

CISG AND REGIONAL SALES LAW: FRIENDS OR FOES?¹

Juana Coetzee

Associate Professor, Department of Mercantile Law

University of Stellenbosch

Email: jcoet@sun.ac.za

ABSTRACT

Economic co-operation and integration brings with it a need to harmonise mechanisms for the regulation of international trade, not only at a public-law level between states but also at a private-law level between traders *inter partes*. It is often forgotten that differences in the substantive law applicable to a contract function as a non-tariff barrier to trade. Because international trade facilitates economic development, the focus in this article is on the harmonisation of sales laws. Traditionally, private law harmonisation has been conducted by international private or inter-state organisations that specialise in the harmonising of law at a global level. Today, private organisations and groups devoted to harmonising business laws, as well as regional economic integration organisations, are also pursuing legal harmonisation. Global, regional and domestic laws now all exist in the same area of the law, which can give rise to duplication of efforts and problems with the co-existence of global and regional sales law. This article will discuss these issues with reference to the United Nations Convention on

1 This article is a revised version of a paper delivered at ‘The Use of UNCITRAL Instruments to Promote Regional Harmonization’, a joint conference held by Unisa’s College of Law, UNCITRAL and the Centre of Studies on Regional Integration and Southern African Development Community Law of the University Eduardo Mondlane, Mocambique, at Untundla Lodge, Dinokeng, South Africa, on 26–27 May 2014.

Contracts for the International Sale of Goods (CISG) and selected regional laws in considering whether regional harmonisation can act as a stepping stone towards increased harmonisation at a global level or whether it is to be viewed as a threat to global integration and harmonisation.

Key words: harmonisation of sales laws; global harmonisation; regional harmonisation; SADC; CISG; OHADA; CESL; PACL

INTRODUCTION

In the aftermath of the global financial recession, world trade and investment have deteriorated significantly. Although developing countries and countries in transition escaped the brunt of the financial crisis, Africa still experienced a decrease in its exports to the developed world (UNCTAD 2013a; UNCTAD 2013b). The continent's exports consist mainly of commodities which are particularly sensitive to economic movement. Global shocks not only affect prices but often also reduce the demand for some of these goods. To hedge against these dangers and, at the same time, to unlock new and larger markets, the continent is shifting its focus towards intra-African trade in manufactured and agricultural goods – so much so that African leaders made a political commitment to this effect at a meeting of the African Union in January 2012 (UNCTAD 2013c).

According to economic philosophy, international commerce facilitates economic development (Castellani 2013: 37; Oppong 2006: 913): a larger market will increase the potential for trade, economic growth and job creation, and ultimately it will contribute to the alleviation and eventual eradication of poverty. It is therefore not surprising that the ultimate objective envisaged by the African Economic Community (AEC) Treaty is one economic community for the whole of Africa. Economic integration will create economies of scale, increase competition and promote exports to regional markets (Oppong 2006: 913). By co-ordinating, harmonising and integrating the activities of the various regional economic communities (RECs), economic communities are to function as building blocks of the greater AEC (Oppong 2010: 93). Countries in Africa are generally in favour of regional integration, as evidenced by their membership of and participation in several regional economic organisations and agreements (Fombad 2013: 55). However, it is often forgotten that the success of economic integration does not depend on the harmonisation of economic policies and strategies alone, but also on legal integration (Oppong 2010: 103). The African integration agenda should, therefore, include the harmonisation and co-ordination of legal systems (Oppong 2006: 924).

In the Southern African Development Community (SADC), trade figures show that intra-regional trade is higher than trade with other countries in Africa outside the region (Behar & Edward 2011; Partridge 2013). According to its website (SADC: Towards a Common Future 2012), intra-SADC trade has more than doubled since

implementation of the SADC Trade Protocol commenced in 2000. However, if measured over the same period of time, intra-SADC trade has only grown from 15,7% to 18,5% in proportion to total trade undertaken by the region. The bulk of its trade is still with regions outside Africa and the rest of the world.

Although the SADC has made significant progress in removing tariff barriers, non-tariff barriers continue to inhibit intra-regional trade (Behar & Edward 2011; Kalenga 2013). Legal diversity increases transaction costs (Castellani 2013: 38; Fombad 2011: 55) and therefore functions as a non-tariff impediment to trade (Wandrag 2011: 455). Both the SADC Treaty and the Trade Protocol refer to harmonised socio-economic and political strategies and policies to facilitate and promote intra-regional trade, but no explicit provision is made for legal harmonisation at the private-law level (Fombad 2013: 55; Wandrag 2011: 454–455).

The SADC consists of 15 member states. The individual states historically had and still have autonomous authority over their contract and commercial laws: they have diverse legal systems based on the common law (Malawi, Tanzania, Zambia and Mauritius), civil law (Angola, Mozambique and the Democratic Republic of the Congo), mixed systems with common-law and civil-law influences (Madagascar and Seychelles) and Roman-Dutch law (South Africa, Botswana, Lesotho, Namibia, Swaziland and Zimbabwe) (Ndulo 1996: 196). These systems were mainly inherited from their colonial rulers after independence, which means that sales laws in the region are still very much based on those systems or what they have ‘borrowed’ from neighbouring countries. They are therefore not always sufficiently geared to the needs of international trade (Fombad 2013: 54). Moreover, in the African context, the law is often inaccessible due to a lack of legal sources and the poor reporting of case law (Fombad 2013: 54). These factors make it difficult to establish the content of sales laws and, therefore, the rights and obligations of the respective parties (Ndulo 1996: 211–212). Furthermore, the rules of private international law differ from country to country (Oppong 2006: 911–912), which exacerbates the problem and leads to forum shopping.

The point of departure of this article is the premise that harmonised law can facilitate international trade. However, it is necessary to point out that reactions to the harmonisation of laws vary between extremes: from those who view harmonisation with scepticism (Eiselen 1999: 330–331; Stephan 1998–1999) to others who are convinced that harmonised law will alleviate the problems arising from different national laws (Eiselen 1999: 325–329; Castellani 2013: 37–40). Similarly, in the SADC context, opinions range from those who regard a lack of goods to trade in, a lack of infrastructure, poor institutional frameworks and political instability to be far greater barriers to intra-regional trade (Behar & Edward 2011; Lehman 2006: 321–323; UNCTAD 2013c), on the one hand, to those who believe that harmonised law will not only reduce the costs of doing business but also facilitate political unity in the region (Eiselen 1999 and 2007; Fombad 2013: 55–56). The rule of law is the

cornerstone of political stability which, in turn, will induce economic stability and development (Castellani 2008: 123; Ndulo 1996: 211). According to Fombad (2013: 55), 'the harmonization of business laws is the missing link needed to cement efforts at economic integration'. The debate should, therefore, no longer be about whether legal harmonisation should be undertaken but rather how it is to be achieved (Fombad 2013: 52).

Because harmonised law can facilitate regional integration (Fagbayibo 2009: 310), economic integration often provides the incentive for regional law (Vázquez 2003: 69). Regional economic integration organisations with law-making capacities therefore increasingly engage in the creation of harmonised law. In the European Union (EU), economic unity has become the basis for greater legal unity: directives and regulations ensure that the laws in member states are increasingly becoming standardised. Although now withdrawn, a Proposal for a Common European Sales Law was a recent attempt to introduce an opt-in regional law regulating intra-regional trade in the EU, not to mention other well-established regional projects in the field of contract law and general civil law such as the Principles of European Contract Law (PECL) and the Draft Common Framework Law (DCFR).

Regional harmonisation is, however, not only undertaken by regional economic communities. In Africa, an inter-governmental initiative specifically formed for this purpose, the Organization for the Harmonization of Business Law in Africa (OHADA) provides uniform commercial laws for its member states. And in East Asia, a private initiative in the form of the Principles of Asian Contract Law (PACL) offers a soft law option for the region. A similar project is underway in some Latin American countries (UNCITRAL 2012: part VI).

As far back as 2003, Kronke advised that regional economic communities such as the SADC needed to explore the potential of private law-making as a vehicle for economic development (Kronke 2003: 12). The East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the SADC have taken their first steps along the road to legal harmonisation by formulating model laws in various areas of the law. Although this is a positive development towards greater similarity, there is still a long way to go. It is, therefore, important that we take note of projects and endeavours in other regions, why they were undertaken and how, so that we can learn from those examples. This paper will make constant reference to the CESL, OHADA and the PACL as examples of regional-law arrangements.

Globally, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG or 'the Convention') provides a uniform law that has been adopted by 83 contracting states, representing the majority of trading nations worldwide (UNCITRAL 2015). The Convention has been hailed as one of the most successful efforts to harmonise law at a universal level (DiMatteo 2013a: 560). At the same time, it is regarded as the global standard for sales law harmonisation (DiMat-

teo 2013a: 577–578). Notwithstanding the apparent success of the CISG, though, efforts continue to be made to harmonise sales laws regionally: the OHADA Act relating to general commercial law, for instance, relied heavily on the example of the CISG but covers a wider sphere and scope of application (Ferrari 2012: 79–85). Although the majority of EU member states are contracting states to the CISG, the content of a regional European sales law was seriously considered and debated over the past few years. The proposal for an optional Common European Sales Law (CESL) was withdrawn by the end of 2014, but the European Parliament gave the concept of regional harmonisation its blessing when it approved an amended version of the proposal earlier that year. Moreover, despite the fact that they are all contracting states to the CISG, China, South Korea, Singapore and Japan still participated with other East Asian countries in a private harmonisation initiative (the PACL), as they believed the region needed a separate voice to address their specific interests. The availability of a regional instrument would imply that global, regional and domestic laws would co-exist in the same area of the law. This situation creates the potential for rivalry and raises important questions, such as:

1. Is there a real need for regional sales law or are these efforts merely an unnecessary duplication of what has been achieved already internationally in the form of the CISG?
2. Can regional sales law and the CISG co-exist?
and
3. Can regional harmonisation act as a stepping stone towards increased harmonisation at a global level or is it a threat to global integration and harmonisation?

The aim of this paper is not to come to any conclusion on how harmonisation is to be achieved in the SADC, but rather to point out that the region essentially faces a choice between promoting the adoption of the CISG and developing a regional sales law of its own. The questions addressed by this paper could shed some light on whether the CISG and regional law oppose each other, or whether theirs can be a friendly co-existence.

GLOBALISM (UNIVERSALISM) VERSUS REGIONALISM

Where an international uniform sales law such as the CISG is available, why would regions see fit to formulate their own laws, especially if those laws are modelled on the universal sales law? Would that simply not be a duplication of what already exists at the global level and, even more importantly, waste scarce resources which otherwise could have been used to further harmonisation efforts on a global scale? To answer these questions it is necessary to establish why regions embark on the

road to regional harmonisation – even more so if the majority of their member states are already contracting states to the CISG.

The CISG as a global sales law

The CISG is an international uniform sales law that operates at a global or universal level. According to its preamble, the Convention aims to stimulate international trade through the removal of legal barriers. This corresponds directly to the goals of regional economic communities such as the SADC, namely to enhance economic growth and development by promoting regional trade. However, despite the fact that the CISG was drafted by the United Nations Commission on International Trade Law (UNCITRAL) – which represents all the nations of the world, including African and other developing countries – the Convention's adoption rate in Africa remains low (Castellani 2008: 118): to date, only 10 countries have ratified the CISG, of which only three (namely Lesotho, Zambia and Madagascar) are in the SADC region. That immediately begs the question: What are the reasons for the apparent lack of interest among African, and more particularly SADC, states?

One possible reason is that developing countries tend to regard any uniform rules formulated by international organisations with apathy. Their argument is that these instruments mainly serve Western countries and are not geared towards the specific needs and interests of African states. However, the main reason why African states have not yet seriously considered adopting the CISG is a lack of political will and not so much criticism of the CISG as uniform law per se. Although regional economic communities in Africa subscribe to the idea of economic integration and harmonisation, the laws regulating international trade tend not to be a priority area of work for them (Castellani 2008: 117). Moreover, these organisations do not generally place any pressure on member states to adopt the CISG (Castellani 2008: 118). COMESA is the first to have urged its member states to accede to the United Nations Convention on the Use of Electronic Communications in International Contracts (UNECIC) as well as other conventions that can facilitate international trade, including the CISG (COMESA 2014: 2–3). This is a positive development. The only example of extensive legal harmonisation in Africa thus far is driven under the auspices of an intergovernmental organisation, the OHADA, which used the CISG as the basis for a regional uniform sales law applicable to its member states.

Regional efforts are often criticised for duplicating what has already been achieved by the CISG globally. On the other hand, the CISG's shortcomings provide the rationale for regional initiatives. It is, therefore, necessary to briefly investigate the arguments for and against regional harmonisation.

Arguments in favour of regional harmonisation

Frustration with the global system is the main reason for regionalism: the process of creating a global instrument of harmonisation is relatively slow when compared to regional efforts (Basedow 2003: 36). Because regional harmonisation involves fewer countries which share common interests, it is mostly easier and, therefore, quicker to negotiate and reach agreement on regional instruments (Laryea 2013: 59). Regional harmonisation is also often preferred to international harmonisation because it can tackle certain issues in greater depth (Vázquez 2003: 67). In the case of global harmonisation, moreover, delegates may be forced into compromise solutions instead of real agreement. This may give rise to overly general or complex and, therefore, inefficient provisions (Calus 2003: 157).

Furthermore, owing to the complexities surrounding its creation, a universal instrument cannot represent the interests of all participating countries or regions. It is said, for example, that the CISG reflects mainly the experiences of the Western world and therefore does not cater to the needs and customs of developing countries. Regional processes, on the other hand, can be more responsive to the needs of a region than would be the case with a global process and for this reason can produce more far-reaching agreements (Vázquez 2003: 67). The creation of the PACL is an example of where a region experienced the need to provide a separate voice for interests which it felt were not adequately addressed by the CISG (Han 2013: 592).

For these reasons, global instruments often do not find adequate support, and some even take very long to receive the adequate number of ratifications or accessions to come into operation (Laryea 2013: 59). History has shown that international sales laws such as the Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) were unsuccessful in finding support outside Western Europe (Eiselen 1999: 334–335). If one considers the low adoption rate of the CISG among African countries, the same can be said of the Convention in Africa. Since the CISG is not in force in every country of the world, it does not really operate as a ‘universal’ or ‘global’ sales law, and this leaves room for the development of uniform laws at a regional level (Ferrari 2003: 178).

Another problem associated with global instruments, especially when they take the form of an international convention, is that they can easily become outdated and stagnant due to the difficulties involved with their revision. The fact that the CISG was drafted more than 30 years ago is often cited as one of the reasons for regional unification. The Convention is no longer capable of coping with the practical needs of international business and will increasingly become incapable of doing so (Han 2013: 591).

Furthermore, the limited substantive sphere of application of the Convention provides an opportunity for regional unification efforts, even where the member states of a region are also contracting states to the CISG (Ferrari 2003: 179 and

2012: 81–84). A substantial shortcoming of the Convention is that it covers only sales contracts, and then only to a limited extent. Pursuant to article 2, the CISG does not cover all contracts for the sale of goods, and what ‘goods’ entails is not always clear. Scholars disagree on whether the Convention applies to digital content, but the prevailing opinion seems to be that it does (DiMatteo 2013a: 561). Moreover, it merely concerns sales contracts between business parties and not consumer sales, which leaves the regulation of the latter to domestic law. Furthermore, the CISG is a non-exhaustive and non-comprehensive sales law which does not regulate the full spectrum of legal issues that could arise in a business-to-business (b2b) relationship. Important areas are left to domestic law (so-called ‘external gaps’): these include validity; transfer of ownership; agency; mistake; fraud; duress; gross disparity; illegality; control of unfair terms; third party rights; conditions; set-off; assignment of rights; transfer of obligations; assignment of contracts; plurality of obligations; and prescription (Ferrari 2012: 84–85; DiMatteo 2013b: 696–697). This leaves ample room for regional law to regulate general contract-law issues not covered by the Convention. Because of its compromise character, the Convention also contains a number of ‘internal gaps’ (DiMatteo 2013b: 696–697). These gaps represent issues on which the drafters could not reach consensus, which therefore resulted in diplomatic compromises (Sorieul, Hatcher & Emery 2013: 493), such as the battle of the forms; specific performance; hardship; and the applicable interest rate, to mention only a few. Ferrari (2012: 81) is of the opinion that where the regional unification effort regulates issues that are not covered by the Convention, the regional law will not be in conflict with the CISG.

The proposed Common European Sales Law (CESL) used the CISG as its point of departure but tried to plug some of the Convention’s gaps as its focus was on distance online contracts and certain mixed-purpose and linked contracts. It also proposed to resolve issues relevant to the protection of consumers, such as pre-contractual duties to provide information; requirements for contract conclusion; the right of withdrawal; avoidance due to mistake, fraud, threat or unfair exploitation; unfair contract terms; and prescription and preclusion of rights (European Parliament/Legislative Observatory 2014). It therefore harmonised broader contractual issues which fall outside the scope of the CISG, such as consumer protection and trade-related services (DiMatteo 2013b: 714). The intention was that the CESL’s sphere of application would mainly be to act as an opt-in sales law directed towards business-to-consumer (b2c) and business to small-to-medium-sized enterprises (b2sme). As their scopes of application do not overflow per se, the chance of the regional law clashing with the CISG was reduced. The CESL would, furthermore, fall under the direct jurisdiction of the European Court of Justice, which was said to address the problems caused by the lack of a superior court in the context of the CISG and would, therefore, ensure uniform application of the regional law (Schroeter 2009: 194–195). Provision was also made for a database containing national judgments on the CESL.

Arguments against regional harmonisation

The CISG represents the main economic and legal systems of the world on an equal footing and therefore constitutes a truly global instrument formulated through an inclusive drafting process (Castellani 2013: 43). Regional efforts to harmonise and unify, on the other hand, cannot meet the needs of global trade as they address only the interests and customs of a few countries and are not produced after consultation with delegates from countries across the world (CISG-AC 2012: para 4). Those opposed to regionalism are of the opinion that regional organisations should rather focus their efforts on securing the ratification and implementation of the instruments adopted at the global level, instead of formulating new instruments which fragment the law (Castellani 2013: 46).

In the area of sales law, the CISG has proved itself to be a major international standard (UNCITRAL 2012: Part III; DiMatteo 2013a: 577–578). Because regional instruments draw from the CISG and PICC, they duplicate the international instruments. This means that there is unnecessary duplication between the work done by international formulating agencies such as UNCITRAL and those that operate at a regional level. Regional efforts, furthermore, increase the work of the private-law formulating agencies, their primary task being to facilitate global uniformity, as they often have to fulfil an advisory function in the context of regional harmonisation. In view of the scarcity of resources, regionalism is a waste of time and detracts from the ideal of universalism and a global sales law (Vázquez 2003: 66; Laryea 2013: 58).

In addition, regional harmonisation efforts are viewed as ‘recipes for fragmentation rather than globalisation’ (Laryea 2013: 71). They constitute yet another instrument to contend with when doing business internationally, which complicates matters even further and defeats the very purpose of legal harmonisation, namely to reduce transaction costs created by different laws (Laryea 2013: 72). Regional law is, therefore, superfluous and only serves to make contract law more complex (CISG-AC 2012: para IV; UNCITRAL 2012: parts I, VI; Sorieul, Hatcher & Emery 2013: 493). It would be much easier to make use of a set of rules that would be applicable to all cross-border transactions and not exclusively designed for intra-regional trade (Butler 2012).

Furthermore, the terminology used in regional-law regimes could differ from that used by the CISG and could therefore contradict established interpretations and solutions, which might add to the confusion and complexity. The regionalisation of legal systems might even reduce the number of cases decided on internationally. Where similar provisions appear in the CISG and the regional law, it could give rise to regional interpretations and pose a threat to the uniform and autonomous interpretation of the Convention (DiMatteo 2013b: 715; Schroeter 2009: 191–192; UNCITRAL 2012: part VI).

Finally, for those countries which are not yet contracting states of the CISG, regional harmonisation can make adoption of the CISG less attractive. It could also

cause them to lose interest in joining any initiatives for the promotion of global harmonisation (CISG-AC 2012: paras 4, 5).

CONCLUSION

It is clear that the views on regional harmonisation differ radically. Those opposed to regional law view it as an unnecessary complication that generates legal diversity instead of legal certainty; those in favour advocate its benefits, especially in areas where the CISG has failed to provide efficient law or any law at all.

Most regional blocs do not promulgate commercial laws for transacting with those external to the bloc, which creates the impression that the existence of side-by-side worldwide and regional harmonisation should not necessarily generate tension and conflict. There would, however, be instances where either one or both parties to a contract might be a member state to a regional instrument and at the same time also a contracting state to the CISG, which could create the situation where both the global and the regional law govern a contract. How would this apparent conflict be managed? The next section discusses this issue in more detail.

CO-EXISTENCE OF CISG AND REGIONAL LAW

Is there any room for co-existence of the CISG with regional sales law? The CISG's provisions provide a few solutions to how the issue of competing sales laws could be addressed if the CISG and a regional sales law were both to apply in a given situation.

As article 6 of the Convention provides for the principle of party autonomy, the parties to a contract could voluntarily opt out of the Convention and agree that their contract be governed by the regional law. A regional usage or custom could also prevail where the parties have agreed to such a usage (article 9(1) of the CISG or by virtue of article 9(2) of the CISG (Ferrari 2003: 185–186)). Trade usage would, however, still be supplemented by the Convention, unless this were to be precluded by a standard form contract applicable to the trade concerned.

Article 90 of the CISG

Article 90 of the CISG states that

'the Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention'.

This means that the CISG is displaced in favour of any other international agreement which deals with matters that are also governed by the Convention (Ferrari 2012: 86). This provision would potentially serve to avoid any conflict. However, the

problem is that there is no clarity on what an international agreement is for the purposes of article 90. In the literature, there is some dispute as to whether such agreements must be multilateral or whether bilateral international agreements will also suffice (Ferrari 2003: 181 and 2012: 87). Furthermore, will the CISG be displaced by international agreements only on substantive law or do agreements on conflict of laws have the same effect (Ferrari 2003: 181)? And will the Convention restrict these agreements to those that have universal reach or will preference also be given to regional agreements? The position is not clear if considered in the context of, for example, the OHADA uniform laws or the EU law.

According to Ferrari (2003: 181 and 2012: 87–88), it is not a requirement that the international agreement should be of universal reach as nobody has ever denied that regional agreements may prevail over the CISG. It is his opinion that article 90 implicitly provides for regional agreements provided that both parties have their places of business in states that are parties to such agreements. By virtue of article 10 of the OHADA Treaty, the OHADA uniform laws are automatically applicable to its member states and do not have to be incorporated into national law by domestic legislatures. Some commentators argue that the OHADA laws constitute an international agreement; therefore, if both parties have their place of business in OHADA member states, the OHADA Uniform Commercial Law would prevail (Ferrari 2012: 88). Opinions differ on this matter, however. Another argument holds that the OHADA laws are enactments of a supranational organisation and for that reason do not qualify as international agreements that can take precedence over the Convention (Magnus 2012b: 150). Following this line of argument, even if one were to argue that the OHADA laws or an EU regulation constitutes an international agreement, the member states would not be considered to be parties to such an agreement. These laws apply automatically to the member states and are not dependent on their agreement, which is a requirement for the operation of CISG under article 90 (Koch 2012: 143–144). Moreover, the prevailing opinion seems to be that, by virtue of article 90, EU directives and regulations do not constitute international agreements that supersede the CISG (Schroeter 2009: 190).

Article 92 of the CISG

The Convention, furthermore, provides contracting states with the opportunity to make declarations to the effect that regional law would supersede the CISG.

By virtue of article 92 of the CISG, contracting states can declare that they will not be bound to Parts II and III of the Convention and, therefore, for purposes of any of the provisions contained in those parts they will not be a contracting state. The aim of this reservation is to protect the domestic law of the reserving country and, in effect, therefore also regional law. This reservation has limited impact, however. Because a state that has made a reservation is considered to be a non-contracting

state, it means that the Convention's applicability is to be determined by virtue of article 1(1)(b) of the CISG, and therefore the reservation will have effect only if the application of the rules of private international law leads to the law of a reserving state. Furthermore, where it does apply, regional law will have limited application as this reservation only excludes the application of Parts II and III of the Convention (Ferrari 2003: 182 and 2012: 89–91). For the rest, the Convention will still apply.

Moreover, there is a movement away from these declarations: all of the Scandinavian reserving countries, which were the only countries that had made such reservations, have revoked their article 92 reservations. Furthermore, in 2013, the CISG Advisory Council issued a declaration in which, in the interests of the uniform application of the CISG and global uniformity, it strongly urged countries to refrain from making any reservations or declarations in future (CISG-AC 2013).

Article of 94 of the CISG

There is, however, another opportunity for regional law to supersede the Convention. Article 94(1) of the CISG provides that contracting states which have closely related laws may declare that the Convention will not apply to contracts between parties who have their places of business in these states. The rationale for this declaration is based on the similarities in the laws of reserving countries, which negate the need for a uniform law to reduce transaction costs (Ferrari 2003: 183). Countries which are joined by regional law and wish to protect the supremacy of their law may therefore do so under article 94 by making a declaration at any time, even after adoption of the Convention. Problems could arise, however, if one of the reserving states revises its laws without withdrawing the declaration (Ferrari 2003: 183 and 2012: 93). The question that then arises is this: Are the courts obliged to look at the declaration or at the content of the law after the revision?

Article 94 is said to provide the strongest basis for the supremacy of regional law (Ferrari 2003: 184 and 2012: 94). At first glance, article 90 would seem to provide an easier way to support regional law because it does not call for a declaration. However, it requires an international agreement, which, as the discussion has shown, is no straightforward matter. An article 94 declaration can be made at any time, which makes it preferable to an article 92 declaration. Moreover, article 94(2) extends to the law of a non-contracting state, which is even more favourable to the notion of regionalism (Ferrari 2012: 95).

In the case of OHADA, where the majority of its member states are non-contracting states, article 94 would protect regional law the best, unless one were to argue that OHADA constitutes an international agreement by virtue of article 90. Article 234(2) of the OHADA Uniform Act on General Commercial Law provides that for the purposes of international sales, the OHADA Uniform Commercial Law will apply if the parties to the contract have their businesses in OHADA states or if

the rules of private international law lead to the law of an OHADA member state (Magnus 2012b: 149). If such member state were also a CISG contracting state, the Convention would prevail unless an article 94 declaration had been made. Parties are, however, permitted to opt out of OHADA law in favour of the CISG.

In the context of the CESL, where the majority of the EU member states are also contracting states to the CISG, it would seem that there could be greater potential for rivalry than in the case of OHADA. However, the proposal was that the CESL would function as an optional national law and would apply only if the parties decide to opt in. Even then, the potential for conflict was small due to differences in their scopes of application, because the CESL was primarily aimed at providing a uniform sales law for consumers and small businesses in the EU. If the parties were to opt in to the CESL, would that indicate an intention to exclude the CISG *in toto* by virtue of article 6 of the CISG? In general, the exclusion of the Convention on the basis of a choice of law is a controversial topic. Scholars are of the opinion that it would implicitly qualify as an exclusion or derogation of the CISG, unless the agreement is contained in a standard contract term which has not been brought to the attention of the other party before conclusion of the contract (Koch 2012: 142–143; Magnus 2012a: 105–107; DiMatteo 2013b: 714). According to the CISG Advisory Council, however, it would not be possible to opt in to selected provisions of the CESL only, for example those on validity, and so combine its provisions with those of the CISG (CISG-AC 2012: para 3).

STUMBLING BLOCK OR STEPPING STONE?

Does regional sales law pose a threat to global harmonisation, or can it function as a stepping stone towards greater universal harmonisation?

A balanced viewpoint would recognise that despite its potential to impede global harmonisation, regionalism may facilitate it: as both promote international trade by removing legal barriers to trade, regional and global harmonisation subscribe to the same goals (Bazinas 2003: 54).

At the domestic level, numerous countries have found inspiration in the Convention when revising and modernising their national contract laws (Andersen 2012: 148; UNCITRAL 2012: part III; DiMatteo 2013a: 577–578). Examples are the German law of obligations, the Dutch law of obligations, the Nordic and Danish sales laws, the contract law of the People's Republic of China, the law of Estonia and other post-Soviet codifications in Eastern Europe and Central Asia, as well as the new Japanese Civil Code, to mention only a few. Where a global instrument inspires the revision of domestic law, there is not only a greater approximation between global and domestic law but domestic laws become more uniform, which in turn facilitates the reduction of legal barriers to trade. This could even expedite the adoption of the CISG by states which have failed to do so for fear of incurring costs that a new sales

law might entail. Where the domestic law of a country is closer to the CISG, it will not be perceived as a strange law any longer and a state will adopt the Convention much more easily.

The CISG even formed the basis for codifications such as the Unidroit Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), the Common Framework Rules (CFR), the Principles of Asian Contract Law (PACL); it was also used as a model for various EU laws (Andersen 2012: 150–151; Schroeter 2009: 182–188; UNCITRAL 2012: part V(2)). Modern-day regional laws such as the OHADA and CESL also track the provisions of the Convention very closely (Castellani 2013: 40; Laryea 2013: 72). Where a regional law takes the instrument developed for worldwide use as a point of departure and then adapts it to the needs of the region, the potential for conflict with the global instrument regarding divergent interpretations is reduced as the two would then complement each other. CISG case law and scholarship are also easily accessible and could serve as an easy form of reference when interpreting the provisions of a regional law that is modelled on the global law.

Regional efforts are often driven by the shortcomings of the CISG. These shortcomings necessitate supplementation by national law, which defeats the purpose of a unified law, namely to provide legal certainty. The potential therefore exists for synergy with regional law, as it can supplement the gaps in the CISG (Schroeter 2009: 191; Han 2013: 591).

Regionalism reduces unilateral action by member countries as they are more inclined to conform to what the bloc does. This tends to facilitate the adoption, implementation and even the voluntary use of the CISG in regions such as Africa, where the CISG has not yet found support on a wide scale (Laryea 2013: 72–73). Where a regional trade agreement or an economic organisation observes an international instrument such as the CISG, either by using it as the basis for its own regional sales law or promoting it as the sales law for the region by encouraging member states to ratify or accede to the Convention, it will support and facilitate rather than impede universal harmonisation. In the North American Free Trade Area (NAFTA), for instance, all the member states are contracting states to the CISG, with the practical effect that the Convention functions as the common law for international sales in the region and, therefore, as the regional sales law.

With Brazil's accession to the CISG, MERCOSUR is moving in the same direction. The Dominican Republic–Central American Free Trade Agreement (CAFTA-DR) and the Association of Southeast Asian Nations (ASEAN) also advocate the adoption of the CISG (UNCITRAL 2012: part VI; Castellani 2013: 40). These instances illustrate the point that legal harmonisation can also be facilitated if regional economic organisations with legislative authority accede to universal uniform-law organisations, such as UNCITRAL, as well as to international instruments of uniform law which permit such an action (Kronke 2003: 18).

Where the universal instrument is not perceived as a true ‘global’ law capable of representing the interests of all its audience, regional voices might influence the development of an international instrument that enjoys universal approval across all social, economic and legal systems (Laryea 2013: 74–76). Only when such an instrument is developed and adopted on a global scale will it be possible to speak of a truly global law. Whether such a global instrument should be created through a top-down (start with harmonisation worldwide and then implement or even modify it at the regional level) or a bottom-up approach (where the foundations for the global law are laid in the regions and then culminate in a global instrument) (Kronke 2003: 16) is not an easy question to answer and is also not within the scope of this article. What is clear, though, is that regions and regional economic integration organisations should play an important role in fostering the globalisation of international commercial laws (CISG-AC 2012: para 4). Through the establishment of regional centres of expertise to provide technical assistance for trade law reform, UNCITRAL is not only strengthening the rule of law in developing countries but also creating regional hubs that can contribute towards greater global harmonisation.

In this sense, regional harmonisation is capable of acting as a building block for, rather than a stumbling block to, greater global harmonisation. For this reason UNCITRAL encourages regional harmonisation (Bazinas 2003: 62) and believes that the time has arrived to plot the way for a global contract law. The success of a global instrument in regulating contracts has to hinge on effective engagement and coordination with other private-law formulating agencies such as UNIDROIT, but of equal importance will be the input of regional integration and economic co-operation organisations and law-reform bodies that have already embarked on efforts in contract-law reform, including the OHADA, CESL and PACL (Basedow 2003: 43; Sorieul, Hatcher & Emery 2013: 498).

Whereas regions can function as building blocks towards continental unity, they can also act as stepping stones towards the achievement of unity on a global scale.

FINAL CONCLUSION

The CISG is still the only uniform sales law that effectively addresses the issue of legal diversity globally. Although the number of contracting states has grown significantly over the years and will continue to do so in the years to come as a testament to its success, it would be naïve to think that the Convention would be the ultimate answer to contract harmonisation. The Convention has a limited sphere and scope of application and was created on the basis of diplomatic compromise. Its vague and neutral language, which is often perceived as a shortcoming, is actually an advantage as it provides an opportunity to develop the law in accordance with the changing needs of international trade. However, there are certain areas of contract law that are not covered by the Convention and which cannot be addressed by autonomous

interpretation. It is also clear that, even in countries which are contracting states to the CISG there is dissatisfaction with the Convention, not only with its limited scope but also with its inability to address certain regional needs.

A balanced viewpoint would recognise the advantages of the CISG but also acknowledge that the time has come for the next phase of global harmonisation. Regional efforts which build on the model of the CISG should, therefore, not be ignored or discarded, as they can provide a meaningful contribution to the creation of a new global contract law.

SADC countries should strongly consider ratifying the CISG as doing so would at the same time facilitate trade within and outside the region. That, however, does not mean that the region should refrain from harmonising contractual issues that are currently not covered by the Convention. Such a regional law could supplement the global sales law where needed. Collaboration between global and regional sales law can provide contractual parties with a more efficient legal framework that will facilitate economic development in the region.

REFERENCES

- Andersen, CB. 2012. Breaking the mould of scope – unusual usage of the CISG. *Vindobona Journal of International Commercial Law and Arbitration* 16: 145–162.
- Basedow, J. 2003. Worldwide harmonisation of private law and regional economic integration – general report. *Uniform Law Review* 1/2: 31–49.
- Bazinas, SV. 2003. Harmonisation of international and regional trade law: The UNCITRAL experience. *Uniform Law Review* 1/2: 53–62.
- Behar, A & Edward, L. 2011. How integrated is SADC? Trends in intra-regional and extra-regional trade flows and policy, Policy Research Paper 5625, The World Bank Development Research Group Trade Integration Team, April 2011. Available from http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/04/05/000158349_20110405125648/Rendered/PDF/WPS5625.pdf (accessed 9 May 2014).
- Butler, P. 2012. The perversity of contract law regionalization in a globalizing world. In I. Schwenzer & L. Spagnolo (eds). *Globalization versus Regionalization 4th Annual MAA Schlechtriem CISG Conference*. The Hague: Eleven International Publishing.
- Calus, A. 2003. Modernisation and harmonisation of contract law: Focus on selected issues. *Uniform Law Review* 1/2: 155–162.
- Castellani, LG. 2008. Ensuring harmonisation of contract law at regional and global level: The United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL. *Uniform Law Review* 1/2: 115–126.
- Castellani, LG. 2013. CISG in time of crisis: An opportunity for increased efficiency. In I Schwenzer & L Spagnolo. *Globalization versus Regionalization 4th Annual MAA Schlechtriem CISG Conference*. The Hague: Eleven International Publishing.
- CISG Advisory Council (CISG-AC). 2012. The CISG and regional harmonization. CISG Advisory Council, Declaration No 1. Rapporteur: Professor Michael Bridge, London School

- of Economics, London, United Kingdom. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand, on Friday, 3 August 2012. Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-dec1.html> (accessed 9 May 2014).
- CISG Advisory Council (CISG-AC). 2013. Use of reservations under the CISG. CISG Advisory Council Declaration No 2, Rapporteur: Professor Dr Ulrich G Schroeter, University of Mannheim, Germany. Adopted by the CISG-AC following its 18th meeting, in Beijing, China, on 21 October 2013. Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-dec2.html> (accessed 9 May 2014).
- COMESA, 2014. Model law on electronic transactions and guide to enactment. Executive summary. Available at [http://programmes.comesa.int/attachments/article/78/COMESA%20Model%20Law%20and%20%20Guide%20to%20Enactment%20\(fin\).pdf](http://programmes.comesa.int/attachments/article/78/COMESA%20Model%20Law%20and%20%20Guide%20to%20Enactment%20(fin).pdf) (accessed 9 May 2014).
- DiMatteo, LA. 2013a. Harmonization of international sales law. In LA DiMatteo, Q Zhou, S Saintier & K Rowley (eds). *Commercial contract law: Transatlantic perspectives*. New York: Cambridge University Press.
- DiMatteo, LA. 2013b. CISG as basis of a comprehensive international sales law. *Villanova Law Review* 58(4): 691, 691–722.
- Eiselen, S. 1999. Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa. *South African Law Journal* 116: 323–370.
- Eiselen, S. 2007. Adopting the Vienna sales convention: Reflections eight years down the line. *South African Mercantile Law Journal* 19: 14–25.
- European Parliament/Legislative Observatory. 2014. 2011/0284(COD)–25/09/2013. Committee report tabled for plenary, 1st reading/single reading. Available at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1309400&t=d&l=en> (accessed 26 June 2014).
- Fagbayibo, B. 2009. Towards the harmonisation of laws in Africa: Is OHADA the way to go? *Comparative and International Law Journal of South Africa* XLII: 309–322.
- Ferrari, F. 2003. Universal and regional sales law: Can they coexist? *Uniform Law Review* 1/2: 177–189.
- Ferrari, F. 2012. CISG and OHADA sales law: Or the relationship between global and regional sales law. In U Magnus (ed). *CISG vs regional sales law unification: With a focus on the new common European sales law*. Munich: Sellier European Law Publishers.
- Fombad, CM. 2013. Some reflections on the prospects for the harmonization of international business laws in Africa: OHADA and beyond. *Africa Today* 59(3): 51, 51–80.
- Han, S. 2013. Principles of Asian contract law: An endeavor of regional harmonization of contract law on East Asia. *Villanova Law Review* 58(4): 589–600.
- Kalenga, P. 2012. Regional integration in SADC: Retreating or forging ahead? Stellenbosch: Tralac. Available at <http://www.tralac.org/files/2012/09/D12WP082012-Kalenga-Regional-integration-in-SADC-retreating-or-forging-ahead-20120919.pdf> (accessed 9 May 2014).
- Koch, R. 2012. CISG, CESL, PICC and PECL. In U Magnus (ed). *CISG vs regional sales law unification: With a focus on the new common European sales law*. Munich: Sellier European Law Publishers.

- Kronke, H. 2003. UNIDROIT 75th Anniversary Congress in Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, certainties and open questions. *Uniform Law Review* 1/2: 10–26.
- Laryea, ET. 2013. Globalizing international trade, investment and commercial laws through regionalism: The prospects. In I Schwenzer & L Spagnolo (eds). *Globalization versus Regionalization 4th Annual MAA Schlechtriem CISG Conference*. The Hague: Eleven International Publishing.
- Lehman, K. 2006. The United Nations Convention on Contracts for the International Sale of Goods: Should South Africa accede? *South African Mercantile Law Journal* 18: 317–329.
- Magnus, U. 2012a. CISG vs CESL. In U Magnus (ed). *CISG vs regional sales law unification: With a focus on the new common European sales law*. Munich: Sellier European Law Publishers.
- Magnus, U. 2012b. Concluding remarks. In U Magnus (ed). *CISG vs regional sales law unification: With a focus on the new common European sales law*. Munich: Sellier European Law Publishers.
- Ndulo, M. 1996. The need for the harmonisation of trade laws in the Southern African Development Community (SADC). In AA Yusaf (ed). *African yearbook of international law* 4: 195–225. Pretoria: VerLoren Van Themaat Centre, Unisa.
- Oppong, RF. 2006. Private international law and the African economic community: A plea for greater attention. *International and Comparative Law Quarterly* 55: 911–928.
- Oppong, RF. 2010. The African Union, the African Economic Community and Africa's regional economic communities: Untangling a complex web. *African Journal of International and Comparative Law* 18(1): 92–103.
- Partridge, A. 2013. Africa–South Africa trading relationship. Available at http://www.tralac.org/files/2013/10/Africa-south-africa-trading-relationship_Synopsis.pdf (accessed 9 May 2014).
- Sorieul, R, Hatcher, E & Emery, C. 2013. Possible future work by UNCITRAL in the field of contract law: Preliminary thoughts from the secretariat. *Villanova Law Review* 58(4): 491–508.
- Southern African Development Community (SADC). 2012. Southern African Development Community: Towards a common future, about SADC: Integration milestones: Free trade area. Available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 9 May 2014).
- Stephan, PB. 1998–1999. The futility of unification and harmonization in international commercial law. *Virginia Journal of International Law* 39: 743–798.
- Schroeter, UG. 2009. Global uniform sales law – with a European twist? CISG interaction with EU law. *Vindobona Journal of International Commercial Law and Arbitration* 13: 179–196.
- UNCITRAL (United Nations Commission on International Trade Law). 2012. Possible future work in the area of international contract law. Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law. Note by the UN Secretariat. A/CN.9/758, UNCITRAL 45th session 23 June–6 July 2012, New York.
- UNCITRAL (United Nations Commission on International Trade Law). 2015. United Nations Commission on International Trade Law, Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 28 February 2015).

- UNCTAD (United Nations Conference on Trade and Development). 2013a, Adjusting to the changing dynamics and the world economy. Trade and Development Report 2013. (UNCTAD/TDR/2013).
- UNCTAD (United Nations Conference on Trade and Development). 2013b. Global value chains: Investment and trade for development. World Investment Report 2013. Sales No E.13.II.D.3.
- UNCTAD (United Nations Conference on Trade and Development). 2013c. Intra-African trade: Unlocking private sector dynamism, economic development in Africa. Report 2013. UNCTAD/ALDC/Africa/2013).
- Vázquez, CM. 2003. Regionalism versus globalism: A view from the Americas. *Uniform Law Review* 1/2: 63–70.
- Wandrag, R. 2011. Unification of southern African contract law. *European Journal of Law Reform* 13(3–4): 451–461.