# TEACHING TRANSNATIONAL COMMERCIAL LAW IN THE AFRICAN CONTEXT

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CONTENTS



## I INTRODUCTION

There is little doubt that the process of globalisation in all spheres of life, but importantly in international trade, is placing strain on domestic laws to properly provide for acceptable solutions in international commercial relations. Globalisation is also detected in the regional organisations that are coming into existence to overcome the obstacles of national borders such as different legal systems and rules, customs and excise duties, standards and the free movement of goods. In this context one needs to look no further than organisations such as the European Union, OHADA in West Africa, COMESA in East-Africa, NAFTA in North America and of course Mercosur in South America.

The relative slowness of the law to respond to the challenges posed by globalisation is mentioned quite often as one of the major obstacles in the path of greater globalisation and international trade.[1] The process of amending the law to respond to new challenges is notoriously sluggish causing international

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1 *See* for instance the General Assembly Resolution 35/51 at its 35th Plenary Meeting on 4 December 1980 available at UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)* <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>; L C Backer, *Harmonizing Law in Era of Globalization* Durham Carolina Academic Press, 2007, xiii-xiv; 10-12.

traders to simply accept the legal risks and uncertainties involved, rather than lag behind in developing their international markets.

Unlike international trade which barely knows any national borders these days, law is still very much a domestic affair – there is as yet no over-arching international trade law or *lex mercatoria*[2] that will generally apply to international transactions except where the parties make such concepts and regimes applicable to their transaction.[3] Every international trade transaction is still very much based on the domestic law of a specific country to be chosen by the parties or appointed by the rules of private international law.[4] Domestic laws differ quite significantly even on something as essential as sales law. For instance, most civil law systems require a buyer to inform the seller of any non-conformity of the goods within a fairly brief period of time after which the buyer may lose the remedies available for such non-conformity. In systems based on the common law the duty to notify the seller of deficient goods, is much less clearly defined and usually does not lead to a loss of remedies; the failure to give a timely notification merely reflects on the probability of the buyer's allegations of non-conformity.[5] Such differences may have quite significant consequences for the conduct of the various parties to a sales contract depending on their understanding of the law. For this reason a number of countries around the world have tried to implement harmonized or unified law in targeted areas. The level of unification and harmonization within the

2 R Michaels, 'The true lex mercatoria: law beyond the state' (2007) 14 *Indiana Journal of Global Legal Studies* 447; P J Mazzacano, 'Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods' (2006) 18 *Pace International Law Review*; F De Ly, 'Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods', Collation of Papers at UNCITRAL -- SIAC Conference 22-23 September 2005, Singapore, Singapore: Singapore International Arbitration Centre, pp. 28-38 available at (15 March 2016)<www.cisg.law.pace.edu/cisg/biblio/dely.html>, 28-38.

3 CF Forsyth, *Private International Law* (Juta, 5th ed, 2012) 21-24; J J Fawcett, *Cheshire and North and Fawcett Private International Law* (Butterworths, 14th ed, 2008) 3-5; Michaels *supra* n 2, 458.

4 For a brief comparative overview *see* I Schwenzer in I Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 3rd ed, 2010) Article 39, para 4; S Eiselen and AH Kritzer, *International Contract Manual Volume IV,* (Thompson Reuters, Rochester, 2008) para 89:64; U P Gruber, in W Krüger and H Westermann (eds), *Münchener Kommentar zum Bürgerlichen* Gesetzbuch Band 3 Teil 1 (5th ed, Beck, 2008) CISG Article 39, para 34.

5 Schwenzer, above n, 4 Article 39 para 4; Eiselen and Kritzer, above n 4, Article 39 para 34.

European Union is at an unprecedented level. In Africa the work of OHADA is well known in this regard.[6]

The globalisation of trade has also led to the formation of a number of Free Trading Areas as provide for in the World Trade Organisation Convention ("WTO Convention"). Although one of the key principles of the WTO Convention, namely most favour nation status as contained in Part I Article I of the General Agreement on Trade and Tariffs 1947 (GATT), would seem to conflict directly with the establishment of free trade zones, GATT makes a specific exception for this anomaly in Article XXIV.[7]

In South Africa the teaching of international or transnational commercial law is still in its infancy. The isolation of South Africa during the apartheid years meant that there was no great need or emphasis on internationalisation and the teaching of international commercial law. The first course in this discipline was only launched in 1996 when I started the taught LLM in Import and Export Law at the University of Potchefstroom.[8] As there was nothing similar, the structure of the course was to a large extend based on my own academic expertise and my practical experience, as well as the perceived needs of practice.

At present there are five taught masters courses at South African universities, each with its own distinct flavour and composition dependent on the expertise and interests of the lecturers.[9] Although transnational commercial law forms part of the curricula of all of these programs, some of them include quite a large portion of international trade law, ie WTO and other related laws falling more in the public international law sphere. For purposes of this discussion, transitional commercial law is seen as those areas of law more traditionally associated with private law such as contract, private international law and payment law.

Teaching transnational commercial law in the African context as we do, cognizance must be taken of all the various regional bodies involved in free

6 K Boele-Woelki *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Hague Academy of Law, 2010) 53 ff.

7 J T Gathii *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011) 86-87.

8 Now the Potchefstroom Campus of the Northwest University.

9 The available courses are taught in the law schools of the Northwest University, University of the Free State; Stellenbosch University, University of Cape Town and University of the Witwatersrand.

trade areas and the harmonization or unification of law in their region. The legal landscape in Africa is further interesting due to the influence of colonial law which still persists in many countries on the continent or form the basis for their current law. The discussion will be focused on the various regional harmonization and economic bodies which must be taken into consideration when teaching transnational commercial law, before briefly dealing with the composition of the curriculum of the Northwest University program where I have been involved since 1996.[10]

## II LEGAL LANDSCAPE IN AFRICA

The introduction of the Napoleonic Code in the Democratic Republic of the Congo ("DRC") in the course of the 19th century is illustrative of the way in which European civil law, and more particularly contract and sales law was imported into Africa by the colonizing powers, but it also has certain quirks of its own. Kahindo remarks that when the Belgian colonizers arrived in the Congo, they did not find a country without law, but a country where the law was unwritten and based on custom as was the case with most other sub-Sharan African countries.[11]

In the French colonies the Code Napoleon was introduced without further ado,[12] but in the Congo the Belgian King appointed a drafting civil code commission composed of experienced Belgian lawyers, the so-called Superior Council. Although the Superior Council drafted a novel civil law for the Congo, taking into account the latest codes in Europe, the law was still based largely on Belgian law, which in turn was still largely based on the Napoleonic Code. And so the Book on Contracts and Conventional Obligations was published in 1888, based on Belgian and French law, but not identical to it.[13]

10 In South Africa I have also taught in the programmes of Stellenbosch, the University of Johannesburg and the University of the Witwatersrand besides the Potchefstroom programme.

11 N Kahindo *International Sales Contracts in Congolese Law - A Comparative Analysis* (unpublished thesis, University of South Africa, 2013) 31.

12 S Mancuso 'The new African law: Beyond the difference between common law and civil law' (2008) 14 *Annual Survey of International and Comparative Law* 41.

13 Kahindo *supra* n 11, 31; J A P Matipé 'The history of the harmonization of laws in Africa' in C M Dickerson (ed) *Unified Business Laws for Africa Common Law Perspectives on OHADA* (GMB, 2009) 21 ff.

English common law, and more specifically English contract law and sales law was introduced in some of its colonies and protectorates like Zambia (formerly Northern-Rhodesia), Kenya, Malawi (formerly Nyasaland), parts of Cameroon and Tanzania (formerly Tanganyika).[14] In other colonies and protectorates like South Africa, Botswana (formerly Bechuanaland) and Zimbabwe (formerly Southern Rhodesia) the Roman-Dutch civil law which had been established by the Dutch was left intact. Many of these countries also chose to base their commercial legislation on English legislation rather than the modern Dutch codes as English legislation was much more accessible due to the language.

The one exception is Southern Africa where under Dutch rule the Roman-Dutch law was introduced.[15] When England annexed the Cape in 1806 the Roman-Dutch civil law which was already well established in the colony, was simply continued to be applied.[16] This also applied to other Southern African countries such as Namibia, Swaziland and Zimbabwe where Roman-Dutch law was also established[17]. Mancuso quite correctly indicates that although the legal systems of African countries are generally classified according to the legal system introduced in the colonial period, important changes have taken place and there has also been some Africanization of the law.[18]

It is against this background that the work conducted by regional economic blocks and legal harmonization efforts must be seen. In a globalized economy the modernization of antiquated colonial laws and the removal of stumbling blocks such as perceived legal uncertainty has become a priority.[19]

14 Matipé *supra* n 13, 10-11.
15 H R Hahlo and E Kahn *The South African Legal System and its Background* (Juta 1973) 571 ff.
16 Hahlo and Kahn *supra* n 15, 571-2.
17 Hahlo and Kahn *supra* n 15, 578-9.
18 Mancuso *supra* n 12, 45.
19 C Clapham et al (eds) *Regional Integration in Southern Africa – Comparative International Perspectives* (SAIIA 2001) 13-5; H Kyambalesa and M C Houngniko *Economic Integration and Development in Africa* (Ashgate, 2006) 17-21; Gathii *supra* n 7, 2011).

## III ECONOMIC DEVELOPMENT BLOCKS

### A *Introduction*

As part of teaching transnational commercial law in the African context it is necessary to take cognizance of a number of regional economic blocks and regional legal harmonization efforts. In some cases there is an overlap between the regional economic cooperation and legal unification or harmonization efforts. In this section a brief introduction will be provided to the most important of these blocks and efforts. Although much has been made politically about the African Economic Community after the signing of the Treaty in Abuja in June 1991, so far little tangible has been achieved. One of the reasons may be that the architects of that project failed to properly analyse the different regional economic blocks and harmonisation efforts before embarking on that venture.[20]

### B *ECOWAS*

The major emphasis of creating regional economic communities in West Africa was the liberalization of intracommunity trade and related projects such as linked infrastructure to support the economies of the participating states. It also included the free movement of people within the region.[21] The organizations established include the Economic Community of West Africa (ECOWAS), the West African Economic and Monetary Union (UEMOA),[22] and the now defunct Mano River Union.[23]

ECOWAS was founded in 1975 and is based on the Treaty of Lagos. Its membership numbers 15 and consists of Benin, Burkina Faso, Cape Verde Islands, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali,

20 A Bundu 'ECOWAS and the future of regional integration in West Africa' in R Lavergne (ed) *Regional Integration and Cooperation in West Africa – A Multidimensional Perspective* (IRDC, 1997) 29-30. For more information on ECOWAS see ECOWAS <http://www.ecowas.int/>; K O Kufuor *The Institutional Transformation of the Economic Community of West African States* (Ashgate, 2006) 19-25.

21 Bundu *supra* n 20, 31; W C Peters, *The Quest for an African Economic Community – Regional Integration and its Role in Achieving African Unity – The Case of the SADC* (Peter Lang, 2010) 123-4; .

22 Gathii *supra* n 7, 357-8.

23 Gathii *supra* n 7, 4.

Niger, Nigeria, Senegal, and Sierra Leone, Togo.[24] The dominant economic countries in the region are Nigeria, Ghana and the Ivory Coast. Cocoa, coffee, timber, cotton and oil are the region's main export products.

Although one of the stated missions of ECOWAS is the economic integration of the region, the member states can be grouped into two distinct monetary groups, namely the CFA franc region and the non-CFA region.[25] The CFA franc is a common currency which is guaranteed by the French treasury and has been pegged to the Euro since 1999. The countries using it are Benin, Burkina Faso, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal, and Sierra Leone, Togo. The countries in the non-CFA group use their own currencies.[26] In a number of countries such as Mali, Niger and Nigeria, Sharia law also plays a role in commercial legal matters.

In 2000 the heads of state of six other African countries decided to set up a new monetary zone known as the West Africa Monetary Zone (WAMZ).[27] These non-francophone countries, namely Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone, signed the Accra Declaration which defined the objectives of the Zone.[28] The currency, the ECO, was to be launched on 1 January 2015 but that did not materialize. All the ECOWAS countries are now expected to adopt a single currency regime by 2020, after the failed attempts to introduce the ECO for the non-francophone countries in the region.[29]

There is no common commercial law which applies in the region although a number of the countries are members of OHADA, namely Benin, Burkina Faso, Gambia, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. Under the OHADA Treaty countries must adopt *inter alia* the General Commercial Law. The underlying commercial law in the region is based either

24 S Buthelezi *Regional Integration in Africa: Prospect & Challenges for the 21st Century* (Ikwhezi Afrika, 2006) 129. See also ECOWAS *Member States* <http://www.ecowas.int/member-states/>; Peters *supra* n 21, 120-1; Gathii *supra* n 7, 144-5.
25 Buthelezi *supra* n 24, 129-130.
26 Buthelezi *supra* n 24, 129.
27 Gathii *supra* n 7, 352 ff.
28 ECOWAS <http://www.ecowas.int/>.
29 See J Acheampong 'WAMI abandons ECO for new currency' (<http://www.graphic.com.gh/business/business-news/49114-wami-abandons-eco-for-new-currency.html>.

on civil law, and more particularly the French Civil Code[30] and Portuguese Civil Code or English common law. In the countries where the unified OHADA law has been adopted the general contract law and sales law has been displaced by the OAHDA laws.

At present ECOWAS is focused on their Vision 2020 programme. The programme aims at setting a clear direction and goal to significantly raise the standard of living of the people through conscious and inclusive programmes that will guarantee a bright future for West Africa and -shape the destiny of the region for many years to come.[31]

### C *ECCAS*

The Economic Community of Central African States (ECCAS) was founded in 1983 and aims at the promotion of regional economic cooperation in central Africa. [32] It aims to achieve collective autonomy, raise the standard of living of its populations and maintain economic stability through harmonious cooperation.[33]

It had its origins in the Customs and Economic Union of Central Africa (or UDEAC) that was established by the Brazzaville Treaty in 1964 to form a common customs union. UDEAC was superseded by the Economic and Monetary Community of Central Africa (CEMAC) which established a common monetary union based on the Central Africa CFA franc, which is guaranteed by the French treasury similar to the West Africa CFA franc.[34]

30 Mancuso *supra* n 12, 45.
31 Chapter II Article 4 of the Treaty. See also ECOWAS, *About* <http://www.ecowas.int/about-ecowas/vision-2020/>.
32 African Union *ECCAS* <http://au.int/en/recs/eccas>; CEEAC, *Présentation de la CEEAC* <http://www.ceeac-eccas.org/index.php/en/a-propos-de-la-ceeac. See also Gathii *supra* n 7, 237-8.
33 For a general discussion see L L Ntumba 'Institutional similarities and difference: ECOWAS, CEEAC, and PTA' in R Lavergne (ed) *Regional Integration and Cooperation in West Africa – A Multidimensional Perspective* (IRDC, 1997) 304 ff; N Alexander (ed) *Economic Community of Central African States Business Law Handbook* (International Business Publications, 2003) 7; Gathii *supra* n 7, 238.
34 Buthelezi *supra* n 24, 129; N Alexander (ed) *Central African Monetary and Economic Community Business Law Handbook* (International Business Publications, 2003) 6-7 ff.

In 1981 the UDEAC leaders decided to form a wider economic community of Central African states and was established in 1985. [35] Its current membership consists of Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial-Guinea, Gabon, Rwanda and São Tomé.

There is no common commercial law which applies in the region although most of the countries are members of OHADA, with the exception of Angola. Under the OHADA Treaty countries must adopt *inter alia* the General Commercial Law. The underlying commercial law in the region is based either on civil law, and more particularly the French Civil Code[36] and Portuguese Civil Code or English common law although the latter's influence is only felt in part of the Cameroon.[37] In the countries where the unified OHADA law has been adopted the general contract law and sales law has been displaced by the OAHDA laws.

## D *EAC*

The East African Community was founded in 1967 as a regional economic promotion block in the African Great Lakes region in eastern Africa. After its initial failure and collapse in 1977 due to disagreements on representation and other political tensions in the region, the organisation was revived in July 2000.[38]

35 African Union *Economic Community of Central African States* (<http://au.int/en/recs/eccas>; Gathii *supra* n 7, Gathii *supra* n 7, 342.

36 Mancuso *supra* n 12, 45.

37 Kahindo *supra* n 11, 45.Under the Treaty of Versailles Cameroon was placed in part under British rule (2 provinces) and in part under French rule (8 provinces) resulting in the dual application of English common law and French civil law in regard to commercial and sales laws. See S Cziment, "Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System through the Perspective of the Nine Interim Conclusions of Worldwide Mixed Jurisdictions" 2009 (28) *Tulane University Law School* 1-12; Matipé *supra* n 13, 13 ff.

38 The Treaty for the Establishment of the East African Community signed 30/11/1999 and entered into force on 7/7/2000. See East African Community, *History* <http://www.eac.int/about/EAC-history>; N Alexander (ed) East African Community *Business Law Handbook* (International Business Publications, 2003) 18-9; Peters *supra* n 21, 113-4; Gathii *supra* n 7,181-2.

The broad objects of EAC is to develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence security and legal and judicial affairs, for their mutual benefit.[39] Although the countries intended to establish a customs union, a common market, a monetary union and ultimately a political federation,[40] only the establishment of a free trade agreement has come to fruition.[41]

EAC currently has six members, namely Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. Most of these countries are also members of COMESA,[42] another economic integration block that is active in the area. The official languages of the Community is English, but the Treaty aims at developing Kiswahili as a *lingua franca* for the region.[43]

There is no common commercial law which applies in the region. The underlying commercial law in the region is based either on civil law, and more particularly the French Civil Code (in Burundi) or English common law (in Kenya, Tanzania and Uganda).

## E *COMESA*

The Common Market for Eastern and Southern Africa traces its genesis to the mid-1960s. In the aftermath of the colonial period, the post-independence period was characterised by a buoyant and optimistic mood of 'of pan-African solidarity and collective self-reliance born of a shared destiny'.[44] The first step was the establishment of a Preferential Trade Area for Eastern and Southern Africa" (PTA) in 1981 with the signing of the PTA Treaty. The Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing the Common Market for Eastern and

39 See Article 5(1) of the Treaty.
40 See Article 5(2) of the Treaty.
41 Alexander *supra* n 38, 6-7.
42 See below. Tanzania and South Sudan are not members of COMESA.
43 See Articles 119 and 137 of the Treaty.
44 See COMESA *About* <http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117>.

Southern Africa, COMESA, was signed on 5th November 1993 in Kampala, Uganda and was ratified a year later 8th December 1994.[45]

COMESA's vision is to "be a fully integrated, internationally competitive regional economic community with high standards of living for all its people ready to merge into an African Economic Community".[46] It also aims to achieve sustainable economic and social progress in all member states through increased co-operation and integration in all fields of development particularly in trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, environment and natural resources.[47] Although not explicitly stated, it also aims at greater legal harmonization in specific areas of the law.

COMESA has 20 members namely Burundi, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.[48] The official languages of the Community is English, French and Portuguese.[49]

There is no common commercial law which applies in the region.[50] The underlying commercial law in the region is mostly based on civil law, and more particularly the French Civil Code (in Burundi, Comoros, Congo, Democratic Republic of the Congo,[51] Djibouti, Egypt, Madagascar, Mauritius, Rwanda,) or English common law (in Kenya, Malawi, Uganda, Zambia). One notable

45 COMESA, *About* <http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117>. N Alexander (ed) *Common Market of East & South Africa Business Law Handbook* (International Business Publications, 2003) 9-10; Peters *supra* n 21, 107-108; Gathii *supra* n 7, 165-6.

46 COMESA Treaty Article 3.

47 COMESA Treaty Article 3 .See also COMESA, *About* http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117>.

48 Some states who were initially part of COMESA has withdrawn: Lesotho (1997), Mozambique (1997), Tanzania (2000), Namibia (2004 and Angola (2007).

49 Article 185 of the COMESA Treaty. Portuguese was included as an official language due to the initial membership of Angola and Mozambique, both of which have now withdrawn from the Treaty, leaving no Portuguese speaking country as a member.

50 Peters *supra* n 21, 163 refers to the artificial character of COMESA as a regional body.

51 Although the DRC had the civil law of Belgium imposed, the Belgium civil code was largely based on the Napoleonic Code. See Kahindo *supra* n 11, 31 ff. Two legal systems are however based on Roman-Dutch law, namely Swaziland and Zimbabwe.

exception is Ethiopia where no colonial power introduced its own private law. Instead a distinctly Ethiopian Civil Code was drafted in the 1950's, drawing from both civil and common law where modernization was necessary.[52] In a number of countries such as Libya and the Sudan Sharia law also plays a role in commercial legal matters.

## F *SADC*

The Southern African Development Community (SADC) is an organisation that strives for regional integration to promote economic growth, peace and security in the southern African region. It was founded on 17 August 1992 with the adoption of the Treaty of the Southern African Development Community.[53] It was preceded by Southern African Development Coordination Conference (SADCC) whose membership consisted of the so-called Front Line States.[54] These states were involved in the political and military struggle to bring an end to apartheid rule in South Africa. After the fall of apartheid the way was open to establish a regional economic block including South Africa.[55]

SADC aims to create common political values, systems and institutions among its 15 member states, to build social and cultural ties, and to help alleviate poverty and enhance the standard of living among a regional population of 277-million.[56] It stands for the sovereignty of its member states, the upholding of human rights and the rule of law, and the peaceful settlement of disputes.[57]

SADC has 12 members, namely Angola, Botswana, Democratic Republic of the Congo, Lesotho,

52 For a more detailed discussion see T Beru 'Brief History of the Ethiopian Legal System – Past and present' (2013) 41 International J of Legal Information 351 ff where the codification of Ethiopian law is discussed..

53 SADC *SADC Treaty* <http://www.sadc.int/documents-publications/sadc-treaty/>. See also G H Oosthuizen *The Southern African Development Community – The organization, its policies and prospects* (IGD, 2006) 54-5, 120; Peters *supra* n 21, 129-33.

54 Oosthuizen *supra* n 53, 53-54.

55 See the Windhoek Declaration of 1992 available at UNESCO *Windhoek Declaration* <http://www.unesco.org/webworld/fed/temp/communication_democracy/windhoek.htm>. See also Oosthuizen *supra* n 53, 69.

56 See the Preamble to the Treaty and Article5. See also Gathii *supra* n 7, 211-2

57 See Article 4 of the Treaty.

Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zimbabwe.[58] The working languages of the Community are English, French and Portuguese.[59]

There is no common commercial law which applies in the region. The underlying commercial law in the region is mostly based on civil law, and more particularly the French Civil Code (in the Democratic Republic of the Congo,[60] Madagascar, Mauritius, Mauritius, and the Seychelles) the Roman-Dutch law (Botswana, Lesotho, Namibia, South Africa,[61] Swaziland, and Zimbabwe), Portuguese law (in Angola and Mozambique or English common law (in Malawi and Tanzania). Since 2015, OHADA law applies in the Democratic Republic of the Congo.

As envisaged in the Treaty SADC has adopted a number of protocols to further the aims of the organisation. The Protocols on Trade (1996), Finance and Investment (2006) and Trade and Services (2012) are the most relevant for purposes of trans-border commercial law.

## IV Legal Harmonization

### A *Introduction*

Although many of the organisations listed above are also involved in legal harmonization projects, these projects are aimed at very specific issues and is not one of the primary aims of the organisations. There is, however, one organisation whose primary aim has been the legal harmonization and unification of commercial law, namely OHADA. It is the only regional organisation in Africa which has had considerable success with legal harmonization as its instruments have been adopted across most of francophone West Africa.[62]

58 See SADC *Member states* <http://www.sadc.int/member-states/>.
59 Treaty Article 37.
60 Although the DRC had the civil law of Belgium imposed, the Belgium civil code was largely based on the Napoleonic Code. See Kahindo *supra* n 11, 31 ff. Two legal systems are however based on Roman-Dutch law, namely Swaziland and Zimbabwe.
61 For a good introduction to South African commercial law see P Stoop *Commercial and Economic Law in South Africa* (Alphen ad Rijn 2015).
62 For a history of legal commercial law harmonization efforts in Africa see Matipé '*supra* n 13, 21 ff.

## B *OHADA*[63]

The Organization for the Harmonization of Business Law in Africa (OHADA) was established on 17 October 1993 in Mauritius with the signing of the OHADA Treaty.[64] OHADA was created with the objective of fostering economic development in West and Central Africa. Its objective is to create a better investment climate so as to attract investment in order to foster more growth in this market which includes 225 Million of Africans. [65] The Treaty is open for accession by any state member of the Organization of African Unity (OAU) as well as the accession of any other state not member of the OAU invited to accede to the agreement of all States Parties.[66] The geographical area thus may stretch beyond the borders of the franc zone.[67]

The main reason for establishing the Treaty was the awareness that the globalization of trade in a world of national commercial laws, created unnecessary barriers to the liberalization of trade, especially where the commercial laws of many West African countries were antiquated and out of step with modern requirements.[68] The purpose of OHADA is therefore providing member states with a harmonised set of business laws by elaborating and adopting simple and modern common rules adapted to African economies.[69]

OHADA consists of 17 member states at present, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea-Bissau, Mali, Niger, Senegal, Togo and the Democratic Republic of the Congo. The official working language of OAHDA is French which

63 OHADA is the French acronym for Organisation pour l'Harmonisation en Afrique du Droit des Affaires.
64 OHADA *Actualité* <http://www.ohada.org/lohada.html>.
65 A Moumoul *Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)* 2nd ed (2009) 8; Kahindo *supra* n 11, 45.
66 Treaty Article 53.
67 Treaty Article 53. See OHADA *Actualité* <http://www.ohada.org/lohada.html>. See also Kahindo *supra* n 11, Kahindo *supra* n 11, Kahindo *supra* n 11, 47.
68 Moumoul *supra* n 65, 7. See for instance the case of the Democratic Republic of the Congo where 19th century Belgian law prevailed until fairly recently with the adoption of the OAHDA laws – Kahindo *supra* n 11, 4, 31-44, Mancuso *supra* n 12, 41.
69 Kahindo *supra* n 11, 45; Mancuso *supra* n 12, 40-1.

has caused some difficulties in a country such as Cameroon where judges in the English provinces of the country have been reluctant to apply the Uniform Acts because they were initially only available in French.[70] The Uniform Act on Commercial Law has been translated, but it would seem that the translation is also causing difficulties because of poor translation in a number of instances making a substantive differences.[71]

According to Articles 5 and 6 of the Treaty, OHADA statutes are prepared by the Permanent Secretariat in association with governments of member states. They are adopted by the Council of Ministers on the advice of the Cour Commune de Justice et d'Arbitrage.[72] Those statutes are known as "Uniform Acts. So far nine Uniform Acts have been enacted under OHADA's sponsorship. These include the Acts relating to Commercial Law, and Commercial Companies and Economic Interest Groups; the Acts regulating Securities, Arbitration, and the Carriage of Goods by Road; the Acts organising Simplified Recovery Procedures and Enforcement Measures, Collective Insolvency Proceedings, and Accounting Systems; and more recently, the Uniform Act relating to Cooperative Corporations.[73] Generally the Acts are based on civil law and has borrowed to some extent from French business law.[74]

Central to the OHADA law is Article 10 of the Treaty which states:

> *Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.*

This means that OHADA members no longer have any competency to legislate on any matter covered by a Uniform Act and such Acts will take precedence over any local custom, unwritten law of legislation.[75]

The OHADA sales law is contained in Book VIII of the Uniform Commercial Act. The Act applies in all instances where both the parties have

70 Cziment *supra* n 37, 8; Mancuso *supra* n 12, 48.
71 M S Tumnde, The applicability of the OHADA treaty in Cameroon: Problems and prospects. <http://www.ohada.com/doctrine/ohadata/D-04-37.html> 60; Mancuso *supra* n 11, 48.
72 Mancuso *supra* n 12, 41.
73 Kahindo *supra* n 12, 47.
74 Mancuso *supra* n 12, 42.
75 Mancuso *supra* n 12, 48.

their places of business in an OHADA country and therefore also applies to internal commercial sales in the various countries.[76] This unification of sales law has modernized sales law and commercial law in the region and has made cross-border trade much easier to conduct as they are regulated by one common law. Based on the CISG the OAHDA sales law is in line with modern international sales law as the CISG applies to 85 countries worldwide, representing about 80% of world trade. There are 4 OHADA countries which are also CISG members, namely Guinea, Liberia, Gabon and the Congo. It is not yet clear which law will apply if for instance if a Liberian and Congolese company should conclude a sales agreement.

There are a number of other acts which are still being drafted including the Uniform Acts dealing with contract law, labour relations and evidence.[77]

## V UNCITRAL In Africa

### A *CISG*

Although UNCITRAL has had some major successes with some of its instruments worldwide, it does not really hold true for Africa where the CISG has only been adopted by 14 countries so far as illustrated on the map. Of these members, only Egypt can be described as an economically significant party. The two countries with the biggest economies and the most international trade, South Africa and Nigeria, are not yet members of the CISG and do not look likely to do so in the near future.[78]

The following African countries have adopted the CISG so far: Benin, Burundi, Congo, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Madagascar, Mauritania, Rwanda, Uganda, and Zambia. The reason for the reluctance of African countries to adopt the CISG is not clear. In the case of OHADA countries it may be that due to the close similarity between OHADA sales law and the CISG, there is a reluctance to complicate the

76 Kahindo *supra* n 12, 50.
77 Kahindo *supra* n 11, 48.
78 In respect of South Africa see Eiselen S "Adopting the CISG in South Africa; Reflections 8 years down the line" 2007 *SA Merc LJ* 14-25.

legal situation by introducing a further sales law regime.

The reasons for South Africa's reluctance to becomes a member is hard to fathom, but it may be that amongst a number of priorities in the Department of Trade and Industry, international legal harmonization does not feature high at this stage.[79] The moves to adopt the convention in the late 1990's came to nothing as the person responsible for the project took employment in the private sector. It was hoped that regional harmonization within SADC might provide the necessary interest and impetus, but even that factor has not yet played any significant role.

The adoption in Africa has been rather fragmented so far and none of the economic development areas such as ECOWAS, COMESA or SADC has taken any steps to adopt the convention. OHADA countries are also unlikely to adopt the CISG as the sales law part of the OHADA Treaty 1993 is based on the CISG and quite similar in many respects, but there are also significant differences.[80]

### B *UNCITRAL Model Law on Electronic Commerce 1996*

The UNCITRAL Model Law on Electronic Commerce has also met with considerable success serving as a drafting model for more than sixty countries worldwide, including Australia, Canada, China, France, India, Korea, South Africa, the United Kingdom and the USA.[81] Unlike conventions, the Model Law only provides harmonizing text to be adopted but also adapted to the needs of a particular country.

Similar to the CISG, use of the Model Law on the African continent has been slow. To date only Gambia, Ghana, Liberia, Madagascar, Mauritius, Rwanda, Seychelles, South Africa, and Zambia have adopted legislation based on the model, but at least there are

79 Eiselen *supra* n 56 14.

80 See Kahindo *supra* n 11, 9 ff and 381 ff; U Magnus, *CISG vs. Regional Sales Law Unification with Focus on the New Common European Sales Law* (Sellier, 2012) 3; F Ferrari, *Quo Vadis CISG? Celebrating the 25th Anniversary of the United Convention on Contracts for the International Sale of Goods* (Bruylant, 2005) 79-81.

81 UNCITRAL, *Status UNCITRAL Model Law on Electronic Commerce (1996)* <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html>.

indications that COMESA and SADC are in the process of supporting the use of the Model Law in their regions. COMESA commissioned a model law in 2011. The draft model law was adopted and recommended by a committee of experts at a workshop in Khartoum, Sudan in June 2011. Unfortunately no further developments have taken place since that workshop and it is unclear where the process got stuck. SADC similarly adopted a text based on the UNCITRAL Model Law at a conference in Gaborone, Botswana in January 2012. This text is now an officially recommended Model Law to be implemented by the SADC members.

It is to be hoped that the endorsement of SADC and COMESA for the Model Law will provide impetus for its adoption in more countries in these regions. There are indications that the Model Law is being considered in Kenya, Malawi and Botswana at present.

## VI Teaching Transnational Commercial Law

### A *Materials*

It is against this background that transnational commercial law must be taught in the African context. Some of this teaching is missionary in nature, promoting amongst others the adoption of UNCITRAL legal instruments to modernize and harmonize the transnational commercial law of Africa.

With a few exceptions such as South Africa and Egypt, the availability of primary legal materials in African states is notoriously difficult since the publication of legislation and case law is often haphazard and unreliable. The situation is improving with the availability of some of these materials on the internet, but it is still difficult to determine the true legal position in many of these countries. This makes the implementation of harmonized law such as the CISG and OAHDA Uniform Acts particularly important and valuable as they provide a measure of legal certainty.

The CISG provides an excellent example of an international instrument where the relevant legal materials are available and easily accessible on websites such as UNCITRAL[82], the Pace Institute for Internationals Commercial Law[83]

82 UNCITRAL <http:www.uncitral.org>.
83 Institute of International Commercial Law *CISG Database* <http://iicl.law.pace.edu/cisg/cisg>.

and the Global Sales Law portal of the University of Basel[84], to mention a few. On these sites not only the primary texts such as the Convention and case law can be found, but also interpretative materials such as books and journal articles. This makes teaching these materials very easy, in contrast to the teaching of domestic law.

### B *First Steps*

The teaching of transnational commercial law in South Africa was for quite a long period restricted to the teaching of maritime transport law at a couple of coastal universities and the teaching of private international law as an elective in LLB programmes. This was caused in part by the isolation of South Africa at the time.

With the dismantling of apartheid and greater freedom South Africa enjoyed economically and the globalization of international trade that was increasing at an unprecedented speed during the 1990's it soon became apparent to some of us that we needed to introduce courses on transnational commercial law.

I started a structured masters course in 1996 building on my research into electronic data interchange and international harmonization at the Potchefstroom University (now Northwest University). This programme is still going strong after almost twenty years. In 1998 a similar programme was introduced at the Free State University. Soon afterwards the University of Stellenbosch, Rand Afrikaans University (now University of Johannesburg) and the University of the Witwatersrand also started offering some courses on the subject. Considering the content of these programmes it is clear that often the structure and emphasis of each particular programme has been built around the expertise of the teachers involved. So for instance, does the Northwest University programme reflect my strong background in private law and the law of obligations, whereas the programme at the University of Johannesburg focuses on private international law and procedural law, the strengths of Prof Jan Neels.

84 Global Sales Law *Global Sales Law* < http://www.globalsaleslaw.org/>.

### C *Northwest University Curriculum*

The masters course at the Northwest University consists of 4 compulsory core taught courses plus a research component. In addition students must choose one additional elective. The courses are:

**Compulsory modules:**

- International Law of Contracts – CISG and INCOTERMS
- International Instruments of Payment and Guarantee – Letters of Credit and UCP600
- International Transport Law – Hague-Visby, Rotterdam Rules
- Customs and Excise Law – World Customs Organization and the Brussels Harmonized System
- Short dissertation of between 20,000 and 30,000 words.

**Electives:**

- Private International Law and Aspects of Insurance Law
- International Commercial Arbitration
- Cross-Border Insolvency Law and International Transfer of Technology
- International Environmental Law
- International Tax Law

## VII Conclusion

Teaching transnational commercial law in the African context is both exciting and challenging. As indicated above one has to take into account a number of different contexts when teaching these courses, not only to sensitize South African students to the multitude of different laws that may be applicable to transnational transactions, but also to accommodate the needs of the growing cohort of African students from north of the South African borders. It is a common feature of most of the South African programmes that about 50% of the student enrolment consists of foreign students, mostly from Africa.