economic Community” (n 9) 3; Bamodu (n 125) 125, 127.

171 Bamodu (n 125) 125; Ndulo “Harmonisation of trade laws” (n 9) 105.

172 *Ibid.*

the needs of the parties to an international commercial transaction.¹⁷³ In such a case, the harmonisation of trade-related or commercial laws will serve a dual purpose: It will modernise the participating legal systems and bring them in line with the needs of today's business practices. It will also eliminate the divergences which prove problematic to the conduct of cross-border trade.

The first reason why differences in national legal systems are deemed to be problematic is the fact that they contribute to the transaction costs associated with cross-border business dealings.¹⁷⁴ Such transaction costs will be eliminated if the relevant commercial laws are harmonised. In addition, if the laws are harmonised, the efficiency with which commercial transactions are concluded (or with which related disputes are resolved) will increase. There would also be some guarantee of consistency in the manner in which the parties are treated, and their legal position would be characterised by more clarity – the parties would in most cases be able to predict the outcome of the concluded transaction, or of their dispute.¹⁷⁵

The guarantee of legal certainty is a valued result which harmonisation seeks to achieve, mostly because of the extent to which differences in national legal systems contribute to legal uncertainty in any business transaction crossing national borders. Uncertainty exists in relation to questions such as which legal system will govern their transaction, or what the content of that law is. The latter is particularly problematic since access to another state's legal materials

173 Bamodu (n 125) 130; Ndulo "Harmonisation of trade laws" (n 9) 109.

174 Goode (n 140) at 555; Dalhuisen "Legal orders and their manifestation: The operation of the international commercial and financial legal order and its *lex mercatoria*" 2006 *Berkeley J of International Law* 156, 165; Rodrik "How far will economic integration go?" 2000 *J of Economic Perspectives* 179. The author cites the problem of contract enforcement as being the most obvious manifestation of such a transaction cost. In general, transaction costs are defined as "[t]he costs of money and time incurred in the process of buyer-seller search, negotiation and contract-enforcement activities": see http://www.agtrade.org/glossary_search.cfm; Herings & Kanning (n 168) 10-11: additional costs are those which merchants would incur in familiarising themselves with the relevant laws, and *cf idem* 12 n 18: "Transaction costs are ... the costs of formation, performance, and enforcement of an agreement." The authors, however, discuss the term with reference to the costs that would be incurred in the event of unification, where the unified commercial law (which in the authors' discussion represents the commercial law of one given state) does not reflect the preferences of the citizens of another given state (it differs from the commercial law previously applicable in this state), thus the transaction costs amount to the costs of "complying with legal solutions that are not preferred the most, or the transaction costs of getting accustomed to different legal solutions". However, extra benefits may be generated by increased volume and value of cross-border trade. While this may be true, my work is dedicated to advancing the case for the harmonisation of commercial laws by way of international instruments, which contain rules that are arrived at through comparative study of the commercial laws of the different African states and which take into account various practical considerations. The envisaged instruments will be the result of a compromise; they will not be based on a *single* state's commercial laws. It is also submitted that even if there are additional transaction costs associated with the change to the "new" harmonised rules, these costs will only be incurred at the beginning of the transitional period and will be outweighed by the advantages of certainty, predictability of outcome and long-term facilitation of (and therefore boost to) trade.

175 Dalhuisen (n 174) 156, 165; Goode (n 140) 555, 557.

may be difficult.¹⁷⁶ The difficulty manifests itself in the variance of language use, legal philosophy, terminology and concepts, and the fact that legal institutions differ from state to state,¹⁷⁷ all of which may open doors to misinterpretation (and thus unpredictability of outcome) for the international trader.

Even if the above prospects do not deter the parties from venturing into a business transaction, a number of problems may arise. First, the use of a national law in cases of international contracts is problematic because domestic legal rules may not necessarily provide a solution to a problem posed by an international transaction.¹⁷⁸ For example, domestic law is not necessarily suited to governing international sales, by virtue of the fact that such sales involve, among others, international payments, currency conversions and cross-border transportation of goods.¹⁷⁹ Some domestic legal rules may be unsuitable for international business trust structures or agency relationships operating against third parties, or they may place limitations on the protection of *bona fide* purchasers.¹⁸⁰ The problems are usually complex because there often is an accumulation of contracts being concluded (the effects of which will be felt across national boundaries), such as additional contracts of agency, insurance and carriage.¹⁸¹

Should there be a dispute in which there is an international element present, the court which has jurisdiction will utilise the rules of private international law in order to determine what national legal system would govern the transaction.¹⁸²

176 Ndulo "Harmonisation of trade laws" (n 9) 109; Volckart & Mangels "Are the roots of modern *lex mercatoria* really medieval?" 1999 *Southern Economic J* 429-430.

177 Goode (n 140) 554.

178 Horn & Schmitthoff *The Transnational Law of International Commercial Transactions* (1982) 10; Volckart & Mangels (n 176) 430; Ndulo "Harmonisation of trade laws" (n 9) 108; Lando "The *lex mercatoria* in international commercial arbitration" 1985 *ICLQ* 753; Berger "International arbitral practice and the UNIDROIT Principles of International Commercial Contracts" 1998 *American J of Comparative Law* 138; Dalhuisen (n 174) 153; Goode (n 140) 554; *SPP v Arab Republic of Egypt* ICC case no 233 of 1992 where Egyptian law did not furnish an answer to the question from what date interest should run.

179 Van Niekerk & Schulze (n 138) 69. See also Lando (n 178) 753 where the author provides an example from the Scandinavian *Sale of Goods Act* in terms of which a buyer who wants to rely on a late delivery must give an immediate notice to this effect immediately upon delivery. Such a rule is unfit for international sales since it may prejudice foreign buyers who are unaware of this rule.

180 Dalhuisen (n 174) 158.

181 Van Niekerk & Schulze (n 138) 69.

182 Oppong "Private international law rules and the African Economic Community: A plea for greater attention" 2006 *TSAR* 497; Forsyth *Private International Law* (1996) 5; Kahn "International contracts I – What legal system governs them?" 1990 *Businessman's Law* 203; Booyesen (n 138) 96; Lando (n 178) 763; "Progressive development of the law of international trade: Report of the Secretary-General" (n 8) pars 15-16.

All international contractual obligations draw their existence from one (or more) legal systems and the domestic court must select the appropriate one, the one which should govern the substantive aspects of the litigants' dispute. Each legal system has its own set of private international law rules.¹⁸³

The law which creates or governs the contract is referred to as the "proper law of contract".¹⁸⁴ The latter could be either the law chosen by the parties or the law to which the contract is most closely connected.¹⁸⁵ In the absence of choice by the parties (be it express or tacit) the courts will assign the appropriate law by weighing the factual connection between the contract and the different legal systems.¹⁸⁶ The process of assignment in South African courts, for example, has in some instances been known to involve the determination of the presumed intention of the parties, while on other occasions the courts have tried to establish where the seat of the contract is.¹⁸⁷ Thus, in an exercise plagued by uncertainty, the court may apply the *lex loci contractus*, *lex loci solutionis*, the law determined in accordance of the flag of a ship, and so on.¹⁸⁸

However, certain aspects of the agreement may be governed by a legal system which may be different from the assigned proper law: consensus, contractual capacity, illegality, formalities of the contract, to name but a few.¹⁸⁹

The rules of private international law are therefore frequently deemed to be undesirable,¹⁹⁰ such undesirability being fuelled by the fact that the outcome is often uncertain and therefore unpredictable,¹⁹¹ as well as by the reality that investigating the foreign-law position may involve the expenditure of both

183 Forsyth (n 182) at 2; Lando (n 178) at 763.

184 Van Niekerk & Schulze (n 138) at 35; Forsyth (n 182) at 274.

185 Forsyth (n 182) 274; Goode (n 140) 545-546; Van Niekerk & Schulze (n 138) 36.

186 Forsyth (n 182) 286.

187 *Idem* 288.

188 Forsyth (n 182) 286; 288; Kahn (n 182) 204; Van Niekerk & Schulze (n 138) 40-42.

189 Booysen "The international sale of goods" 1991-1992 *SAYIL* 72-75; Forsyth (n 182) 292 cites "commercial convenience, principle or logic" as reasons for the application of law, different from the proper law. The author also explains that "[t]he idea of a personal law – a law which applies to a person wherever he may be by virtue of his being a member of a certain group (a nation or other community) – lives on albeit in an attenuated form, for all systems of private international law use either the *lex domicilii* or *lex patriae*, as the governing law in matters of status ...": *idem* 28. On formalities of the contract, the author explains that in most cases it is the *lex loci contractus* which will be applicable to the formalities of the contract, because this is where the parties have obtained local advice: *idem* 297. In English and Scots law, eg, some formalities are governed by the *lex fori*, because they are considered to be procedural issues: *idem* 296 n 134. Furthermore, on the issue of illegality, the rules of the *lex fori* may in certain circumstances result in the contract being void on the grounds of illegality, even if that contract is not illegal in terms of the rules of its proper law; furthermore the contract must not offend the public policy principles of the forum: *idem* 299.

190 Lando (n 178) 754, discussing the application of private international law rules in the context of disputes resolved by arbitration; Goode (n 140) 545-546.

191 Oppong (n 182) 498; Jemielniak "Legitimization arguments in the *lex mercatoria* cases" 2005 *International J for the Semiotics of Law* 178 discussing the use of private international law in the context of arbitration.

money and time.¹⁹² Another drawback is that private international law rules are complex¹⁹³ and partly owing to such complexity, they could lead to a result which might not have been envisaged by the contracting parties at all.¹⁹⁴ Legal uncertainty is exacerbated by the fact that the national courts of different states may assign different domestic legal systems as governing a specific agreement (since private international law rules differ from state to state). This has often sparked the possibility of so-called “forum shopping”, enabling a claimant to select the forum whose private international law rules would lead to the application of law most favourable to his cause.¹⁹⁵ The fact that such a practice is indeed a real and well-known possibility, undermines, to my mind, any notions of fairness or objectivity to which the law ought to lay a claim.

Another disadvantage of having to rely on the rules of private international law is that in many instances (although not always) the court will apply not its own law, but the law of a foreign state.¹⁹⁶ Thus, a party who has a multitude of trade partners from different states, will have to deal with a number of different national laws, a rather cumbersome process: One or more of the parties involved may not know that a particular domestic legal system will govern their contract, and while being so unaware, he may fail to comply with requirements of which he has no knowledge or which he does not properly understand.¹⁹⁷ Furthermore, the application of foreign law by a domestic court may present the additional problem of proof.¹⁹⁸ And although the court may rely on the testimony of expert witnesses, there is always the danger of misinterpreting the foreign law into which the judge will most probably lack insight.

It must also be kept in mind that private international law rules will in most cases guide towards a solution found in a national legal system. As stated above, international trade and investment are fields characterised by

192 Sweet “New *lex mercatoria* and transnational governance” 2006 *J of European Policy* 631; Goode (n 140) 546.

193 Ndulo “Harmonisation of trade laws” (n 9) 108; Goode (n 140) 545.

194 Van Niekerk & Schulze (n 138) 69; Oppong (n 182) 498; Jemielniak (n 191) 178 discussing the use of private international law in the context of arbitration.

195 Viejobuena “Private international law rules relating to the validity of international sale contracts” 1993 *C/LSA* 173.

196 Forsyth (n 182) 2, 274. See also Lando (n 178) 754 discussing the application of private international law rules in the context of arbitration. He points out that the arbitrator may face considerable difficulties, especially when he has to apply a set of rules that are alien to him, which can also be conducive of mistakes. For that reason, the author explains that the *lex mercatoria* is preferable.

197 Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” 1999 *SALJ* 328.

198 Van Niekerk & Schulze (n 138) 36. In South African law, eg, the local court may take judicial notice of foreign law to the extent that it can be ascertained readily and with sufficient certainty as required by s 1 of the Law of Evidence Amendment Act. If not, it must be proven – the presumption that South African law and the foreign law are the same must be rebutted and the existence of “difference” must be proven by the party relying on the difference. Failure to do so will result in the application of the law of the forum.

complexity and fast change,¹⁹⁹ and domestic laws may be inadequate to govern the transaction. The private international law rules themselves will not necessarily be formulated to take account of the needs of modern business practice.²⁰⁰

Lastly, it is important that foreign law will not be applied if it contravenes a fundamental public-policy principle of the forum.²⁰¹ Therefore the contract between parties from different jurisdictions may end up being unenforceable.²⁰²

Harmonisation of private international law rules themselves²⁰³ will not solve the problem. Although it is true that the inherent legal uncertainty will decrease, the court would in most instances still have to apply a domestic legal principle, which would probably be foreign to at least one of the parties, in addition to its possible added unsuitability to govern a cross-border transaction.

Fortunately, the use of private international law is not the only option open to parties from different jurisdictions. In terms of the concept of party autonomy they have the freedom to choose the law which is to govern their contract by inserting a choice-of-law clause.²⁰⁴ On the face of it, an express choice-of-law clause is desirable since it prevents the adjudication of a dispute according to a set of rules which neither party intended to govern their contract. Failure to insert a choice-of-law clause (eg, because the parties have been unable to reach an agreement on this sensitive matter, or have overlooked the need for such a clause),²⁰⁵ or in the event of the forum not accepting it, will in most instances lead to the application of the rules of private international law, which,

199 Viejobueno (n 195) 177.

200 See Goode (n 140) 542 and his criticism of the Appeal Court decision in *Macmillian v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387. The case dealt with fraudulent transactions with securities, which one of Robert Maxwell's companies held as nominee. The court was called upon to consider the law applicable to the competing claims to priority of securities held indirectly through an account with an intermediary. On appeal, the court applied the law of the place where the issuer was incorporated. This law failed "to take account of the indirect holding system, where the account holder's relationship is solely with its own intermediary, not with the issuer, who will have no knowledge of his existence".

201 Lando (n 178) 764; Forsyth (n 182) 299.

202 Rodrik (n 174) 179.

203 The Hague Conference on Private International Law is an intergovernmental organisation which works towards the progressive unification of the rules of private international law, see <http://www.jus.uio.no/lm/hague.conference/doc> (5 Jan 2007); Kronke "Methodical freedom and organizational constraints in the development of transnational commercial law" 2005 *Loyola LR* 288.

204 Booysen (n 138) 201; Barton "The United Nations Convention on Contracts for the International Sale of Goods" 1985 *CILSA* 24; Ndulo "Harmonisation of trade laws" (n 9) 108; Roodt & Esser "Venue in transnational litigation: Party autonomy adds new impetus to the 'Judgment Project'" 2006 *SA Merc LJ* 14: parties may also choose the forum to be used in case of litigation. See further Baxter "International business disputes" 1990 *ICLQ* 288-289; Van Niekerk & Schulze (n 138) 35.

205 Bamodu (n 125) 129; Ndulo "Harmonisation of trade laws" (n 9) 109.

as discussed above, could render a less than satisfactory result.²⁰⁶ It would mean that in any event, a *country's domestic* legal rules will be applicable.²⁰⁷

One possibility is for the choice-of-law clause to point to a *particular domestic* legal system. But even then such a choice could nevertheless be subject to limitations imposed by individual states.²⁰⁸ More importantly, its insertion may be a manifestation of unequal bargaining power, and it may favour only one of the parties who insisted on the application of its own domestic law. This may happen in cases where the one contracting party is a government or a governmental agency.²⁰⁹ The chosen domestic system could have been prescribed by the politically stronger party, thereby prejudicing the weaker party (the individual).²¹⁰ Such prejudice may occur, for example, because the laws of the state have changed after the conclusion of the contract.²¹¹ But even if this is not the case, the fact remains that at least one of the parties may be unfamiliar with the chosen legal system, its sources and methodology.²¹² This is a factor which may be taken into account when the international contract is drafted. However, the negotiation of the contract hinges on the power position of the respective parties. It therefore remains somewhat of a deterrent to the international trader.²¹³

Secondly, the choice-of-law clause may serve to select an international convention, designed to apply to cross-border transactions, and the provisions of which would then govern their contract. Both UNIDROIT²¹⁴ and

206 Van Niekerk & Schulze (n 138) 69; Lando (n 178) 754, discussing the issue in the context of arbitration.

207 Also, if the contract is otherwise incomplete, the "gaps" will be filled in by domestic laws, norms and customs. See Rodrik (n 174) 179.

208 Ndulo "Harmonisation of trade laws" (n 9) at 108; Goode (n 140) 547-548 who points out that while the parties are free to choose their own law, they have this power "by the will of the sovereign States, alone or acting in concert, and it [is] subject to important exceptions, for example those based on public policy or overriding mandatory rules".

209 Horn & Schmitthoff (n 178) 10; Lando (n 178) 748.

210 Barton (n 204) 24.

211 *Ibid.*

212 Bamodu (n 125) 129; Ndulo "Harmonisation of trade laws" (n 9) 108. See, eg, the argument in ICC Award No 8385/1995 for the use of the *lex mercatoria*: An American and a Belgian party had agreed that the applicable law between them should be that applicable in New York. However, the arbitrator reasoned that triple punitive damages was an unknown remedy to parties from a civil jurisdiction and that that would make the result unpredictable for the Belgian party (Jemielniak (n 191) 202).

213 Bamodu (n 125) 129; Ndulo "Harmonisation of trade laws" (n 9) 108.

214 UNIDROIT (International Institute for the Unification of Private Law) is an independent intergovernmental organisation seated in Rome and established by virtue of the International Institute for the Unification of Private Law Statute, 1940, as amended in 1993 ("the UNIDROIT Statute"): <http://www.unidroit.org/english/presentation/statute.pdf> (20 Nov 2006); Hugo "Non-governmental initiatives towards the harmonization of international trade law" 2003 *J for Juridical Science* at 151-153; Kronke (n 203) 287-288. The uniform rules prepared by UNIDROIT have traditionally been drafted in the form of conventions; alternatively they can take the form of model laws (which states may take into consideration when drafting their legislation: <http://www.unidroit.org/english/presentation/structure.htm> (20 Nov 2006). See also Booyesen (n 138) 30. The Conventions drafted under the auspices of UNIDROIT are available at <http://www.unidroit.org> (20 Nov 2007).

UNCITRAL²¹⁵ have been responsible for the preparation of conventions which aim to bring about the gradual harmonisation of international trade law.

However, the African states have not been active participants in the negotiation and drafting of the conventions aimed at the progressive harmonisation of international trade law²¹⁶ and few of them are parties to the existing conventions.²¹⁷

Furthermore, although the international unification conventions are drafted with the specific aim of governing international transactions, they could be criticised on the ground that they are incomplete.²¹⁸ There are a number of conventions dealing with international trade, and more specifically its private law aspects, but these conventions do not guarantee uniformity: apart from the fact that there will always be states which have not become parties to any given number of these conventions, among the state parties themselves there will be a difference as to the manner in which such conventions are treated by domestic law. Different states may accord different hierarchical status to the provisions of

215 The United Nations Commission on International Trade Law (UNCITRAL) was established for the purpose of promoting the progressive harmonisation and unification of the law of international trade and the unification of the law of international trade (see n 138); Hugo (n 214) 145-148. Conventions drafted under the auspices of UNCITRAL are available at <http://www.uncitral.org> (20 Nov 2007).

216 "Progressive Development of the Law of International Trade", Report of the Secretary General (n 8) par 210; Sempasa (n 3) 389f.

217 Hugo (n 214) 147-148: Countries that have ratified/acceded to UNCITRAL Conventions: (1) Convention on the Limitation Period in the International Sale of Goods, 1974 (n 215): Egypt, Uganda, Zambia; (2) United Nations Convention on Carriage Carriage of Goods by Sea, 1978 (n 215): Botswana, Burkina Faso, Burundi, Egypt, Gambia, Ghana, Kenya, Lesosotho, Madagascar, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tunisia Uganda, Tanzania, Zambia; (3) United Nations Convention on Contracts for the International Sale of Goods, 1980 (n 215): Burundi, Egypt, Lesotho, Mauritania, Uganda, Zambia; (4) United Nations Convention on Independent Guarantees and Standby letters of Credit (n 215): Tunisia. UNCITRAL Model Laws that have been used as bases by African countries for legislative purposes: (1) Model law on International Commercial Arbitration, 1985 (n 215): Bahrain, Egypt, Kenya, Madagascar, Nigeria, Tunisia, Zimbabwe; (2) Model Law on Cross-Border Insolvency, 1997 (n 215): South Africa; (3) Model law on Procurement of Goods, Construction and Services, 1994 (n 215): Mauritius, Tanzania, Uganda. UNIDROIT Conventions signed/acceded to/ratified by African states: (1) Convention on Agency in the International Sale of Goods, 1983 (n 214): South Africa; (2) Convention on International Financial Leasing, 1988 (n 214): Nigeria; (3) Convention on International Factoring, 1988 (n 214): Nigeria; (4) Convention on International Interests in Mobile Equipment, 2001 (n 214): Burundi, Congo, Ethiopia, Ghana, Kenya, Lesotho, Nigeria, Sudan, Tanzania, Senegal; (5) Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2001: <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> (6 Dec 2006): signed by Burundi, Congo, Ethiopia, Ghana, Kenya, Lesotho, Nigeria, South Africa, Sudan, Tanzania, Senegal. See also Hugo (n 214) 152-153.

218 Lookofsky "Loose ends and contorts in international sales: Problems in the harmonization of private law rules" 1991 *American J of Comparative Law* 407f discussing problems created by the "CISG gap" (The Convention on the International Sale of Goods) with respect to capacity, validity, misrepresentation and related torts, economic duress and product liability. However, the UNIDROIT Principles of International Commercial Contracts (n 214) may be used to supplement the CISG, as provided by the former's preamble. In this regard see also Berger (n 178) 133 and his commentary on the 1994 Principles.

international conventions *vis-à-vis* municipal law, and the interpretation of such conventions' provisions will also vary from state to state.²¹⁹

Closely related to the harmonisation efforts evidenced in the conventions alluded to above, is the possibility of utilising the rules of the international *lex mercatoria*, which will be discussed briefly below.

By virtue of the rule of party autonomy mentioned above, the inserted choice-of-law clause could make the *lex mercatoria* applicable to the transaction.²²⁰ The international *lex mercatoria* (the international law merchant, also known as transnational commercial law)²²¹ governs the transactions entered into by persons from different states and seeks to overcome obstacles posed by national law and courts.²²² It is private in nature, in a sense that unlike international trade law which is of public law character and governs trade relations between states, the international *lex mercatoria* concerns itself with relations between individuals, or individuals and states.²²³

The *lex mercatoria* is generally said to consist of trade usages (or custom²²⁴) which have been developed by the community of merchants.²²⁵ Some of these usages have been codified by UNIDROIT²²⁶ or UNCITRAL²²⁷ in treaties,²²⁸ or its principles may have been included in model laws,²²⁹ (legislative) guides,²³⁰

219 Van Niekerk & Schulze (n 138) 5.

220 Booyesen (n 138) 201: Private international law rules may also point to the application of the *lex mercatoria* as the proper law of contract.

221 See generally: Booyesen (n 138) 9-16; Van Niekerk & Schulze (n 138) 4-5; "Progressive development of the law of international trade: Report of the Secretary-General" (n 8) par 19; Dalhuisen (n 174); Sweet (n 192); Jemielniak (n 191); Volckart & Mangels (n 176); Lando "The *lex mercatoria* in international commercial arbitration" 1985 *ICLQ* 747; Maniruzzaman "The *lex mercatoria* and international contracts: A challenge for international commercial arbitration" 1999 *American University International LR* 657; Goode (n 140); Goode "Usage and its reception in transnational commercial law" 1997 *ICLQ* 1; Kerr "The origin and development of the law merchant" 1929 *Virginia LR* 350.

222 Sweet (n 192) 627; Goode (n 140) 545, although as the author points out most *developed* countries have adequate laws to govern cross-border transactions.

223 Booyesen (n 138) 11-12; Jemielniak (n 191) 177.

224 Van Niekerk & Schulze (n 138) 5.

225 Kronke (n 203) 287-288; Lando (n 178) 751; Goode (n 140) 541; Van Niekerk & Schulze (n 138) 5-6; "Progressive development of the law of international trade: Report of the Secretary-General" (n 8) par 19.

226 See n 214 above; Volckart & Mangels (n 176) 430. Cf Booyesen (n 138) 30; Jemielniak (n 191) 181-182.

227 See n 214 above.

228 Eg, UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958); Uniform Law on International Sales (Hague Convention, 1964) (n 214). See also Kronke (n 203) 288; Van Niekerk & Schulze (n 138) 5.

229 Eg, UNCITRAL Model Law on International Credit Transfers (n 215); The Principles of International Commercial Contracts (n 214) which may serve as both a legislative guide, and a collection of principles that may be used by parties as the proper law of contract. See also Goode (n 140) 541; Kronke (n 203) 288.

230 Eg, UNCITRAL Legislative Guide on Insolvency law (n 215); Goode (n 140) 541.

standard clauses and contract terms.²³¹ The *lex mercatoria* partly comprises of norms common to different national legal systems.²³² Its rules have developed through arbitration, the most common way of enforcing the *lex mercatoria*.²³³

As stated above, the *lex mercatoria* finds application when parties exercise their right to select it as the law governing the international transaction they have entered into. Alternatively, it may be applied even when the parties have not expressly agreed on the application of the *lex mercatoria*, or are not agreeable to the composition of the arbitral tribunal,²³⁴ but the arbitrators have not found that the application of either set of national laws would be “sufficiently compelling”.²³⁵

It must be noted that academic opinion differs on exactly what the sources of the *lex mercatoria* are. Van Niekerk and Schulze state that the main sources of the *lex mercatoria* are treaty and custom.²³⁶ Dalhuisen²³⁷ goes further and enumerates no less than eight sources of the *lex meractoria* in strict hierarchical order:

1. Fundamental legal principles, likely to be mandatory, or matters of public order;
2. mandatory custom which supports and directs the abovementioned fundamental principles;
3. mandatory uniform treaty law;
4. party autonomy;
5. directory custom;
6. directory uniform treaty law;
7. general principles which have been derived from comparative law, uniform treaty law, ICC Rules;
8. residual domestic laws found through the rules of private international law.

Goode, however, prefers to limit what should be called “the *lex mercatoria*” to those rules that have been created spontaneously through the international

231 Eg, UCP 600, in force as of 1 Jul 2007, as well as the International Rules for the Interpretation of Trade Terms, 1990 (Incoterms) (both by the International Chamber of Commerce) <http://www.iccwbo.org/> (12 Dec 2006); Goode (n 140) at 541; also his remark at 550 that not all of the terms will amount to evidence of pre-existing usage, because of the needs of contemporary practice.

232 Milenković-Kerković “Origin, development and main features of the new *lex mercatoria*” 1997 *Facta Universitatis: Economics and Organization* 88, 90.

233 Volckart & Mangels (n 176) 427, 430; Lando (n 178) 751; Milenković-Kerković (n 232) 88. Zamora “Is there customary international law?” 1989 *German Yearbook of International Law* 14; Jemielniak (n 191) 181, 184; Goode (n 140) 540.

234 In other words, they have agreed that their dispute should be settled on the basis of equity. In order to reach a fairer decision, the arbitrator has the power to depart from the strict application of a legal rule (Jemielniak (n 191) 191).

235 Lando (n 178) 757, discussing ICC Arbitral Award of 26 Oct 1979. See also Jemielniak (n 191) 195-196, particularly her discussion of arbitral decisions where the tribunal decided on a basis of usages of trade, despite the parties having chosen what national law is to govern their transactions such as ICC Award No 8873/1997.

236 Van Niekerk & Schulze (n 138) 5.

237 Dalhuisen (n 174) 180-183.

practice of merchants²³⁸ and warns against considering the *lex mercatoria* to be all encompassing of standard-term-contracts, codes of practice and treaty law, and treating “as a homogenous mass things that are quite different in character”.²³⁹ He also cautions that the *lex mercatoria*, if confined to observed practice, would not be truly law: it exists and it is observed for the sake of fairness and efficiency in the business world; non-compliance would result in the “opprobrium from fellow businessmen, their unwillingness to deal with the culprit and, in the last resort, expulsion from the relevant mercantile community”.²⁴⁰ Before the practice becomes a binding customary rule, in a manner analogous to the formation of custom in public international law, the practice must be accompanied by a genuine, although erroneous, “pre-law” belief that there is a legal obligation to act in a certain manner before the usage obtains the force of a legal rule.²⁴¹ But how does one ascertain the collective mental state of the members of the business community?

In addition uncertainty exists as to whether the *lex mercatoria* can be considered an autonomous legal order: Some answer the question in the affirmative,²⁴² while others express doubts.²⁴³ Therefore, even though countless arbitration awards have been based on the *lex mercatoria* and national courts have given recognition to it,²⁴⁴ there are those who question its existence. Thus, the *lex mercatoria* has been criticised on the grounds that it is “generally indeterminate”,²⁴⁵ “diffuse and fragmented”,²⁴⁶ lacking in comprehensive formulation and not always supported by state legislative or institutional authority.²⁴⁷

However, counter arguments may be raised against the above points of criticism, for example: the *lex mercatoria* can be seen as comprising the common core of commercial regulations extracted through comparative

238 See also Jemielniak (n 191) 179: On this ground the *lex mercatoria* has been criticised for its lack of legitimisation, because its proponents assume that private agreements can be a source of law without state control and authorisation, and that it is applied without global recognition.

239 Goode (n 140) 547.

240 *Idem* 549.

241 *Idem* 550-551.

242 Booysen (n 138) 184-185.

243 Kronke (n 203): “And as far as there is merchants’ autonomy as far as observance of practice is concerned, there is no autonomous generation of *lex*. Since all developed legal systems do sanction this as a source of binding power, nothing more is needed.” See also Goode (n 140) 541. See, however, his discussion of the meaning of autonomous legal order in the context of the *lex mercatoria* 549f. Doubts are also expressed by Sempasa (n 3) 409-410.

244 Jemielniak (n 191) 194-198; Lando (n 178) 757f; Berger (n 178) 148.

245 Jemielniak (n 191) 181; Goode (n 140) 552.

246 Lando (n 178) 752: “It will grow with the growth of uniform laws, international trade customs and usages, and with the increasing number of reported awards, but it will never reach the level of the copious and well-organised national legal systems ... [but] [t]o do so is ... not to admit that the *lex mercatoria* can not be applied.”

247 Jemielniak (n 191) 188.

analysis of national legal principles,²⁴⁸ therefore its principles have already been authorised within the national legal systems.²⁴⁹ The *lex mercatoria* is flexible and therefore able to respond to evolving practical needs; and since it is the product of international business practice, its rules are accordingly pragmatic and most suitable to govern transnational commercial issues.²⁵⁰ Yet, in connection to its transnational character one must not be too quick to assume that once the parties have selected it as the proper law of their contract, they will be free from the application of any other legal system, or that it will be used to escape the rules of public policy of a given state: If the parties have chosen the *lex mercatoria* as the law governing their contract, international mandatory rules, as well as the mandatory (or peremptory) rules of the state with which the transaction has a close connection may be applied, provided it is reasonable to give effect to them.²⁵¹

In spite of its advantages, the fact remains that if there are issues on which the *lex mercatoria* contains gaps, private international law rules (discussed above) would probably be applied in order to determine which legal system would fill them.²⁵²

As has already been stated, the *lex mercatoria* is usually used in the settlement of commercial disputes by way of arbitration.²⁵³ The parties are likely to resort to arbitration, because in that way they will not be forced to submit to the

248 Dalhuisen (n 174) 183; Milenković-Kerković (n 232) 88, 90.

249 Jemielniak (n 191) 198.

250 *Idem* 201.

251 Booysen (n 138) 207-209 argues that this result defeats the purpose behind party autonomy and that the parties' *bona fide* choice ought to be questioned only if the non-application of the mandatory rules would be contrary to public policy. See Berger (n 178) 148-149: "One of the major arguments of those who oppose the *lex mercatoria* doctrine has always been that this transnational approach to decision-making serves to circumvent rules and principles of a public policy nature ... Thus far, the domestic courts ... have increasingly shown their willingness to acknowledge the application of transnational rules by international arbitrators." *Cf* Lando (n 178) 765; Goode (n 140) 549.

252 Booysen (n 138) 15.

253 Sempasa (n 3) 409-11, 412: Although the situation is changing, international arbitration on the African continent has been distrusted by African lawyers and marked by general lack of information, study and understanding regarding its process and the rules developed thereby. Few African countries have become parties to the 1958 New York Convention: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (28 Dec 2006). There has also been poor access to the sources embodying UNCITRAL's work. The United Nations Commission on International Trade Law is a specialised agency of the UN, aimed at furthering the progressive harmonisation and unification of the law of international trade. It is responsible for the drafting (among others) of the UNCITRAL Model Law on International Commercial Arbitration of 1985: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (20 Nov 2006) which is a standard against which national legislation pertaining to arbitration is measured. (In this regard see Butler "Procedures for resolving international commercial disputes: A South African perspective" paper prepared for presentation at the *Seminar on the Essentials of International Trade Law*, organised by the Law Society of Northern Provinces, 10 Jun 2004, Pretoria 2, 7). However, the Asia-African Legal Consultative Committee recommended the establishment of the African Arbitration Centre in Cairo (arbitration to make use of UNCITRAL Arbitration rules; in 1987 PTA Federation Chambers of Commerce and Industry established the PTA Centre for Commercial Arbitration for sub-Saharan Africa: Sempasa (n 3) 397.

jurisdiction of the other party's municipal law and courts,²⁵⁴ and in an attempt to avoid the problematic posed by the diversities of national legal systems. As Sempasa succinctly observes: "[A]rbitration provides certain mechanisms of escape from substantive and procedural rules of municipal systems which foreign businessmen scarcely understand and often consider as having very little relevance to the issues needing resolution."²⁵⁵

However, the arbitral award itself is *enforced* by an order obtained from a domestic court. Thus, the enforceability of international arbitral awards rests on a decision to that effect of domestic courts²⁵⁶ and may be affected by the possible bias of local judges.²⁵⁷ This is something which future harmonisation of trade-related laws will have to address: It should clarify the question of how disputes are to be resolved, and provide for clear, universally recognised (at least on the African continent) principles pertaining to the recognition of such awards or judgments. Or would such express provisions really be necessary? Recognition (of arbitral awards, and also of course of foreign judgments) is understandably more likely in cases where the foreign legal order contains similar values and notions to those in the recognising order.²⁵⁸

Up to this point I have touched upon the problems posed by diverse national legal orders from a trader's point of view. However, we must not forget the importance of investment, and the role of the Private-Public Sector Partnership proposed by NEPAD.²⁵⁹ The activities of the private sector (activities of private companies) must be encouraged and their willingness to participate must be nurtured. What is needed is the establishment of institutions which are conducive to private sector development²⁶⁰ and which operate within a legal

254 Lando (n 178) 747; Dezalay & Garth "Merchants of law as moral entrepreneurs: Constructing international justice from the competition for transnational business disputes" 1995 *Law and Society LR* 30; Sempasa (n 3) 411.

255 Sempasa (n 3) 411.

256 Jemielniak (n 191) 178; Dalhuisen (n 174) 171. In terms of the New York Convention on the Recognition of Foreign Arbitral Awards, 1958 (n 224) the courts of a contracting state must recognise and enforce foreign arbitral awards subject to the provisions of art V. See Lando (n 178) 761. Art V(2) of the New York Convention provides, eg, that "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country". Berger (n 178) 144-145 states that in the arbitration of a transnational contract which contains an arbitration clause but no express choice-of-law provision, the tribunal may rely on the fiction that the parties intended to divorce their transaction from any domestic legal system and consequently decide the case on the basis of the *lex mercatoria*. Such an arbitral award could be set aside, or be refused enforcement.

257 Dalhuisen (n 174) 171 n 69.

258 *Idem* 173.

259 n 68.

260 United Nations Conference on Trade and Development (2006) *Trade and Development Report 2006: Overview* (UNCTAD/TDR/2006) at XVII-XVIII: <http://www.unctad.org> (8 Dec 2006).

framework that consists of fair and impartial rules which ensure clarity and predictability in the private sector.²⁶¹

The role of the private sector in African regional integration (which has to date been largely in the hands of governments and non-governmental organisations) is gradually increasing: Apart from its contribution to policymaking and advice to governments, the private sector can participate in the implementation of regional projects and provide financial and human resources, spread of expertise, and technological and management knowledge. It can also contribute to production of goods, job creation and increased market size and cross-border investment.²⁶² The hope for Africa's economic development rests not only on increased trade, but also on domestic and foreign investment. The ability of African states to attract such investment in the first place is paramount.²⁶³

The harmonisation of the legal regimes improves the capacity of states to coordinate their economic policies. If harmonisation of laws is extended beyond the coordination of economic policies to include substantive business laws among member states, individual traders will be encouraged, but so will potential investors who will have the needed assurance that they will be familiar with the legal procedure and consequences.²⁶⁴ Every investor, creditor or trader wants to be aware of the risks inherent in the undertaken commercial transaction.²⁶⁵ For “[w]hen the content and effect of legal rights and obligations are more predictable, the legal risks and thus the transaction costs are reduced”.²⁶⁶

261 Ayee (n 4) 5- 6 explains that the structural adjustment programmes (which involved fiscal, trade and monetary reforms) operated on the assumption that if producers are provided with economic incentives, they will expand existing production and invest in new productive activities. However, the expected increase in private investment did not occur because of poor governance and sound development management.

262 Ross-Larson *et al* (eds) *Assessing Regional Integration in Africa* (2004) 217-218. Examples of private-sector participation include: the participation of Ecobank Transnational Incorporated in regional financial integration (the bank has presence in twelve countries); and Telecel International, the first private operator of private telecommunications (it is based in South Africa and has presence in thirteen countries). Private participation in infrastructure development includes Trans African Concessions' involvement in the development of the Maputo Corridor N4 Toll Road and the Maputo Rail Network run by Spoornet: *idem* 220-221. See also Udombana (n 9) 221. The establishment of a Public-Private Sector Partnership (PPP) is also provided for by NEPAD (see n 68).

263 El-Agraa (n 9) 39.

264 Van der Merwe (n 75) 401; Persson “A review of regional integration in Southern Africa: Comparative international perspectives on the legal dimensions of cross-border trade” *Regional Integration in Southern Africa: Comparative International Perspectives* 121: http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5049_2.pdf (5 Oct 2006).

265 Persson (n 264) 121. According to the author such risks include financial risks, transport risks, currency risks and insolvency risks. See also Rodrik (n 174) 185 on the benefits brought about by a “supranational promulgation of rules”.

266 Persson (n 264) 121.

Investment uncertainty is further increased by “inefficient and cumbersome” legislation found in some African states.²⁶⁷ Even if a potential investor (and a potential trader for that matter) is not deterred by the unfamiliarity or possible complexity of a foreign legal system, he may be loathe to invest in a state whose laws have not been brought up to date with the developments in economic and international relations.²⁶⁸ Of course, once attracted, investor interests must be protected.²⁶⁹ And each African state must have laws that provide such security to all investors.

One organisation which has recognised this is OHBLA²⁷⁰ whose members have acknowledged that outdated business laws undermined investors’ confidence.²⁷¹ Hence OHBLA’s objective is to harmonise the business laws among its member states by “the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes”.²⁷²

When harmonisation of laws takes place, it will achieve two goals. First it will eliminate uncertainty by providing a common solution amongst African states to any given problem.²⁷³ Secondly, it will serve to modernise the commercial laws on the African continent.

5 Conclusion

The harmonisation of trade laws *per se* does not feature as a distinct objective of the AEC Treaty,²⁷⁴ but it is a necessary corollary to the overall aim to promote trade and investment and increase economic growth. In order to make the process of regional integration meaningful, traders and investors must be given the opportunity to avoid the doldrums of legal diversity, they must be

267 Ross-Larson (n 262) 222.

268 Henning “Convergence of government systems in SADEC: The OHADA and COMESA examples” 2003 *J of Juridical Science* 156; Dickerson “Harmonizing business laws in Africa: OHADA calls the tune” 2005 *Columbia J of Transnational Law* 19-20.

269 Sempasa (n 3) 411. The source of such protection would, of course, in addition lie in the conclusion of bilateral investment agreements, as well as in utilising the protection afforded by the mechanisms of the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA). The text of the Convention is available at <http://www.miga.org> (4 Jan 2008).

270 More commonly known by its French Acronym: OHADA (Organisation pour l’Harmonisation en Afrique du Droit des Affaires, translated as “Organisation for the Harmonisation of Business Law in Africa”, or OBHLA). For the sake of convenience, I will refer to the organisation as “OHADA” and to its treaty as “The OHADA Treaty”. The text of the 1993 OHADA Treaty on the Harmonization of Business Law in Africa is available at <http://www.weilconnect.com/InterArb.nsf/aa72adf4bbc00f7985256ac300746543/3842df1d784974d585256ab20058fed9?OpenDocument> (10 Nov 2006).

271 See also Sempasa (n 3) 391f discussing the need to update arbitral laws in Africa.

272 Art 2 OHADA Treaty (n 281).

273 “Progressive development of the law of international trade: Report of the Secretary-General” (n 8) par 18.

274 Ndulo “African Economic Community” (n 9) 4.

allowed to rely on laws which are in line with the realities of business practice and which are up to date with international standards. This should involve the harmonisation of domestic substantive legal provisions.²⁷⁵ What remains for African states is to find the most appropriate method by which such harmonisation would take place.

275 "Progressive development of the law of international trade: Report of the Secretary-General" (n 8) pars 15-16.