REGIONAL HARMONISATION OF CONTRACT LAW – IS IT FEASIBLE?

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ABSTRACT

This article investigates whether regional harmonisation is merely an academic exercise or a serious attempt to create a uniform contract law in a defined region. It builds on the recently conducted Symposium at Villanova University in 2013 and addresses comparatively the efforts by well-defined regions, namely OHADA, the EU and ASEAN. OHADA has introduced regional uniform laws; the EU is still working on formulating them. Furthermore, UNCITRAL has considered a proposal by the Swiss government to work urgently on a new initiative to further harmonise contract law. Against this backdrop, this article argues that regional proposals to harmonise contract law are akin to saying that '*ein Gespenst geht um*' (a ghost is going around) (Reich 2006: 425). This is justified, because a proposal to create a harmonised contract law in East Asia has currently also been discussed, but the discussions have stalled. Is there a solution or do we simply admit that regional harmonisation is not possible? The starting point is the CISG, as has been adopted by 80 countries and needs to be considered by any region as a possible, albeit not perfect, solution. If the CISG has already been ratified, the issue, then, is how any regional developments can coexist with it. Or does a ratification of the CISG preclude any regional harmonisation? Secondly, the question must be asked whether regional harmonisation will reduce transaction costs, which is beyond what the CISG was able to achieve. This article argues that as far as the drafting of international instruments is

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concerned, a shift in thinking has occurred. Instruments such as the Cape Town Convention are considered to be reforming the law in a particular narrow area rather than attempting to draft codes. Furthermore, the process is driven by industry groups. Regional harmonisation must take note of the ongoing shift and a more fruitful approach is to develop uniform laws through a better understanding and coordination of existing instruments.

Keywords: Contract law, uniform laws, regional harmonisation, CISG

INTRODUCTION

In 2013 the Villanova Law School hosted the Norman Shachoy Symposium. The title was 'Assessing the CISG and Other International Endeavours to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?'[1] Since the inception of the CISG in 1980, many attempts have been made to harmonise[2] contract law but as of this date the CISG is still the only sales convention. The UNCITRAL-sponsored CISG has certainly stood the test of time and nothing explains this better than the number of ratifications representing more than two-thirds of the total volume of international trade. At the time of writing it stands at 80. Another point to note is the continued withdrawal of reservations in Europe – and elsewhere, for that matter (Sorieul, Hatcher & Emery 2013: 491). This is arguably an indication that the political climate has shifted and that the relevant reservations have lost their political logic. Above all, the most far-reaching achievement of the CISG is art 7, which not only demands a uniform interpretation of the Convention but has been copied by many other conventions and model laws. As there is no global supranational commercial court, harmonisation can be achieved only through domestic courts' applying the CISG correctly. This is now being realised as the courts and the legal profession are becoming more familiar with the application of the CIS – specifically art 7 – and the existence of truly international jurisprudence. But that was not always the case, because many decisions displayed (and unfortunately still do) the inability of courts and the legal profession to understand the mandate of art 7.

Sorieul, Hatcher and Emery correctly stated that 'the creation of a harmonising instrument is one possible step toward actual harmonisation which, in practice, requires effective implementation to be truly realized' (2013: 491). This is where the problem lies, as seen by the attempts of the EU to create a harmonised contract law: it has devised and then in effect rejected many harmonisation attempts. It is argued

1 See 2013 *Villanova Law Review* 58(4).

2 The utility of harmonisation has been discussed at length and is not an issue in this article. See, for example, Mads Andenas & Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation*, Edward Elgar (2011).

that the political will of the EU as a body has prevented the creation of a binding instrument and so none of the EU proposals were ever truly realised.

What can be said is that several soft-law attempts were made at harmonising contract laws. Of greatest importance are the UNIDOIT Principles, which were first released in 1994 and underwent their third revision in 2010. But it would be remiss not to mention other instruments which arguably never had the same attraction as the UNIDROIT Principles. In the EU the best-known proposals are those that constitute the PECL. This project was the work initiated by the Commission on European Contract Law led by Ole Lando, the Aquis group led by Professor Ajani and the Trento group led by Professors Mattei and Bussani. The Draft Common Frame of Reference (DCFR) was the next project, followed by the Draft Common European Sales Law (CESL). So far none of the proposals has passed the draft stage. It can be argued that the problem in the EU is the issue that formulating agencies are not flexible in choosing an instrument and in conceiving ways in which hard and soft law may best supplement each other (Estella Faria 2009: 11).

In Asia, the Principles of Asian Contract Law (PACL) are being worked on. The only successful attempt at harmonising and implementing contract law was at a regional level. The OHADA group of nations drafted and implements the Uniform Act on Contract Law, which relied heavily on the CISG and is now the governing law of the OHADA group of nations.

This conference adds a newcomer to the list and asks for practical approaches and strategies for mainstreaming the Southern African Development Community (SADC)[3] regional integration agenda through the harmonisation of business and economic laws and institutional governance with specific reference to UNCITRAL instruments. This proposal would fit in to what is now called the 'third phase of legal harmonisation', namely 'the dawn of inter-regionalism' (Estella Faria 2009: 7).

This article critically analyses whether regional harmonisation contributes to the creation of a Global Commercial Code or whether a complex web of international standards interacting with domestic and regional contract law acts as a hindrance to further global harmonisation (Sorieul, Hatcher & Emery 2013: 493).

HARMONISATION OF GLOBAL CONTRACT LAW

As seen recently and noted above, regional harmonisation efforts are not new but have taken on a new life since the Swiss Proposal (UN Doc A/CN9/758, 8 May 2012) was launched with UNCITRAL. The Secretariat commentary concluded that:

3 The member states of the SADC are Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The SADC headquarters are located in Gaborone, Botswana. Of these states, only Lesotho and Zambia have ratified the CISG.

> 'As has been shown, there is an urgent need for a global reflection on the further unification of contract law beyond the endeavours already carried out by UNCITRAL. In light of the above, Switzerland proposes that UNCITRAL give a mandate for work to be undertaken in this area' (UN Doc A/CN9/758, 8 May 2012).

The question that arises is: Will UNCITRAL develop harmonised contract law at a global level? The answer to this can be confidently stated as being No, for several reasons. First, resources at UNCITRAL are scarce, as seen by the increase in the financing of the drafting of convention and model laws by interested industries. This was clearly demonstrated by the drafting of the Cape Town Convention, which was financed by the aircraft-manufacturing industry. Secondly, there is absolutely no guarantee that all 80 CISG convention countries will abandon the CISG and ratify the new 'Global Contact Convention'. The history of the carriage of goods by sea conventions supports this contention, because now several conventions govern the same topic.

Professor Veneziano put it differently, but the outcome is the same. She notes:

> '… all those who are familiar with the process of going thought governmental experts' sessions first, and a diplomatic conference afterwards, are fully aware of the difficulties that arise in this connection. It is a costly and burdensome procedure, which is further complicated by the possibility of introducing reservations in order to reach consensus and by the need to obtain ratification afterwards' (2013: 527).

In addition, both the US State Department's Advisory Committee on Private International Law and the Executive Committee of the Uniform Law Commission rejected the Swiss Proposal (Loken 2013: 509). It does not take much to venture that the Swiss Proposal is not going to succeed despite comments that there is an 'urgent need to further harmonise, if not unify, general contract law' (Schwenzer 2013: 727).

It could be argued that the gaps in the CISG need to be filled and that sales law only should be widened to encompass contract law. This could be a reason to investigate the feasibility of a global contract law. However, as UNCITRAL has acknowledged, the UNIDROIT Principles have answered the call already (Sorieul, Hatcher & Emery 2013: 493). It can be stated confidently that any further harmonisation of contract law will not be driven by international bodies but will be left to regional organisations. In this regard, the Secretary General of UNIDROIT argued in 2009 that:

> 'International originations active in the field of legal harmonisation seem to have recognised that international conventions should be reserved for special cases that require uniformity. This trend should continue. If a greater degree of flexibility is desired and is appropriate to the subject matter under consideration, a different unification technique would, in most cases be preferable' (Estella Faria 2009: 7).

What the different unification technique is going to be was left unanswered. To that end, it could be argued that the Swiss Proposal has brought one era to an end and

opened a new one. It appears that a global contract law does not fit into the category reserved for conventions.

However, this is not the end of the attempts to harmonise contract law. New regional associations are formed and, as with OHADA, the desire to formalise uniform laws within a region will need to be discussed. At the moment, the issue of a Global Commercial Code appears to have stalled, having been replaced with the question: Can regional harmonisation succeed and are different unification techniques required to drive harmonisation further?

Global Commercial Code – A brief review

In 2007, at the proceedings of the Congress of UNCITRAL on the occasion of the fortieth session of the commission, several papers advocating a global commercial code were discussed. Not all the participants were in favour of the notion, as Professor Smits observed: 'I am quite sceptical about the need for harmonisation of commercial law and that if one wants to harmonise this area, one should do so from the bottom up' (Smits 2007: 46).

Professor Bonnell saw a different side to the debate and suggested that the UNIDROIT Principles ought to be integrated with the CISG. He argued that UNCITRAL should recommend the use of the principles to interpret and supplement the CISG (Bonnell 2008: 27). Such a proposal was to fail, however, especially regarding the mandate of art 7 of the CISG. Furthermore, UNCITRAL has not embraced such a solution, but has observed – as many academics have done – that the UNIDROIT Principles must operate within the confines of art 7 – that is, their role is only a subordinate one (Sorieul, Hatcher & Emery 2013: 494). The real issue is the fact that soft laws such as the UNIDROIT Principles take on the role of mandatory rule only if they are included as terms to a contract. This has not happened very often and will arguably happen extremely rarely. However, it must be stated that the UNIDROIT Principles have been chosen as the governing law in arbitrations, but only in situations where the contract allowed the arbitrators flexibility. As two arbitrators commented:

> 'The Unidroit Principles are work in progress and unlike an international treaty are readily amenable to amendment to reflect contemporaneous commercial concerns ... Principles that may fail the test of the marketplace will be cast off, and those that are needed but nowhere found will be ... devised' (Brower & Sharpe 2004: 220–221).

Unfortunately, devising new instruments is only the first step, as seen in case of the EU, but the application and, more importantly, the acceptance of principles is another matter. One important reason for a slow uptake is that lawyers advising clients must take into consideration that in the case of litigation most judges and barristers will not be familiar with anything other than domestic laws. This unfamiliarity is more evident in relation to soft laws. Consequently, the client will run the risk

of having their case not adjudicated and argued in pursuance of the full potential of the UNIDROIT Principles. This argument is borne out by the fact that today cases are still emerging where the homeward trend and patently wrong application of the CISG are documented. Furthermore, it is anecdotally shown that the CISG continues to be routinely excluded.

The fact that the drafting of UNIDROIT Principles had the direct involvement of governments does not alter the fact that it is still a soft law and therefore its authority is not enhanced at all. It is true to say that the best outcome would be a global uniform law as it would have an enormous impact on reducing transaction costs. However, such a law has either to be politically accepted if it is to advance beyond the soft-law stage or to have such an appeal to governments (as is the case with the UNCITRAL Model Law on Arbitration) that most countries adopt it into their domestic law. In other words, its success justifies it. Another avenue for bringing soft laws into the sphere of acceptance is the business community itself, as demonstrated by the acceptance of the INCOTERMS which were drafted by the International Commercial Court (ICC), a non-governmental body.

On the other hand, the fate of the Draft Common Frame of Reference (DCFR) illustrates this point well: a coherent and consistent body of laws was not politically accepted in the EU and as a result it is 'gathering dust on the shelf'. It appears obvious that:

> 'To increase the use of international uniform law, a desire that should be self-evident to this body, there appears to be two avenues to pursue. First, there should be conscious effort on the part of bodies such as this to educate parties to the existence of these instruments. Second, it is incumbent upon bodies such as UNCITRAL to ensure that these instruments reflect a fair balance between the competing domestic legal traditions such that the use of these instruments encourages international trade and facilitates predictable and fair resolution of disputes that will inevitably arise' (Gabriel 2007: 229).

This statement is equally applicable to soft law and conventions. The creation of a global harmonised law can also cause problems, though, as Wagner has argued:

> 'What would be lost in the course of harmonization is the treasure of different solutions to a given legal problem which is preserved within the many legal systems still existing on this planet. In this respect, law behaves like any other feature of life. Just as the extinction of species reduces the variance within the biological system, so the annihilation of the municipal systems of commercial law would reduce the variance within the legal system. The experience to draw on would be diminished and the potential for fatal errors increased' (Wagner, G 2007: 40).

There are instances in legal history, however, which show that harmonisation outperforms the benefits of diversity. Two examples came to mind: the CISG and the UNIDROIT Principles. The real issue for any attempt at harmonisation in any regional setting, therefore, is to be aware of both the advantages and the disadvantages

of choices between convention or soft laws compared to simply keeping the diversity of domestic contract laws in place. One point in favour of harmonisation is not necessarily the saving of transaction costs but, as Wagner has put it:

> 'States which adopt the Model Law or which accede to the CISG are not motivated by the intrinsic virtues of these instruments but by the simple fact that they want to run with the crowd. Whether the CISG really is superior to any other given law of sales will always be a matter of dispute; the decisive point is that many lawyers around the world feel comfortable with the CISG – for better or worse' (Wagner, G 2007: 41).

Of course the above arguments are raised from a global perspective. Taking only one business into consideration, harmonisation is easily achieved by simply choosing one system of law for all contracts the business might enter into. However,

> 'even for powerful international firms that have enough bargaining power to impose their terms on their contract partners, the idea of putting each and every business relationship on the same legal footing remains an illusion' (Wagner, G 2007: 42).

As already noted above, to draft a harmonised global law is only the first step, and the easy one to boot. Besides the CISG and the UNIDROIT Principles, many legal volumes have been drafted which could all be termed 'global contract law'; these include the DCFR and the Lando Principles.[4] However, this misses the point: the drafting of a global contract law is worthless unless it is transformed into or supplemented by 'law in action' (Wagner, G 2007: 44). The continual efforts by the EU can serve as a valuable lesson to others attempting to harmonise laws; success comes only with the implementation that is the political will to transform the draft into a 'law in action'.

REGIONAL HARMONISATION

Harmonisation as discussed above has focused primarily on international transactions and has not yet fully explored domestic-law reform in transitional economies and developing countries.

Any regional development must be aware that law reform will have to take place in the shadow of international conventions. Interstate trade will therefore be international in character, whereas intrastate trade is purely domestic in nature. Arguably, two models are possible:

First, all the states within a region either ratify the same convention such as the CISG or agree on a model law such as the UNIDROIT Principles to govern their interstate trade. However, if the latter option is chosen, the interrelationship with the CISG must be worked out. In the case of the SADC, only Lesotho and Zambia

4 After the CISG, Ole Lando and Hugh Beale wrote the text on a common contract law, namely the Principles of European Contract Law, 1998, revised in 2000.

have ratified the CISG. As a model law is chosen, each state has the opportunity to adjust the text to accommodate local requirements. However, the outcome is not full but only a partial harmonisation if states are reluctant to relinquish their sovereignty.

The second option is that every state agrees to reform its domestic law or replace its domestic law with a supranational one. Again, this option is not an optimal one because political reality would hinder a process in which each state is prepared to change its domestic laws. OHADA, for instance, has introduced a supranational law and court for interstate trade, but domestic trade is still governed by the relevant domestic law.

The success rate of any regional harmonisation is dependent on the positive impact of the new regulated framework on economic activities, that is, transaction costs. As early as 1960 Coase wrote that

> 'such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the cost which would be involved in bringing it about' (1960: 15).

Such a consideration will have a great impact on small and medium-sized enterprises in emerging markets. However, it should also be noted that the anecdotal and empirical evidence about the effect of uniform law does not clearly point in one direction or another (Smits 2007: 48).

An important point needs to be taken into consideration, though. In order to move the process forward formulating agencies are necessary, and ideally an intergovernmental influence could be present and the agencies are not 'too closely associated with the romantic and somewhat impractical "republic of scholars"' (Estella Faria 2009: 14). The experience of the EU indicates that despite excellent attempts by the academic community at producing several harmonised contract documents such as the DCFR, the process has stalled, arguably due to a lack of political will and most likely a lack of demonstrable reduction of transaction costs, considering that all but four EU countries have ratified the CISG. Considering that the CISG is widely used in the EU, it would appear that the

> 'effect of the so-called "natural" barriers, like language or distance, on cross-border contracting is difficult to assess separately from "policy-induced" barriers, like regulation and taxation' (Smits 2007: 49).

At the same time, it has to be recognised that trade between nations and blocks of nations is conducted at several levels – unfortunately without interlocking regulations: 'Domestic law enriched by international conventions and transplantations must be understood against the backdrop of bilateral or multinational trade agreements' (Zeller 2010: 255). However, trade agreements and international conventions are operating at different levels, so the approaches to harmonisation processes differ.

It is sufficient for the purposes of this article to be aware that 'full harmonisation' requires that not only at-the-border harmonisation or behind-the-border harmonisation

is studied but that an interlocking mechanism needs to be found to gain optimal value from harmonisation. For this to happen, a discussion must be initiated about the optimal reduction of transaction costs within a region by harmonising at-the-border and behind-the-border transactions.

In addition, it is important to understand that UNCITRAL and UNIDROIT are now directing greater attention at law reform as distinct from classic legal harmonisation (Estella Faria 2009: 18). The Cape Town Convention and the model law on leasing are examples that fit into the new innovative work of international organisations. It is therefore left to regional organisations to 'plumb the depths of the need for domestic-law reform in transition economies and developing countries, particularly in the era of globalisation' (Estella Faria 2009: 15).

In essence, two issues need to be resolved. First, a region should hold discussions with all stakeholders to clarify the relationship between soft laws and international conventions. The second question should be whether the harmonised law will be a soft law with an opt-in clause or whether the OHADA solution will be followed. It is obvious that a region cannot draw up a convention, but the region as a whole can, as noted above, ratify an existing convention – in this case the CISG – or, as also noted, draft a regionally relevant soft law.

Soft law versus convention

The choice of a soft-law approach arguably offers flexibility compared to conventions because political interference is minimised, although, generally speaking, it does not affect the drafting process. On the other hand, the drafters of a convention have to overcome obstacles such as differences in both commercial practices and legal theory and legal policies (Gabriel 2014: 246). Gabriel points out that:

> '… basic legal principles tend to work as a unified whole, thus to borrow selectively a contract or property principle from another legal system runs the risk of destroying the balance and interplay with other rules. The harmonisation of legal rule presupposes that the rules being harmonised do not have major substantive or structural differences' (2014: 247).

However, it is not suggested that it is impossible to devise conventions, as seen especially in the case of the CISG. What must be kept in mind is that the CISG is also an example of a convention that includes compromises resulting from political involvement. It is essentially political interference that caused the gaps in the convention as well as its slow adoption.

Soft laws, on the other hand, have the flexibility to provide a comprehensive solution as they are not drafted by delegates of governments, most of the participants appearing in their private capacity. The DCFR in the EU is an example, as is the UNIDROIT Principles. The advantage of a soft law is its neutrality and balance, which are usually not achievable through conventions (Gabriel 2014: 251).

However, the problem lies not in the drafting process but in the implementation of a soft law. Here, only two solutions are possible. The first is to declare that the soft law is based on an opt-in principle: since it has no binding effect, it obviously can be only an opt-in instrument, and therefore it can derive its authority only from a contract. Indeed, the Official Comments to the Uniform Commercial Code specifically note the binding effect of contractual terms:

> 'An agreement that varies the effect of provisions of the Uniform Commercial Code may do so by stating the rules that will govern in lieu of the provisions varied. Alternatively, the parties may vary the effect of such provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT or non-legal codes such as trade codes' (Uniform Commercial Code art 1–302, Official Comment 2).

The second solution is for legislators and courts to decide what and how much to accept as a governing law – as was the case with the UNCITRAL Model Law on Arbitration. One of the advantages of soft laws often overlooked is that they are used by courts and tribunals as gap fillers when the governing law does not address a particular issue (*Hideo Yoshimoto v Canterbury Golf International Ltd* (2000) NZCA 350). A real advantage of soft law is the fact that it can be changed quickly to reflect changing business practices. The INCOTERMS are an excellent example of this: they were first published by the ICC in 1936 and subsequently revised in 1967, 1976, 1980, 1990, 2000 and most recently in 2010. Another advantage is that INCOTERMS and the UCP600 are recognised as customary law and can be implied into contracts.

As noted above, soft laws in effect need to be given authority either through contractual terms or by governments' including them into domestic legislation. In this way their enforcement should be a matter of course. And once a law is enforced, the need for certainty is also satisfied.

History will show that if a region intends to harmonise contract law, a discussion must first be held about whether the flexibility of soft law is the desirable outcome or whether the certainty and enforceability of conventions are more important. In the end it will be the governments of a region which will determine what is in their best interests and hence the attempt to harmonise could either succeed or simply fade away. The EU again serves as a good example where – since 1982 – many attempts at drafting a European contract law have failed and all the proposals are collecting dust. This impasse points to the fact that the various governments have been unable to agree on a joint contract law but instead found it useful to ratify the CISG individually.

In summary 'there is a proper role for both soft law and binding conventions in the development of international commercial law. There are advantages to both' (Gabriel 2014: 260). If decision-makers ask whether they should harmonise commercial law

or continue to live with diversity – or rather, a mixture of harmonised and national law – the answer must surely be that this depends on whether the balance of costs and benefits is positive (Wagner, G 2007: 45). To optimise the possibility of achieving a positive outcome Smits argues that

> 'one should adopt a model that allows corrections at an early stage and allows business and consumers to get acquainted with a new contract law regime. This points in the direction of drafting an optional contract code that parties can choose if they find this code suits their interests best' (2007: 52).

If Smits is correct in his argument regarding the introduction of opt-in soft laws, the question remains the same: Why has the EU not yet adopted a harmonised soft law? It is interesting to note that Wagner, looking at this from an economic point of view, argues:

> 'full harmonization may (at first sight) seem to be an adequate instrument for reducing the costs of cross-border legal uncertainty; however, full harmonization itself tends to imply high economic costs, so that it is not generally recommendable. Nevertheless, a gradual (partial) harmonization process could, in some circumstances, be beneficial' (Wagner, H 2007: 53).

Wagner is partially correct in claiming that the uncertainty is a reflection of the variety of structural peculiarities in each country. If that is the case, the move from what is known to the unknown does increase the economic cost and full harmonisation is not the desired outcome. However, partial harmonisation is possible in such instances as the legal principles are either similar or the same within a given region. Revisiting the CISG, it is not by accident that countries with different economic backgrounds have ratified the convention: once the initial controversial issues were out of the way, globalisation tended to minimise structural peculiarities anyway.

Wagner has put the issues into a succinct conclusion by arguing that

> '[c]orrespondingly, it might be better to adopt a step-by-step approach. One could start with harmonization of contract law for international (trans-border) transactions. This would give individuals time to get acquainted with the new regime and to evaluate it. A step-by-step approach would also allow the correction of errors at an early stage. Against the background of the experience gathered, one could then turn to a more comprehensive harmonization at a later stage if this then is assessed as being desirable. However, legal harmonization only makes sense if it is accompanied by a thorough reform of the system of civil justice and a harmonization of procedural law' (Wagner, G 2007: 60).

It is argued that the drafting methodology of the Cape Town Convention ought to be considered. Professor Kronke has commented that

> 'in the run-up to the negotiations of the Cape Town Convention of 2001, we started not with the comparative law study, but with an economic impact assessment study. And that economic impact assessment study defined the legal tools which needed to be put in place by the Cape Town Convention' (2007: 63).

Obviously this is a different path from that taken by previous attempts at harmonisation. It requires attention and arguably it could be the solution to regional harmonisation. However, it is instructive to note that Professor Kronke also made the following comment:

> 'Now the irony is that in economically much more significant subsequent projects such as our current draft on intermediated securities, US$20 trillion trading volume every 20 trading days, there were neither the negotiating governments nor industry willing to put up the money which would have been needed for an economic impact assessment study as they did in the run-up to the Cape Town conference' (2007: 63).

The conclusion to be drawn from this is that not only the desire to harmonise or unify the law on a particular topic is needed but also the determination of both governments and other organisations as well as industry. After all, it is industry or global business which will profit from law reform, so the participation and commitment of the main beneficiaries is required. This approach is crucial, because the soft-law or model-law approach, as attempted in the EU, simply does not work – successful model laws are incorporated by states into their domestic legal regimes and not by parties as contractual terms.

As noted above, one of the possible solutions is a step-by-step approach. It is argued that the methodology employed by the drafters of the Cape Town Convention follows this approach – it certainly applied a new methodology in treaty design not previously employed.

It is argued that this approach can be applied to the harmonisation of contract law. In essence, the structure of the Cape Town Convention is unique in its unparalleled use of supplementary protocols (Sundahl 2005–2006: 342). This was the result of the basic understanding that the 'economic impact assessment study defined the legal tools which needed to be put in place' (Kronke 2007: 63).

The base convention operates in conjunction with protocols which are industry specific and hence provides the degree of flexibility needed to respond to the idiosyncratic needs of different industries such as aircraft, rolling stock and space (Sundahl 2005–2006: 342). In effect, the issues common to all – that is, where there was broad agreement – were packaged into the base convention and all the other issues which are the 'blockers' and are also industry specific were left to be included in the protocols.

The same approach, it is submitted, is also feasible in the creation of a regional harmonised contract law. Two options are possible: first, the CISG is the base convention and additional protocols are attached covering areas such as the gaps in the CISG, consumer law or agency. The DCFR could serve as a blueprint in deciding on the subject-matters which need to be governed by protocols. The second approach is simply to draw up a base convention which reflects the core elements of the contracts of the relevant region. As with the Cape Town Convention, controversial issues such as the validity of contracts can be left for consideration at a later stage

and can be designed as soft laws. 'Soft-law protocols' would have a greater chance of inclusion as terms of a contract if the parties believed that the base convention did not adequately cover the perceived risks. Understandably, total harmonisation is sacrificed in order to harmonise at least partially certain areas of the law, as seen in the CISG.

CONCLUSION

This article has highlighted the problematic issues which need to be taken into consideration when attempting regional harmonisation. The efforts of the EU so far in this regard indicate that the easy part is to draft a contract law. The real question is whether the draft is really politically acceptable. It is argued that before any conversation about harmonisation occurs, a clear view on the nature of a politically achievable goal needs to be worked out. The observation by Professor Kronke above indicates that an important shift in thinking has taken place which is slowly shaping the drafting of conventions and model laws. He noted that it is important that an economic impact assessment study first be used to define the legal tools that need to be put in place before any legal drafting is contemplated (Kronke 2007: 63).

The lessons to be learned are simple. The first step is that a conversation at a political level has to take place which will indicate whether there is the will and the desire to harmonise regional laws. If the answer is No, any work on a harmonised law will be of no use and, as argued above, will be of academic interest only.

The important question which needs to be resolved is: How far does harmonisation need to be taken and, more importantly, which laws need to be harmonised? If the OHADA model is chosen, a law is drafted which governs interstate trade only and a supranational court is created. If the creation of a supranational court is not palatable, however, the alternative course is to simply agree to ratify the CISG as a first step. It is not a perfect solution as only sales laws are harmonised and gaps still exist in the convention. However, it does create an incentive for individual states to modernise their domestic laws in order to bring them into line with the CISG, or at least with other model laws such as the UNIDROIT Principles. The conclusion this article draws, therefore, is that the approach Wagner advocates, namely to adopt a step-by-step approach where errors can be remedied without losing the impetus of harmonisation, appears a workable way forward. The drafting of the Cape Town Convention has shown that it is possible.

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Case law

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