

## **MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): RETHINKING THE ROLE OF THE CISG IN THE SADC REGION**

Tapiwa Shumba\*

Post-doctoral Research Fellow, Law, Science and Justice RNA, Nelson R Mandela School of Law, University of Fort Hare

The Convention on Contracts for the International Sale of Goods (CISG) has proved popular, particularly outside Africa. However, only a few States have adopted it in Africa, with only two in the Southern African Development Community (SADC). Taking into account the role that African countries have played in the United Nations Commission on International Trade Law (UNCITRAL) and the creation of the CISG, it has always been pertinent to look at whether SADC Member States should adopt the CISG as an instrument for harmonising the law of international sales in the region. Since it came into force, only two SADC Member States (Lesotho and Zambia) have ratified the convention. There is apparent reluctance from the rest of SADC Member States to ratify the convention despite calls to that effect and the genuine need for legal harmonisation. The article revisits the call for the ratification of the CISG in SADC and considers other realistic alternatives to ratification.

### **1 INTRODUCTION**

The United Nations Commission on International Trade Law (UNCITRAL) is one of the most established and leading organisations in the area of international trade law. The Commission has produced a number of successful instruments for the harmonisation of international trade laws of which the United Nations Convention on Contracts for the International Sale of Goods (CISG) is a leading example. The CISG is hailed across the globe for its success in harmonising the law relating to the sale of goods at international level which is evidenced not only through the volume of trade that is conducted by countries that have ratified the Convention, but also by the geographic sphere of its operation which reaches across different legal, social, economic and political traditions.<sup>1</sup> As will be shown below, to

---

\* LLB Cum Laude (UFH), LLM (UCT), LLD (Stellenbosch).

<sup>1</sup> Significantly influential countries are parties to the CISG, such as for example the United States, Germany, Japan, Russia and China. In fact, twelve members of the G12 Group are parties to the CISG. The Group of G12 is a group of thirteen industrially advanced countries whose central banks co-operate to regulate international finance. They are Australia, Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Spain Sweden, Switzerland and USA. The 13th and non-CISG member state is the United Kingdom. See Lookofsky

date, the CISG has had remarkable influence on international and regional projects towards the harmonisation of laws and has functioned as the point of reference for the UNIDROIT Principles, the Principles of European Contract Law, the Common European Sales Law, the OHADA Uniform Acts and many more. It has even been used as the standard for the revision of national sales laws, such as in the case of Article 2 of the American Uniform Commercial Code, the German Law of Obligations, the Dutch Civil Code and Chinese Contract Law. However, the CISG has also attracted criticism on its limited scope of application and the interpretational challenges it presents.

This article focuses on the role that the CISG can play in the harmonisation of sales law within the SADC region. At the same time, it also investigates whether UNCITRAL as an international organisation with a mandate to promote the harmonisation of trade law can facilitate such a harmonisation process. For this reason, it is important to trace the history, institutional and operational mechanisms of the organisation, its working methods and progress thus far. The discussion will show that UNCITRAL should not be perceived as a “foreign” or Eurocentric organisation based on Westernised ideas but that there is an underlying relationship between African states and the UNCITRAL which dates back to its inception although its products have not always been fully appreciated by countries in Africa.<sup>2</sup>

## **2 THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)**

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by way of resolution 2205 (XXI) of 17 December 1966.<sup>3</sup> It is an international intergovernmental organisation mainly tasked with the progressive development and reform of the law of international trade.<sup>4</sup> UNCITRAL furthers

---

*Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* 4 edition (2012) 1.

<sup>2</sup> In Africa, to date, only Benin, Burundi, Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda, and Zambia are Contracting States to the CISG and, of those, only Lesotho and Zambia are in the SADC region. See the updated list of Contracting States on UNCITRAL website available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)> (accessed 12-08-2014).

<sup>3</sup> See UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume 1: 1968-70 (1971) 65.

<sup>4</sup> See United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section I in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 65. The Commission’s first session was convened in January 1968 at United Nations Headquarters in New York. See Farnsworth “UNCITRAL - Why? What? How? When?” 1972 *American Journal of Comparative Law* 314 314

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

the progressive harmonisation and modernisation of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law, including dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and the sale of goods. Other functions that are undertaken by UNCITRAL include a range of technical assistance activities to promote its work and the use and adoption of the legislative and non-legislative texts it has developed to further the progressive harmonisation and unification of private law. UNCITRAL is also tasked with coordinating and promoting the work of other organisations involved in international trade law, establishing a regional presence and publishing materials for the development of international trade law. It maintains close ties of co-operation with other international organisations, both intergovernmental and non-governmental, which in many cases take the form of co-operation agreements concluded at inter-Secretariat level.<sup>5</sup> Thus the three private law formulating agencies, UNCITRAL, the Hague Conference on Private International Law and UNIDROIT, “are quite appropriately referred to as the three sisters.”<sup>6</sup>

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

“Recently the United Nations has undertaken special efforts towards the development of international trade, having regard particularly to the general interest of the community of nations in the advancement of the developing countries. A thorough study of the legal forms of international trade, their possible simplification, harmonization and unification, would be well suited for this purpose. Governments, learned societies and international organizations have thus far done commendable work in this field. This work, however, is done mostly on a regional basis and practically without the participation of representatives of the greatly interested States of Africa and Asia.”<sup>7</sup>

---

and Honnold “The United Nations Commission on International Trade Law: Mission and Methods” 1979 *American Journal of Comparative Law* 201 201.

<sup>5</sup> See the United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section II in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 66.

<sup>6</sup> See *UNIDROIT: An Overview* (2012) 5 [http://api.ning.com/files/f\\*Vgn5il1A4TZHe4QO iBxAAKwd417vwIR4KV1Z88-](http://api.ning.com/files/f*Vgn5il1A4TZHe4QO iBxAAKwd417vwIR4KV1Z88-)

LW259rMVgbKwWFBT3GXbzxLMuMvt0eluWrVFZLWNcawAGht0ymXkUTe/Unidroit.orgINTERNATIONALINSTITUTEFORTHEUNIFICATIONOFPRIVATELAW.pdf (accessed 20-09-2014).

<sup>7</sup> See UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 5.

This statement shows that at that time there was a need to bring African and Asian States to the table when shaping an international unified sales law since they were not part of the previous harmonisation endeavours by The Hague Conference and UNIDROIT. The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) had primarily a European focus,<sup>8</sup> which was in the end one of the main reasons for their demise. There was therefore a clear need for an organisation that represented all nations of the world.

The first membership of the Commission was numerically distributed in favour of Africa with seven seats against five from Asian States, four from Eastern European States, five from Latin American States and eight from Western European and other States.<sup>9</sup> Further, Africa, played quite a significant role right from the formation of UNCITRAL in that at its first and second meetings, on 29 and 30 January 1968, the Commission elected the Ghanaian representative, Ambassador Emmanuel Kodjoe Dadzie, as its first Chairman.<sup>10</sup> This was the session and the year that prioritised work on the harmonisation of international sales law.<sup>11</sup> Three African countries, namely Ghana, Kenya and Tunisia were members of the first Working Group on Uniform Rules Governing the International Sale of Goods and the Law Applicable Thereto.<sup>12</sup> Also, in 1978, the year when the Final Draft of the CISG was finalised, former Justice Date-Bah of the Supreme Court of Ghana was UNCITRAL's Chairman.<sup>13</sup> He also presided over the session at which the rules on contract formation were adopted.<sup>14</sup> It is, therefore, undeniable that African states have been involved in the work of UNCITRAL from the time of its formation. UNCITRAL's work is furthermore organised in a way that ensures

---

<sup>8</sup> See Date-Bah "The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States" 2011 *European Journal of Law Reform* 360 361-362 and also Farnsworth 1972 *American Journal of Comparative Law* 315-316.

<sup>9</sup> See the United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section II para (1) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 66. Members from African states were Nigeria, Tunisia, Democratic Republic of Congo, Kenya, Tanzania, Ghana and the United Arab Republic (now Egypt). See Annual Report of the Commission (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 72.

<sup>10</sup> See Report of the Commission: I. the First Session (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 73.

<sup>11</sup> See Report of the Commission (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 77.

<sup>12</sup> See Report of the Commission: II. The Second Session (1969) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 99; Date-Bah 2011 *European Journal of Law Reform* 262.

<sup>13</sup> See Report of the United Nations Commission on International Trade Law on the work of its eleventh session (New York, 30 May-16 June 1978) (A/33/17) in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume IX: 1978 (1981) 12. See also Date-Bah 2011 *European Journal of Law Reform* 362.

<sup>14</sup> See Date-Bah 2011 *European Journal of Law Reform* 362.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

transparency and accountability to all states in the United Nations and at the same time guarantees participation of African states.

### 3 THE CISG

#### 3.1 Background to the CISG

In 1968, shortly after its inception, UNCITRAL set out to develop an effective uniform international sales law. Work began with Member States being asked to comment on the ULIS and the ULFIS in order to establish why they never gained international favour and to create a way forward.<sup>15</sup> In 1970, the Working Group on Sales Law started to prepare drafts for the plenary UNCITRAL sessions, which were based on the ULIS and the ULFIS. It appointed Working Groups which focused on specific issues such as the definition of the international sale of goods.<sup>16</sup> This culminated in the first draft uniform law which was finalised in January 1976 and revised by UNCITRAL at its tenth session in 1977. The rules on the formation of the contract which had been prepared by the Working Group on its ninth session in 1977 were discussed by the UNCITRAL in 1978 at its eleventh session and merged with the substantive draft to form what became the New York Draft. This was the Final Draft which was circulated to the United Nations Member States for comment.<sup>17</sup> This draft and the comments received formed the basis for the Vienna Conference in 1980. At this Conference, delegates from 62 nations deliberated on the Draft Convention and 42 countries voted in favour of its adoption.<sup>18</sup> The United Nations Convention on Contracts for the International Sale of Goods (the CISG) received the requisite number of ratifications on 11 December 1986 and it came into force on 1 January 1988.<sup>19</sup>

The CISG was adopted to bridge the gap between the different legal systems of the world, mainly between the civil law and the common law by creating a uniform law for the

---

<sup>15</sup> See Schwenger (ed) *Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG)* 3 edition (2010) 2.

<sup>16</sup> See Schwenger (ed) *Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG)* 3 edition (2010) 2.

<sup>17</sup> For a brief background to the Convention, see Schlechtriem *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (1986) 17-20.

<sup>18</sup> Schwenger (ed) *Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG)* 3 edition (2010) 3.

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

international sale of goods.<sup>20</sup> It is a uniform sales law - a single collection of default rules that apply to sales contracts within its scope, which is to govern the formation of the contract of sale as well as the rights and obligations of the buyer and seller.<sup>21</sup> However, the CISG is not merely a codification of existing rules of international trade, but is part of a progressive effort towards harmonising diverse approaches to international trade law led by UNCITRAL.<sup>22</sup> It has been described as “a workmanlike attempt to devise legal rules and practical procedures for international sales transactions” using language which is “free of legal shorthand, free of complicated legal theory and easy for businessmen to understand,” because “it is, after all, businessmen who must understand the meaning of the provisions.”<sup>23</sup>

The CISG is an instrument founded on the broad objectives of the resolutions adopted by the sixth session of the General Assembly of the United Nations on the establishment of a new economic order and, hence, is a product of globalisation. It takes into account the different social, economic and legal systems in which international trade takes place, and recognises that the development of international trade should take place on the basis of “equality and mutual benefit” in order to promote friendly relations among states. It is also based on the understanding that the adoption of uniform rules would contribute to the removal of legal barriers to trade and promote the development of international trade.<sup>24</sup>

Significantly influential countries are parties to the CISG, such as the United States, Germany, Japan and Russia. China is a leader among developing countries and has lately also moved up to become a world leader.<sup>25</sup> In fact, twelve members of the G12 Group are parties to the CISG.<sup>26</sup> Nine of the top ten countries in terms of international trade which altogether

---

<sup>20</sup> See Preamble to the United Nations Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980), Reprinted in 19 I.L.M. 671 (1980).

<sup>21</sup> Walt “The CISG’s Expansion Bias: A Comment on Franco Ferrari” 2005 *International Review of Law and Economics* 342 342.

<sup>22</sup> See Esslinger “Contracting in the Global Marketplace: The UN Conventions on Contracts for the International Sale of Goods” 2007 *ALI-ABA Business Law Course Materials Journal* 43 43.

<sup>23</sup> Sono “The Vienna Sales Convention: History and Perspective” in Sarcevic & Volken (eds) *International Sale of Goods: Dubrovnik Lectures* (1986) 1 1, 7.

<sup>24</sup> Preamble to the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

<sup>25</sup> See Esslinger 2007 *ALI-ABA Business Law Course Materials Journal* 44-45.

<sup>26</sup> The Group of G12 is a group of thirteen industrially advanced countries whose central banks co-operate to regulate international finance. They are Australia, Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Spain Sweden, Switzerland and USA. The 13<sup>th</sup> and non-CISG member state is the United Kingdom. See Lookofsky *Understanding the CISG* 1.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

account for more than two thirds of world trade are parties to the CISG.<sup>27</sup> The trade relationships between SADC states and countries which are Contracting States to the CISG, in particular China, the United States and countries in the European Union might be an important factor for SADC countries to follow suit and adopt the Convention. In Africa, to date, only Benin, Burundi, Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda, and Zambia are Contracting States to the CISG and, of those, only Lesotho and Zambia are in the SADC region.<sup>28</sup>

### 4 THE SUCCESSES OF THE CISG IN THE HARMONISATION OF INTERNATIONAL SALES LAW

In weighing the benefits and criticisms of the CISG it is apparent that the Convention has many advantages but that there are also challenges. Before considering whether SADC Member States should adopt the CISG, it is important to identify the successes that the Convention has achieved thus far. In general, creating certainty and predictability is the hallmark of legal harmonisation. Whether this has been achieved can be measured against the uniform application of the Convention; its reception by practitioners, scholars, national authorities and traders; its influence on the law in general and on other harmonisation initiatives; and the total membership of its contracting parties. Although these factors are not conclusive, it can provide a fair indication of how far the CISG has progressed in its quest for harmonisation. This, in turn, informs the question whether it should be considered for ratification by SADC.

#### 4.1 Uniform application

The interpretational problems of the Convention, particularly its imprecision and vague terms, have been criticised; more so considering that there is no court of ultimate resort to ensure uniform interpretation.<sup>29</sup> However, the Convention safeguards uniformity by means of Article 7 (1) which requires that the Convention is to be interpreted in a uniform manner. The CISG provides that in its interpretation, “regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in

---

<sup>27</sup> These are USA, China, Germany, Japan, France, Netherlands, Republic of Korea, Italy and Canada. The odd one out of the top ten is the United Kingdom. See WTO *International Trade Statistics 2012* (2012) [http://www.wto.org/english/res\\_e/statis\\_e/its2012\\_e/its2012\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf) (accessed 02-09-2014).

<sup>28</sup> See the full list of Contracting States on UNCITRAL website available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (accessed 12-08-2014).

<sup>29</sup> See Schwenger & Hachem “The CISG-Successes and Pitfalls” 2009 *American Journal of Comparative Law* 457 467.

international trade”. Therefore, courts and tribunals are mandated to interpret and apply the CISG in a manner consistent with its goal of creating a uniform sales law.<sup>30</sup> While some have ignored this mandate, other courts, including some in the US, have committed themselves to seek out the common values within the CISG which provide for functional uniformity.<sup>31</sup> An example is the case of *MCC Marble Ceramic Center v Ceramica Nuova D’Agostino*,<sup>32</sup> where the court cited foreign jurisprudence on the CISG and referred to academic commentary. It held that the CISG’s purpose is to provide uniformity and certainty for parties to international sales.<sup>33</sup> Incidentally, the number of decisions complying with the obligation to have regard to the CISG’s international character by not resorting to domestic concepts is growing<sup>34</sup> and according to some scholars “clearly outweighs” those that do not comply.<sup>35</sup> A court of last resort for the application and interpretation of the CISG is not the sole and ultimate mechanism for uniform application of the Convention. There are other methods which can be utilised to ensure that courts and tribunals have access to foreign decisions and consider them. For example, UNCITRAL has made accessible a wealth of resources which provides access to decisions from jurisdictions around the world via the internet. If courts seriously consider these decisions with the aim of creating uniformity, the absence of a supranational court on the CISG could have little negative impact. This is supported by evidence that, despite the absence of a supranational court, both civil and common law courts

---

<sup>30</sup> See also Lookofsky “In Dubio Pro Convention? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)” 2003 *Duke Journal of Comparative and International Law* 263 275; Schlechtriem “Requirements of Application and Sphere of Applicability of the CISG” 2005 *Victoria University of Wellington Law Review* 781 789-791; and Torsello *Common Features of Uniform Commercial Law Conventions: A Comparative Study Beyond the 1980 Uniform Sales Law* (2004) 18.

<sup>31</sup> See also Ferrari “Have the Dragons of Uniform Sales Law been tamed? Ruminations on the CISG’s Autonomous Interpretation by Courts” in Andersen & Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008) 134 and also DiMatteo, Dhooge, Greene, Maurer & Pagnattaro “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence” 2004 *Northwestern Journal of International Law and Business* 299 306.

<sup>32</sup> *MCC-Marble Ceramic Center Inc v Ceramica Nuova D’Agostino*, United States Court of Appeals for the Eleventh Circuit, 144 F.3d 1384 (11th Cir.1998).

<sup>33</sup> Other examples of cases that have complied with this obligation under Article 7(1) include *St. Paul Guardian Insurance Company and Travelers Insurance Company, as subrogees of Shared Imaging, Inc. v Neuromed Medical Systems & Support, GmbH and others*, United States District Court for the Southern District of New York, 26 March 2002, 2002 WL 465312 (S.D.N.Y.).

<sup>34</sup> Ferrari “Homeward Trend and Lex Forism Despite Uniform Sales Law” 2009 *Vindobona Journal of International Commercial Law and Arbitration* 15 38.

<sup>35</sup> See also Ferrari “Do Courts Interpret the CISG Uniformly?” in Ferrari (ed) *Quo Vadis CISG?: Celebrating the 25<sup>th</sup> Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (2005) 37.



## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

are producing conforming decisions regardless of traditionally differing approaches to legal interpretation.<sup>36</sup>

Lastly, the criticism based on lack of uniformity is largely founded on the wrong premise. Strict uniformity applying the CISG across national boundaries will practically never be achieved. As Honnold puts it:

“Throughout the work on uniform laws realists have told us: Even if you get uniform laws you won't get uniform results. Those sad-faced realists were dead right - as right as confirmed bachelors and spinsters who build their lives on the realistic view that there is no perfect spouse.”<sup>37</sup>

The CISG seeks the objective of functional or relative uniformity in both the interpretation and application of the CISG across a common set of commercial norms.<sup>38</sup> In other words, the CISG is an attempt to harmonise “not so much the law of international sales transactions, but more precisely, the norms and values regarding the conduct of international trade in goods.”<sup>39</sup>

### 4 2 Support from legal practitioners

The success of the CISG can be deduced from its influence on lawyers, judges, the legislature and scholars which in turn reflects its influence on national legal systems.<sup>40</sup> There are still jurisdictions where legal practitioners continue to exclude the CISG for “fear of the unknown” because they assume that the substance of the Convention cannot easily be grasped.<sup>41</sup> This can primarily be ascribed to a lack of knowledge on the CISG. However, many other practitioners across the world have embraced the Convention because of its

---

<sup>36</sup> See Patterson “United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination” 1986 *Stanford Journal of International Law* 263 282 and also Lando “CISG and its Followers: A Proposal to adopt some International Principles of Contract Law” 2005 *American Journal of Comparative law* 379 286.

<sup>37</sup> See Honnold “The Sales Convention in Action - Uniform International Words: Uniform Application?” 1988 *Journal of Law and Commerce* 207 207.

<sup>38</sup> See also Andersen *Uniform Application on the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (2007) 34-36.

<sup>39</sup> See generally Mazzacano “Harmonizing Values, not Laws: The CISG and the Benefits of a Neo-Realist Perspective” 2008 *Nordic Journal of Commercial Law* 14.

<sup>40</sup> Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480 at 421.

<sup>41</sup> See Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* 413 426; Reimann “The CISG in the United States: Why it has been Neglected and why Europeans should Care” 2007 *Rabel Journal of Comparative and International Private Law* 115 125.

neutral nature.<sup>42</sup> The increasing volumes of trade presumably conducted under the CISG show that practitioners have gained confidence in the Convention. A new generation of legal practitioners educated in the benefits of a unified sales law will also contribute to an increase in its use.

### 4.3 Influence on other harmonisation projects

The CISG has exerted significant influence at international as well as a domestic level. Its influence is substantial and pervasive.<sup>43</sup> When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG, not only in its systematic approach but also with respect to the mechanism of remedies. Although the PICC is broader in its scope of application by addressing commercial contracts in general and not only sales contracts, it also deals with issues that are covered by the CISG. Hence, to the extent that they deal with the same issues, the CISG provisions were essentially followed with the exception of adaptations which were considered appropriate to reflect the particular nature and scope of the PICC.<sup>44</sup> The influence of the CISG on the PICC is clearly recognised by the drafters who made explicit reference to the CISG in their official comments whenever they borrowed from the CISG opposed to their general norm of non-disclosure of their sources.

The Principles of European Contract Law (PECL) published in 1999 have also been influenced by the CISG. The same can be said of the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.<sup>45</sup> The Draft Common Frame of Reference published in the beginning of 2008 is a continuation of the different unification efforts which are all heavily indebted to the CISG.<sup>46</sup> The Common European Sales Law also

---

<sup>42</sup> Fountoulakis “The Parties’ Choice of ‘Neutral Law’ in International Sales Contracts” 2005 *European Journal of Law Reform* 303-314.

<sup>43</sup> Flechtner “The CISG’s impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law” in F Ferrari (ed) *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences - Verona Conference 2003* (2003) 169-176-181 and Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* 3rd edition (2005) 305-306.

<sup>44</sup> See Bonell *An International Restatement of Contract Law*: 305-306.

<sup>45</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Official Journal of the European Communities 7.7.1999 L/171. It took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states. See Schwenger & Hachem “The CISG - Successes and Pitfalls” 2009 *American Journal of Comparative Law* 457-461-462.

<sup>46</sup> Schwenger & Hachem 2009 *American Journal of Comparative Law* 461-462.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

closely resembles the CISG.<sup>47</sup> In Africa, the OHADA Uniform Act of General Commercial Law Book VIII is another example of harmonised law which is primarily based on the CISG.<sup>48</sup>

Furthermore, Ferrari suggests that the Convention may be used as a starting point for a so-called “interconventional”<sup>49</sup> interpretation. This refers to a systematic approach to the interpretation of international uniform law instruments which has the advantage of making the unification process much easier. It obviates the need to create different autonomous concepts for each international uniform law instrument and prepares the ground for a more coherent harmonisation process to “replace the piecemeal unification one confronts today.”<sup>50</sup> Such submissions by eminent scholars provide recognition for the CISG’s role as an “indispensable point of reference”, thus, making it a “success beyond its scope.”<sup>51</sup>

### 4 4 Ratifications and acceptance

The CISG has notably achieved one of its main goals and objectives, namely the creation of a uniform body of international sales law with a high universal acceptance rate. Only ten years after it entered into force, it had been accepted by 50 Contracting States. Currently it has grown to 80 Contracting States.<sup>52</sup> Scholars are of the opinion that it is a “worldwide success”<sup>53</sup> and practitioners hold that its “acceptance is well-founded since CISG is a fair and

---

<sup>47</sup> See Magnus “CISG vs. CESL” in Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97 and also Magnus “Interpretation and Gap-filling in the CISG and in the CESL” 2012 *Journal of International Trade Law and Policy* 266 274.

<sup>48</sup> See Beauchard & Kodo “Can OHADA Increase Legal Certainty in Africa?” (2011) 34 *World Bank Justice and Development Working Paper Series* 17/2011 <http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIncrease.pdf?resourceurlname=17-2011CanOHADAIncrease.pdf> (accessed 03-09-2014); Idris “Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects” in Dickerson *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2012) 43-44; and Ferrari “The CISG and OHADA Sales Law” in Magnus (ed) *CISG vs Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79 81.

<sup>49</sup> Ferrari “The CISG and its Impact on National Contract Law - General Report” in Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413 449-452.

<sup>50</sup> See Ferrari “The CISG and its Impact on National Contract Law - General Report” in Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413 450 and also Anyamele *The United Nations Convention On Contracts For The International Sale Of Goods: A Proposal For Nigeria* (LLM-thesis, University of Durham, 2011) 2.2.5 <http://www.cisg.law.pace.edu/cisg/biblio/anyamele.html#141> (accessed 08-08-2013).

<sup>51</sup> See discussion in Ferrari “Remarks on the Autonomous Interpretation of the Brussels 1 Regulation, in Particular of the Concept of ‘Place of Delivery’ under Article 5(1) (b), and the Vienna Sales Convention (on the Occasion of a Recent Italian Court Decision)” 2007 *International Business Law Journal* 83.

<sup>52</sup> See the updated list of Contracting States on the UNCITRAL websites available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)> (accessed 12-08-2014).

<sup>53</sup> See Bonell “Do we need a Global Commercial Code?” 2001 *Dickinson Law Review* 87 88.

well-drafted law that generally reflects the expectations of the parties to an international sales transaction.”<sup>54</sup>

#### 4 5 Concluding remarks

Like any other international instrument, the CISG faces several implementation challenges, such as that it allows parties to opt out of it where it would legally apply. Furthermore, it is available in different languages and its vague terminology is to be interpreted in national courts and by arbitral tribunals according to similarly vague rules of interpretation. These matters pose great challenges to the application of the Convention in courts and in practice. However, despite these challenges, in practice the benefits far outweigh the challenges<sup>55</sup> and that “most criticism boils down to the reluctance of old dogs to learn new tricks.”<sup>56</sup> This study submits that, as the Convention presents one of the best opportunities for achieving the harmonisation of sales laws, it is best to resolve the challenges that present themselves in the application of the CISG as an instrument for harmonisation, than shy away from using it because of those challenges.

There are thousands of court decisions and arbitral awards which apply the Convention,<sup>57</sup> and it is widely dealt with in the legal literature throughout the world. “Furthermore, the rules of CISG have become familiar to lawyers and business people all over the world.”<sup>58</sup> It is fair to say that the CISG, after more than two decades of being in force, has proved that it can achieve what it set out to achieve, which is the harmonisation of sales laws. There is little doubt that it is the most successful instrument for the harmonisation of laws to date and also one of the most ratified conventions. It has been well received by scholars, practitioners, traders, national authorities and other organisations in the area of legal harmonisation. It “has already proved itself to be a wonderfully effective instrument”.<sup>59</sup> Moreover, it has remained influential in guiding international and regional harmonisation processes by being the point of reference for new initiatives and reforms.

---

<sup>54</sup> See Cook “CISG: From the Perspective of the Practitioner” 1998 *Journal of Law and Commerce* 343 346.

<sup>55</sup> See also, making a case for South Africa’s adoption, Eiselen “Adoption of the Vienna Convention for International Sales of Goods (the CISG) in South Africa” 1999 *South African Law Journal* 323

<sup>56</sup> Schwenzer & Hachem “The CISG - Successes and Pitfalls” 2009 *American Journal of Comparative Law* 457 477.

<sup>57</sup> See Lookofsky *Understanding the CISG* (2012) 2.

<sup>58</sup> See Lando “CISG and its Followers: A Proposal to adopt some International Principles of Contract Law” 2005 *American Journal of Comparative Law* 379 380.

<sup>59</sup> Bridge “Uniformity and Diversity in the Law of International Sale” 2003 *Pace International Law Review* 55 55.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

### 5 SHOULD SADC STATES ADOPT/RATIFY THE CISG?

The CISG has proved to be popular, particularly outside Africa. However, only a few States have adopted it in Africa, with only two in SADC. Taking into account the role that African countries have played in UNCITRAL and the creation of the CISG, it is pertinent to turn to the question whether SADC Member States should adopt the CISG as an instrument for harmonising the law of sale in the region. In this context, the term *adopt* is employed to refer to ratification, accession, approval, acceptance or succession, as the case may be.

The successes of the CISG present strong arguments for SADC Member States to adopt the CISG. SADC can take a decision that its Member States should adopt the CISG as the law governing international sales. It is, however, unprecedented for SADC to adopt an international convention on behalf of its Member States. Even SADC Protocols undergo ratification processes in each Member State. Hence, each Member State will have to complete the procedures individually to introduce the Convention into their respective national laws. SADC as a regional economic community can, however, urge the Member States to adopt the Convention.

Although a number of advantages of the CISG have been outlined already, the focus in this section is specifically on its benefits for the SADC context. An important factor for any successful African trade expansion agenda is the establishment and maintenance of an appropriate legal framework to facilitate trade. The CISG is an instrument that was created to remove legal barriers to trade and hence promote the development of international trade.<sup>60</sup> There is an undoubted relationship between development and meaningful reform of the legal framework for international trade.<sup>61</sup> The CISG provides a strong legal framework for sales transactions which should be reason enough for African states to accede to the CISG.

Moreover, the active role that African states have from the outset played in UNCITRAL and its products deserves to be recognised by Africa. The CISG is a product of a professional and

---

<sup>60</sup> See the Preamble to the United Nations Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) Reprinted in 19 I.L.M. 671 (1980).

<sup>61</sup> See Castellani "International Trade Law Reform in Africa: A Call for Action" 2011 *European Journal of Law Reform* 479 481 and also World Trade Organisation *World Trade Report 2008: Trade in Globalising World* (2008) xxiii. For a contrary view on whether the CISG has been successful in promoting trade, see Lehmann "The United Nations Convention on Contracts for the International Sale of Goods: Should South Africa Accede?" 2006 *South African Mercantile Law Journal* 317 320-323.

sophisticated body which receives its mandate from the United Nations. As United Nations Member States the developing countries from Africa have the opportunity to participate and get more involved in the current and future work of UNCITRAL. The importance hereof is that even poor and smaller countries of Africa can have both diplomatic and political oversight over the work of UNCITRAL.

Another reason that SADC should adopt the Convention is its accessibility. Recalling that the accessibility of laws in SADC is generally a challenge due to underdevelopment and the fragmentation of the legal systems involved, the CISG may be of great benefit for the SADC practitioner.<sup>62</sup> The CISG is available in various languages, especially English, French and Portuguese which are all used in the region. Supporting services that come with the CISG such as "Case Law on UNCITRAL Texts" (CLOUT), the Pace University database on CISG case law and other databases containing important secondary materials on the CISG are maintained around the world. This means that SADC lawyers would have access to materials in the event of a dispute arising under the CISG because the internet makes it possible to access such materials. Furthermore, traders can also easily access information through private research and only have to consult lawyers when it becomes technically necessary.

"One of the most important aims of any legal system is to create an environment wherein the participants can operate with the maximum of security and the minimum of friction."<sup>63</sup> This is done by ensuring that the rules are fair and equitable, consistent, certain and not plagued by complexities. By acceding to the CISG, SADC Member States are provided with a logical, coherent and comprehensive framework for working through complex legal issues which can facilitate cross-border sales and enhance competition.<sup>64</sup>

The intelligibility of the guiding principles of the Convention which were formulated with commercial expectations in mind and do not reflect a specific legal tradition's preferences is also appealing. Thus, for example, the CISG's readiness to uphold the contract and its cautiousness towards termination better fits the expectations and practice of traders across the globe. These expectations are furthermore encapsulated in the concept of good faith which is

---

<sup>62</sup> See Eiselen 1999 *South African Law Journal* 349-350.

<sup>63</sup> See Eiselen 1999 *South African Law Journal* 339.

<sup>64</sup> See Eiselen 1999 *South African Law Journal* 339-340.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

provided for in Article 7.<sup>65</sup> In addition, the primacy it accords to the relief of specific performance in contrast to the common law approach of ordinarily allowing for damages or damages combined with the right to repudiate does not compromise neutrality. Under the CISG, the innocent party can insist on performance by the party in breach. In other words, specific performance is more widely available under the Convention than under common law. This is a direct influence of the civil law tradition. However, article 28 CISG provides a compromise in recognition of common law tradition. Therefore, a court will not have to grant specific performance where under its national rules specific relief would not have been available. This, therefore, strikes a balance between civil law and common law positions regarding remedies. The compromise character of the Convention should appeal to SADC States which are composed of both common law and civilian national legal traditions.<sup>66</sup>

Where the CISG operates, it will mitigate high drafting costs for a SADC trader who will no longer have to contractually provide for issues that are covered by the Convention. The choice of opting out, however, ensures that the parties are not constrained by the Convention but can still have their own terms and conditions tailored to suit their needs. Thus, by providing a legal foundation with default terms which reduce transaction costs and ensure certainty, the Convention can be a necessary tool for the facilitation of trade, which is the main goal of legal harmonisation in SADC.<sup>67</sup>

Moreover, the CISG provides African cross-border traders with access to a system of modern harmonised rules. Through the practice of an increasing number of Contracting States and the scholarly and practical attention of an equally expanding pool of academics and lawyers of many nationalities, this system of rules has now, in effect, become part of a new *lex mercatoria*.<sup>68</sup> This contention is further supported by the fact that the Convention encourages the use of international trade usages and practices worldwide by way of a compromise which was formulated to protect the interests of developing countries.<sup>69</sup>

---

<sup>65</sup> See also Nottage “Who’s afraid of the Vienna Sales Convention (CISG)? A New Zealander’s view from Australia and Japan” 2005 *Victoria University of Wellington Law Review* 815 829.

<sup>66</sup> See Date-Bah 2011 *European Journal of Law Reform* 365-366. See also Ng’ong’ola “The Vienna Sales Convention of 1980 in the Southern Africa Legal Environment: Formation of a Contract of Sale” 1992 *African Journal of International and Comparative Law* 835.

<sup>67</sup> See also Gillette & Scott “The Political Economy of International Sales Law” 2005 *International Review of Law and Economics* 446 477.

<sup>68</sup> See Date-Bah 2011 *European Journal of Law Reform* 264.

<sup>69</sup> See Eiselen 1999 *South African Law Journal* 352.

Another advantage of the CISG, which should be of interest to SADC States, is that it minimises resort to the perplexing rules of private international law.<sup>70</sup> Where the places of business of both parties are in the territories of Contracting States, the rules of private international law are bypassed and the uniform rules of the CISG are applied automatically. In order to foster wealth redistribution and diversify economies, developing economies need to encourage small and medium sized enterprises to engage in international trade. These enterprises and their successes is a major concern for the poverty stricken SADC countries which struggle to create employment for the ever increasing population of young people. Conflict of laws rules could financially and psychologically deter medium sized businesses from entering cross-border markets, even within the SADC region. Adoption of the CISG by SADC Member States will simplify the issue of applicable law and reduce transaction costs.<sup>71</sup>

Considering that many of SADC's trade partners such as China, the US and the EU have adopted the CISG, it could provide further impetus for international trade between SADC countries and their trade partners if the SADC Member States were to adopt the Convention as well. Apart from the "sheer kinetic energy" that has been generated in the past couple of decades towards universality in the cross-border sale of goods law by the CISG, another reason why SADC States should adopt the harmonisation movement represented by the CISG is the creation of a similar legal framework to that of its major trading partners which can function as a mechanism for attracting investment.

The CISG has also been an important tool for legal reform. Many countries have relied on the CISG to reform their national laws. For those countries in SADC where the cost of legal reform can impede other developmental priorities due to lack of adequate resources, the CISG can be used for that very purpose.<sup>72</sup> It offers a fairly modern and simple law that can suit the needs of the diverse cultures and legal traditions in the region.<sup>73</sup> The Convention has proven to be successful, not only internationally but within national systems for domestic law reform.<sup>74</sup> As a key model, the Convention has stimulated the reform of national sales law in

---

<sup>70</sup> See Date-Bah 2011 *European Journal of Law Reform* 264.

<sup>71</sup> See McNamara "U.N. Sale of Goods Convention: Finally Coming of Age?" 2003 *Colorado Lawyer* 11.20.

<sup>72</sup> See generally Ferrari "The CISG and its Impact on National Contract Law - General Report" in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413.

<sup>73</sup> See Castellani "Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)" 2000 *Vindobona Journal of International Commercial Law and Arbitration* 241 243.

<sup>74</sup> See Schlechtriem "25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts" in Flechtner, Brand & Walter (eds) *Drafting Contracts under the CISG* (2008) 167 174, 177; Schlechtriem "Basic Structures and General Concepts of the



## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

countries that have adopted it.<sup>75</sup> This is because of its perceived “greater attunement to modern commercial conditions than old-style national laws.”<sup>76</sup> For instance, Finland and Sweden introduced the Convention into their domestic systems to reform their sales laws.<sup>77</sup> The same applies for Norway.<sup>78</sup> The Convention’s text was consulted when drafting the civil codes of the Commonwealth of Independent States (CIS) countries.<sup>79</sup> It also served as a basis for the modernisation of the Estonian Civil Code and the Estonian law of obligations,<sup>80</sup> the German Law of Obligations and in China where the Chinese Unified Contract law was greatly inspired by the CISG.<sup>81</sup>

From these arguments and many other<sup>82</sup> that have been made since the CISG came into force, it is quite clear that there is a compelling case for adoption of the CISG in SADC. Besides legal harmony and its ancillary benefits, the CISG can serve as a tool for legal reform which is a great necessity in SADC where laws are still characterised by their colonial heritage. Countries in the SADC region could therefore take lessons from the CISG in reforming their domestic laws, which will ensure greater harmony in the law of sale applied in the region. It will at the same time ensure that national laws are brought closer to international trade laws. At the same time, it must be kept in mind that even where both parties to a contract may not have their places of business in Contracting States, the CISG could still apply to such a contract if the rules of private international law point to the law of a country that has adopted the CISG. This makes the reluctance to adopt the CISG partly illogical.

---

CISG as Models for a Harmonisation of the Law of Obligations” 2005 *Juridica International* 27 28; and Schwenzer & Hachem 2009 *American Journal of Comparative Law* 460.

<sup>75</sup> See Schwenzer & Hachem 2009 *American Journal of Comparative Law* 461-462.

<sup>76</sup> See Bridge “A comment on ‘Towards a Universal Doctrine of Breach: The Impact of CISG by Jürgen Basedow’” 2005 *International law and Economics Review* 501 501.

<sup>77</sup> However, they did not include Part II of the CISG (provisions on formation of the contract). See Lookofsky “Alive and well in Scandinavia: CISG Part II” 1999 *Journal of Law and Commerce* 289 290. For a discussion of the CISG’s impact in Europe see also generally Bernstein & Lookofsky *Understanding the CISG in Europe* 2 edition (2003) and Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008).

<sup>78</sup> See Lookofsky 1999 *Journal of Law and Commerce* 289.

<sup>79</sup> Schwenzer & 2009 *American Journal of Comparative Law* 461-463. There are a few departures from the Convention which, however, do not create irreconcilable difference between the national codes and the CISG. See Knieper “Celebrating Success by Accession to CISG” 2005 *Journal of Law and Commerce* 477 478.

<sup>80</sup> See Varul “CISG: A Source of Inspiration for the Estonian Law of Obligations” 2003 *Uniform Law Review* 209 209.

<sup>81</sup> See Ding “China and CISG” in Will *China and CISG: Theory and Practice* (1999) 25 26.

<sup>82</sup> See also generally Eiselen 1999 *South African Law Journal* 323

However, although the advantages of its adoption are apparent, there are also firm arguments against adoption of the CISG in SADC.<sup>83</sup> These concerns might explain why many African and indeed SADC States have not ratified the Convention.<sup>84</sup> While adoption procedures are generally quicker for the enactment of domestic laws, they could be very slow when it comes to the domestication of conventions. In most instances a convention has to be signed and then followed by ratification procedures within the domestic parliaments of the relevant SADC country.<sup>85</sup> On paper this sounds like a simple and quick process; however, in practice it can take years to complete. This might hinder the adoption of the CISG with the goal of creating a regional uniform law. Some countries have conventions that they have signed but after many years have not ratified them yet.<sup>86</sup> This is also true of the SADC Protocols, most of which have taken many years to come into effect because of the slow pace of ratification by SADC Member States. Moreover, you can never know how many countries will ever adopt it and if, when they will do so. However, if political will can be generated the process can be accelerated, and this is therefore not a legitimate excuse for not adopting the Convention.

## 6 CONCLUSION AND OTHER METHODS OF HARMONISATION USING THE CISG

Considering all this knowledge about the success and utility of the CISG in the harmonisation of international sales law and the role it has played in law reform, the question now has to be asked whether this evidence has not been sufficient enough for SADC Member States to ratify the convention. In truth, the reluctance of SADC states to ratify the CISG despite it being a workable solution to legal diversity in the region is perplexing. However, the reality of the matter is that even with 25 years of its existence, SADC states have not shown interest in adopting it. Calls for ratification from scholars have fallen on deaf ears. Perhaps, ratification is not a process states are prepared to go through as is the case with many conventions. It could be high time scholars change their position on how the CISG can be

---

<sup>83</sup> The case of the UK comes to mind here. It has been suggested that a reason for non-ratification of the CISG in the UK is the delay in legislative process, since the CISG has to join the queue in a long list of other legislative priorities. See Hoffman "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe" 2010 *Pace International Law Review* 145-148, 151-152 and Moss "Why the United Kingdom has not ratified the CISG" 2005 *Journal of Law and Commerce* 483-483.

<sup>84</sup> Lehmann 2006 *South African Mercantile Law Journal* 320-323, observes that developing countries particularly from Africa have not ratified the CISG and this could be because they do not believe it to be beneficial to their economic aspirations.

<sup>85</sup> In South Africa the procedure is provided for in section 231 of the Constitution of the Republic of South Africa, 1996.

<sup>86</sup> Ghana for example signed the CISG on 11 April 1980 but has not ratified it to date. See the Status of Ghana's ratification on the UNCITRAL websites available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)> (accessed 12-08-2014).

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

utilised for legal harmonisation and reform in SADC. Experiences in other countries and regions have shown that ratification is not the only way the CISG can be of significant importance. Within the current SADC legislative and functional framework, has to be investigated and alternative ways to ratification recommended. It is pointless to continue to play a tune that no one dances to. It is submitted here that both young researchers and seasoned scholars should be free to depart from the traditional norm of lobbying only for the ratification of the CISG but through learning from other regional experiences, investigate and recommend other ways in which the CISG can still play a role in the harmonisation of international sales law in SADC. As highlighted from the successes of the CISG above, this is not to say ratification has become unnecessary but that although it remains ideal, it has no takers in SADC. The benefits of the CISG in the SADC region cannot be left to waste simply because ratification has failed. There are other methods by which the CISG can be utilised in SADC without ratifying it.

Adoption of the CISG by the SADC Member States as a way of harmonising sales laws in the region could be a giant step towards unification. Adoption, however, has not gained traction SADC leaders. In this regard, it is important to explore other techniques of harmonisation that could utilise the text of the CISG as a blueprint for the harmonisation of sales laws in SADC.<sup>87</sup> The strategy here will be to find ways, within the SADC framework, by which the CISG can still be utilised for legal harmonisation without being ratified by Member States. One could therefore propose using the CISG as a *model law* or a *guideline* which Member States can consider in the development of their own national laws.

If all Member States formulate their sales laws on the basis of the same model law, the different laws will be made more similar and hence the harmonisation of sales laws will be achieved or at least increased. This has happened in many other countries already. The SADC Summit or even the SADC Parliamentary Forum<sup>88</sup> could adopt the CISG as a model law. The

---

<sup>87</sup> In proposing a uniform contract law, Wandrag notes that firstly one has to research the diversity of contract laws in the region, and then on the basis of these results draft the SADC Principles of Contract Law. If acceptable to member countries, this can form the basis of a Uniform Act on Contract Law.” See Wandrag “Unification of Southern African Contract Law” 2011 *European Journal of Law Reform* 451 460.

<sup>88</sup> The SADC PF adopted the SADC Model Law on HIV/AIDS on 24th November 2008, during its 24th Plenary Assembly convened in Arusha, Tanzania, from the 20th - 27th November 2008. SADC Ministers of Telecommunications, Postal and ICT also adopted a SADC Model Law on Electronic Transactions & Electronic Commerce at the meeting in Mauritius November 2012. The Model law was prepared by the International Telecommunication Union and is available at <http://www.itu.int/en/ITU-D/Projects/ITU-EC->

difference between this and a SADC Protocol is that SADC Member States would not be bound to domesticate the text and neither will there be any real legitimate expectation that Member States would take it into consideration. An example relevant to legal harmonisation is that of the SADC Model Law on Electronic Transactions and Electronic Commerce<sup>89</sup> recently adopted by the SADC Ministers of Telecommunication, Post and ICT, which seeks to enhance electronic commerce in the region by improving and modernising national laws. This is an example of a soft law effort towards the harmonisation of laws, which shows that precedents for the harmonisation and facilitation of commerce using model laws already exist in SADC.

The key point here is that the model law is not binding but persuasive. It will also be implemented at the pace of an individual Member State in line with its own developmental goals. This approach leaves room for change and also to adopt some provisions to the exclusion of others. At the same time, traders within the region are free to use the model law as the governing law of their contract if they so wish. The major challenge of this method, however, is that the pace of harmonisation could be very slow since it would now essentially depend on the processes of national legal reform in the individual States. Where States decide to adopt only parts of the model law text it might assist in doing away with archaic elements by substituting them with new rules. However, such an approach could also be a major source of disharmony if the model law is introduced differently by Member States.

Another alternative is to use the CISG as a guideline. SADC already has instruments called guidelines.<sup>90</sup> Guidelines can be adopted by the SADC Summit. Similar to a model law, guidelines would not require ratification by Member States. Guidelines simply create a framework for two distinct purposes: they are aimed at national law reform but also enshrine some legitimate expectations for the region as a whole. However, in practice, although SADC Guidelines are not meant to be hard law, they appear to have some influence as there have been moves to make them effective and applicable as a point of reference in other areas to

---

CP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc\_model\_law\_e-transactions.pdf (accessed 10-10-2014).

<sup>89</sup> The model law that was prepared by the International Telecommunication Union under the auspices of the project on the harmonisation of ICT policies in Sub-Saharan Africa is available at: <http://www.itu.int/en/ITU-D/Projects/ITU-EC->

[ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc\\_model\\_law\\_e-transactions.pdf](http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf) (accessed 16-10-2014).

<sup>90</sup> For example, the Principles and Guidelines Governing Democratic Elections were adopted by the SADC Summit in Mauritius in August 2004.

## MORE THAN 25 YEARS OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

which they apply.<sup>91</sup> The CISG could thus be used in this form as a tool for harmonisation. Because SADC has shown favour for the concept of guidelines, such an approach might accelerate the process of harmonisation. The CISG as a guideline would therefore be used as the principal basis on which trade matters are to be evaluated by the SADC Tribunal should it receive a mandate to deal with trade disputes. Although a guideline is not, strictly speaking, able to ensure total compliance with the rules set out by it; it is a basis for reform and development. With time, the CISG would then become the reference point for sales laws in SADC. Unlike a model law, which will depend much on its own persuasive force, a guideline will carry with it some form of mandate favouring its recognition and be taken into consideration as the basis for any sales laws reform and development in the SADC Member States. The process can be equally slow, but as reform sets in, the guidelines would increasingly be used as a point of reference and with it would come a genuine expectation that the harmonisation of sales laws in the region is inevitable.

It is therefore concluded that the role which the CISG can play in harmonising the law of sale in SADC should not be underestimated. Even without ratification, Member States can alternatively use the CISG as a point of departure for revising their domestic sales laws which will lead to a higher level of harmonisation in the law of sales in the region. International practice also shows that the CISG plays a significant role in regional harmonisation projects and thus can be used as a basis for creating a common sales law for the region.

Above all, it is important to note that UNCITRAL is a well-established, sophisticated and well-resourced organisation with many years of experience and dedication towards the harmonisation of international trade law. It is a United Nations body with representation from United Nations Member States. SADC states have participated in its structures and functions from its inception and continue to do so. They were equally involved in the creation of the CISG which is one of the organisation's celebrated achievements so far. It is argued that through the involvement of African states in the UNCITRAL Commission and the working groups that drafted the CISG, the instrument should have adequate legitimacy and attraction for SADC States. More so, UNCITRAL has technical assistance available for regions and states that wish to utilise its instruments, such as the CISG, for legal reform. With the shortage of resources in SADC and the competing need to effectively participate in the

---

<sup>91</sup> There has been much emphasis at SADC level that elections in the region should be conducted in terms of these guidelines especially in the case of Zimbabwe that has had successive disputed elections.

international trade both at global and regional level it is not clear why SADC States continue to eschew the opportunities and facilities created by UNCITRAL through the CISG. However, it is also not adequate to propose ratification to the exclusion of other approaches that could be useful. With that in mind, it is hoped that SADC leaders will find traction in new non-binding approaches to the harmonisation of laws using the CISG without the need to ratify the convention. The proposed approaches will still go a long way in addressing the problem of legal diversity in SADC although ratification is always ideal to achieve maximum uniformity.