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# A Quest for Harmonised Sale Law for Africa: A Comparative Analysis of Existing Harmonised Laws of Sale

**Van Vreden, Trudie Helena**

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# *A Quest for Harmonised Sale Law for Africa: A Comparative Analysis of Existing Harmonised Laws of Sale*

*by*

1629159

TRUDIE HELENA VAN VREDEN

Under the supervision of Professor Engela C. Schlemmer

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 2025/05/02

**DECLARATION**

I, 1629159 declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABBREVIATIONS

| | |
|---|---|
| AfCFTA | African Continental Free Trade Area |
| AU | African Union |
| AEC | African Economic Community |
| CECL | Commission on European Contract Law |
| CESL | Common European Sales Law |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| COMESA | Common Market for Eastern and Southern Africa |
| ERSUMA | Higher Regional School of Magistracy |
| OAU | Organisation of African Unity |
| OUAGCL | OHADA Uniform Act relating to General Commercial Law |
| OHADA | Organisation pour l'Harmonisation en Afrique du Dtroit des Affaires |
| SADC | Southern African Development Community |
| ICC | International Chamber of Commerce |
| INCOTERMS | International Commercial Terms |
| PECL | Principles of European Contract Law |
| TFEU | Treaty on the Functioning of the European Union |
| UCC | Uniform Commercial Code |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |
| UPICC | Unidroit Principles of International Commercial Contracts |

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*A Quest for Harmonised Sale Law for Africa: A Comparative Analysis of Existing Harmonised Laws of Sale*

ABSTRACT

The AU Constitutive Act establishes the foundation for Africa's integration into the global economy, with the AU committed to accelerating the objectives of the AEC. A significant milestone in achieving this goal is the establishment of the AfCFTA. However, the effectiveness of increased cross-border trade under the AfCFTA is significantly threatened by fragmented sales law in Africa due to colonial influence. This analysis seeks to identify the most suitable harmonised sales law for Africa to enhance trade efficiency by examining existing instruments with a specific focus on its legislative history, provisions on the sale of goods, interpretational and institutional challenges. It examines key aspects and challenges of the CISG, draws lessons from the UCC and regional integration mechanisms, including OHADA and the EU. Findings suggest that while the CISG provides a globally recognised framework, its adoption in Africa remains limited due to political and economic considerations. The UCC presents a successful model for domestic legal harmonisation, offering key insights into how regional sales law in Africa could be structured and successfully adopted. The EU approach highlights the importance of balancing legal certainty with flexibility. The study further argues that a legal framework with direct effect could facilitate a more efficient harmonisation process. Due to significant resource constraints in Africa, it is argued that the existing framework of OHADA should be utilised whereby African nations join OHADA for the harmonisation of their business laws. It is proposed that Book VIII of the OUAGCL which is already influenced by the CISG, could serve as a foundation for a continental sales law framework. However, to be effectively applied across the AU, this act would require further development, including the incorporation of hardship provisions and a broader African perspective. The research also contends that existing scepticism surrounding OHADA—particularly its perceived francophone influence—could be mitigated through targeted amendments to the OHADA Treaty and Uniform Acts, thereby fostering broader continental acceptance. Revitalising OHADA as a pan-African legal project could secure the necessary funding to strengthen its institutions and promote legal certainty. Ultimately, this analysis advocates for a tailored African sales law framework, integrating international best practices with regional economic realities to create a Harmonised Sale Law for Africa and enhance trade efficiency under the AfCFTA.

## 1. INTRODUCTION

To embark on the quest for a harmonised law of sale for Africa, one must first identify the meaning of harmonisation and why this quest is of importance in Africa. Harmonisation is a process whereby divergent national rules are made more similar through common rules whilst respecting the authority of the legislature, its outcome is a set of similar rules between jurisdictions, but those rules are not identical.[1] Although harmonisation of sale law is the focal point of this comparative analysis, it will not discuss harmonisation in a vacuum but will further refer to existing frameworks for unification of the law of sale. Unification means that different countries use a single substantive rule to govern a particular subject and limits the authority of the national legislature in that it replaces the national rule.[2] The goal of both processes is the integration of laws.[3]

The authority for integration of sale law in Africa is drawn from the Treaty Establishing the African Economic Community and the history of the development of the African Union (AU). The Sirte Declaration reinvigorated the sense of urgency for stronger cohesion among members of the Organisation of African Unity (OAU) and that this cohesion must transcend cultural, economic, and political barriers.[4] The Sirte Declaration demonstrated the decision of OAU member states to establish the African Union.[5] The AU Constitutive Act refers to the objectives of sustainable development, integration of economies and acceleration of political and socio-economic integration.[6] It further refers to establishing conditions for Africa to take its seat on the global economic stage.[7] The AU replaced the OAU and sought to accelerate the objectives of the African Economic Community (AEC).[8]

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[1] Eliezer Sanchez Lasaballett 'Conceptualizing harmonization: the case for contract law.' (2019) 24 *Unif L Rev* 73 at 77.

[2] Deo John Nangela 'Harmonisation or unification of laws in the context of SADC regional integration: Analysing the SADC's initiatives in the era of e-commerce' (2013) *SADC Law Journal* 80 at 84.

[3] Ibid at 85.

[4] Declaration adopted at the Fourth Extraordinary Session of the Assembly of Heads of State and Government at Sirte, Libya EAHG/Draft/Decl. (IV) Rev.1 (8-9 Sep 1999) at para 5, available at https://archives.au.int/handle /123456789/10157, accessed on the 6th of December 2024.

[5] Ibid para 8(i).

[6] Art 3(c) of the Constitutive Act of the African Union of 2000, available at https://archives.au.int /handle /123456789/364, accessed on the 6th of December 2024 (hereafter the AU Constitutive Act). Art 3(j) of the AU Constitutive Act.

[7] Ibid.

[8] Art 30 of the AU Constitutive Act. On the need to accelerate the implementation of the Treaty establishing the African Economic Community, see the following: The Preamble of the AU Constitutive Act; Max Du Plessis & Tiyanjana Maluwa 'African Union' in John Dugard, Max Du Plessis & Tiyanjana Maluwa et al *Dugard's*

The AEC promotes the following objectives: development, integration, self-reliance, mobilisation and utilisation of resources.[9] The AEC will be established through six stages.[10] Firstly, existing regional economic communities should be strengthened, and establishing new communities where required. Secondly, on a regional level and continental level, there must be stabilisation of trade barriers, tariffs, duties, taxes as well as the strengthening of integration within the various sectors. These sectors include areas such as trade, agriculture, money and finance. Stages three to five focus on establishing free trade areas; establish a customs union and an African common market. Ultimately, at stage six all sectors are integrated, the implementation of the African monetary union, and a single African currency is issued by the African central bank.

It is the determination to strengthen and build upon the objectives presented here, that the member states concluded the agreement establishing the African Continental Free-Trade Area (AfCFTA ), which came into force on the 30th of May 2019.[11] To date, 47 of 55 countries have ratified the convention.[12] In line with the Africa 2063 Agenda, the agreement seeks to create a single market for goods and services through facilitating the movement of persons.[13] Parties to the agreement have a general obligation to liberalise trade.[14] Further, parties must specifically eliminate tariffs and non-tariff barriers to trade in goods, foster cooperation in trade areas and establish a mechanism to settle disputes concerning state parties' rights.[15] Transnational commercial law plays a critical role in integration and harmonisation.[16] Since the AfCFTA agreement does not establish a central dispute resolution body for private parties, one must

*International Law: A South African Perspective* 5ed (2020) 798-800; Polina Dlagnekova 'The need to harmonise trade-related laws within countries of the African Union: An introduction to the problems posed by legal divergence' (2009) 15 *Fundamina* 1 at 7.

[9] Art 4(1) of the Treaty Establishing the African Economic Community of 1991(hereafter the AEC Treaty).

[10] Art 6 of AEC Treaty. On the stages of development and its flexibility, see W Shumba 'Towards the African Economic Community: Legal and historical perspectives' (2023) 26 *PELJ* 1. On the method of evaluating the success of achieving African integration, see the African multidimensional regional index; African Union 'African Integration Report' available at *https://au.int/en/documents/ african-integration-report-2021*, accessed on 27 January 2024 at 12 (hereafter the African Integration Report).

[11] Preamble of the Agreement Establishing the African Continental Free Trade Area. (Hereafter the AfCFTA agreement).

[12] African Union 'Status List' available at https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area, accessed on the 27th of January 2024.

[13] Art 3(a) of the AfCFTA agreement.

[14] Art 3(b) of the AfCFTA agreement.

[15] Art 4 of the AfCFTA agreement.

[16] African Integration Report at 24. S. Masumbe 'The potential role of the international lex mercatoria in assisting individuals and business entities to navigate the African Continental Free Trade Agreement' (2023) 37 *Spec Juris* 146 at 147.

evaluate whether there are available laws for private buyers and sellers conducting trade in Africa to limit disputes and underscore certainty.[17]

Further, the AU consists of countries with a range of legal traditions, including Spanish, Belgian, English, Roman Dutch and French traditions, with systems classified as civil, common law and mixed systems.[18] Even if parties exercise prudence and agree to stipulate the applicable law in the contract, over-riding mandatory rules and public policy may impact the contract.[19] Also, the proper law does not govern issues such as consensus, capacity, and formalities of contract.[20] Different national legal systems can act as non-tariff barriers hindering trade when the goal is economic integration.[21] The objectives of the AEC and the AU seek to minimise these barriers when identifying the importance of harmonisation of policy and the strengthening of institutions to integrate the African market.

Consequently, there is a need to harmonise commercial laws, especially the law of sale, to simplify trade and to achieve the goal of increasing intra-African trade.[22] The analysis below will evaluate existing harmonised laws of sale as well as frameworks of integration. Next, the analysis will identify key challenges to harmonisation of sale law in Africa. Penultimately, it will build argument in favour of a harmonised African sale law. Finally, it shall conclude with recommendations for the pathway to this final port of call.

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[17] Art 20 of the AfCFTA agreement.

[18] Marcel Fontaine 'OHADA Uniform Act on Contract Law Explanatory Notes to The Preliminary Draft' available at *https://www.unidroit.org/english//OHADA %20explanatory%20note-e.pdf*, accessed on 5 February 2023 at 7.

[19] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 52. Ibid para 58. *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 25. Art 34 and Art 35 of the UNCITRAL Model Law on International Commercial Arbitration of 1985. Art V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5ed (2012) 344-345.

[20] CF Forsyth op cit note 19 at 213. *Creutzburg and Another v Commercial Bank of Namibia Ltd* 2005 (40) JDR (SCA) para 10.

[21] Richard Frimpong Oppong 'Legal harmonisation in African regional economic communities: Progress, inertia or regress' in Johannes Döveling, Hamudi I. Majamba & Richard Frimpong Oppong et al (eds) *Harmonisation of Laws in the East African Community the State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (2018) 112.

[22] Luca G. Castellani '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' (2008) 13 *Uniform Law Review* 115 at 126. JL Neels 'International commercial law emerging in Africa' (2022) 25 *PELJ* 1 at 8. Rita Mawufemor Tsorme 'Ratification of the CISG: A way forward to ensure success of the African Continental Free Trade Area (AfCFTA)' (2021) 107 *Journal of Law, Policy and Globalization* 1.

## 2. EXISTING HARMONISED LAWS OF SALE AND FRAMEWORKS OF INTEGRATION

### *2.1 The CISG*

This section of the analysis will set out the structure, scope and key principles of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Next, the convention will be analysed from a global perspective. Finally, this section will highlight the relevance of the CISG through identification of possible barriers to implementation.

#### *2.1.1 Structure and scope of the CISG*

The CISG is one of the most well-known conventions adopted by UNCITRAL as part of its toolbox of legislative techniques for harmonisation, and is relevant with regard to the harmonisation of the law of sale of goods in cross-border contracts.[23] The CISG is a multilateral treaty between states with a unique approach, that does not bind states to the convention, but rather binds private parties contracting within a member state.[24] The CISG applies to cross border contracts for the sale of goods where the parties' places of business are in different states and when the states are contracting states, or when the rules of private international law lead to the application of the law of the contracting state or where the parties so chose.[25] However, parties are free to exclude the application of the convention, thereby underscoring the value of party autonomy.[26]

The convention does not apply to consumer contracts, the purchase of goods by an individual for personal, family, or household use, amongst a list of other types of contracts dealing for instance with stocks, negotiable instruments and electricity.[27] One of the key principles and advantages of the convention, is that is free of legalese.[28] That is not to say that the text is

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[23] Juraj Kotrusz 'Gap-filling of the CISG by the Unidroit Principles of International Commercial Contracts' (2009) 14 *Uniform Law Review* 119. Described as second most ratified treaty in international trade law in Larry A. Di Matteo (ed) *International Sales Law: A Global Challenge* (2014) 15. See further, the importance of CISG as an example of harmonisation as well as transplantation, as other conventions have followed the CISG in Bruno Zeller 'The significance of the Vienna convention on the international sale of goods for the harmonisation and transplantation of international commercial law' (2006) *Stellenbosch Law Review* 466 at 467.

[24] Kevin Bell 'The sphere of application of the Vienna Convention on Contracts for the International Sale of Goods.' (1996) 8 *Pace International Law Review* 238.

[25] Art 1 of the CISG.

[26] Art 6 of the CISG.

[27] Art 2 of the CISG.

[28] Kazuaki Sono 'UNCITRAL and the Vienna Sales Convention' (1984) 18 *The International Lawyer* 7 at 13.

devoid of any technical terms, but at the very least, it aims to define ambiguities or offer a method for interpretation in Article 7, where certain articles lead to ambiguity.[29]

Article 7 of the CISG provides that when engaged with the interpretation of the convention, one must have regard for its 'international character' and the importance to promote uniformity of application and the observance of the value of good faith in cross-border trade.[30] If a matter is not settled within the convention, one must refer to the general principles on which the convention is based, and failing that, on the law applicable in terms of the rules of private international law. It promotes the consideration of cases and instruments at an international level in order to guard against judges merely following the precedents in foreign cases by using domestic principles to interpret the terms of the CISG.[31] Importantly, the drafters of the convention sought to balance the rights and interests of both the buyer and the seller, whereas certain domestic laws tend to favour one over the other.[32]

*2.1.2 A look at the CISG from a global perspective*

Having regard to its legislative history, third-world countries, including those in the Eastern Bloc and nations such as Egypt and Ghana alongside western nations, played a significant role in the preparation of the convention.[33] Due to profound differences, particularly regarding issues like written sales contracts and buyer notification of defects, the finalisation of the diplomatic conference after intense debates underscored the complexity of reaching consensus among nations with varying economic and political interests.[34] It is triumphant that despite such complexity in the finalisation of the text that ninety-seven countries have adopted the CISG.[35] The number of African nations that have adopted the convention has increased from fourteen to fifteen countries most recently.[36] Saudi Arabia has further adopted the convention on the 1st of September 2024 which is a remarkable step from Middle Eastern countries, albeit

[29] Ibid. Giancarlo Spagnolo *CISG Exclusion and Legal Efficiency* (2015) ch 4 at 74.
[30] Art 7 of the CISG.
[31] Franco Ferrari' Gap filling and interpretation of the CISG: overview of international case law' (2003) 2 *International Business Law Journal* 221.
[32] Sieg Eiselen 'The Adoption of the Vienna Convention for the International Sale of Goods (CISG) 1980 in Africa-a critical analysis.*'*(2022) 55 *CILSA* 1 at 17.
[33] Michael Joachim Bonell 'The CISG, European contract law and the development of a world contract law' (2008) 56 *The American Journal of Comparative Law* 1 at 2.
[34] Ibid. Bruno Zeller op cit note 23.
[35] Status as at 17/01 2025 available at https://treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no= X-10&chapter=10&clang=_en, accessed on the 17th of January 2025.
[36] Ibid.

with reservation to part III of the CISG.[37] This could indicate increasing relevance for Africa, despite its limited adoption in Africa. It is still problematic that large economies such as the United Kingdom as well as South Africa and Nigeria in the AU have not adopted the CISG due to varying political and economic interests.[38]

*2.1.3 Barriers to implementation*

This complexity of conflicting interests can further be highlighted by the debates regarding the interpretation of the convention and whether the drafters of the convention sought to include the principle of good faith, the modified consensus approach, and whether the CISG provides for a hardship remedy. Interpretational difficulties and the resort to domestic legal solutions for these difficulties have been identified as a barrier to implementation of the convention.[39]

For instance, the CISG refers to the value of good faith in Article 7(1) of the convention, and it specifically refers to this value regarding the interpretation of the convention. During the legislative process of the CISG, there was division among national representatives on the inclusion of a general concept of good faith, with some expressing concerns about its practical application and potential lack of uniformity due to a homeward trend regarding its interpretation.[40] Despite opposition, others viewed good faith as a universal norm essential for trading relations, especially with developing countries.[41] Eventually, a compromise was reached to incorporate good faith into the interpretation of the CISG without imposing it directly on the parties, leading to the adoption of Article 7(1).[42] Some scholars view good faith solely as an interpretative tool within the CISG, while others argue that it is a fundamental principle guiding international trade relations, applicable directly to parties in individual contracts despite its mention in the provision dedicated to CISG interpretation. [43]

The view that good faith is a fundamental principle of the convention, can be derived from provisions such as Article 16(2)(b) regarding the reasonable reliance of an offeree.[44] Bridge provides a critique of this argument, stating further that good faith can explain why *pacta sunt*

[37] Ibid.
[38] Bruno Zeller op cit note 23 at 4.
[39] Bruno Zeller op cit note 23 at 17.
[40] Michael Bridge 'Good Faith, the Common Law, and the CISG' (2017) 22 *Uniform Law Review* 98 at 112.
[41] Ibid.
[42] Ibid.
[43] Franco Ferrari op cit note 31 at 225.
[44] Ibid.

*servanda* should stand, and in the same breath, why the contracts should be terminated or renegotiated.[45] These objections can be overcome due to the growing body of cases on Unilex on the principle of good faith and further, because the application of the principle is not abstract but can be categorised.[46]

The second controversial aspect regarding the interpretation of the convention is regarding the battle of the different contractual forms and whose standard contractual terms are included in the agreement.[47] The "last shot" principle operates where the standard terms submitted by one party, immediately prior to the other party's commencement of performance under the contract, are deemed to form part of the contract.[48] This occurs without the explicit agreement of the other party to those terms through a statement indicating assent, but rather acceptance due to conduct of the party indicating assent such as subsequent performance in terms of the agreement.[49] On the contrary, the Principles of European Contract Law (PECL), UNIDROIT Principles of International Commercial Contracts (UPICC), and OHADA Preliminary Draft Uniform Act on Contract Law adopt the modified consensus or knock-out approach.[50] This means that conflicting terms are ignored, and only the agreed-upon terms or those in agreement are considered, thus promoting certainty by reflecting the parties' actual intentions.[51]

However, one could argue that the modified consensus approach is not outside the ambit of the CISG. Article 8 of the CISG dictates that statements and conduct of parties should be interpreted according to the intent of the party if known to the other party, or as a reasonable

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[45] Bridge op cit note 40 at 114.

[46] Selected cases by articles and issues available at https://www.unilex.info/cisg /cases/article/7/issue /169#issue_169, accessed on the 29th of March 2024. Good faith in German law can be used as a gap filling technique, it can further limit the rights of contractual parties where they abuse remedies and engage in contradictory conduct. It further aims to restore or correct the contract when applied through hardship remedies. See discussion to this effect in Jacques Du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 3 *Stellenbosch Law Review* 379 at 418. *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 62.

[47] Maria Del Pilar Perales Viscasillas 'Battle of the forms, modification of contract, commercial letters of confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)' (2002) 14 *Pace International Law Review* 153 at 156.

[48] Ibid.

[49] Art 18 of the CISG.

[50] Maria Del Pilar Perales Viscasillas op cit note 47. Art 19 of the CISG. Art 2:209 of the PECL. Art 2.1.22 of the UPICC. Art 19 of the CISG. Art 214 of the OHADA Uniform Act Relating to General Commercial Law. Art 2/19, Art 2/20, Art 2/21 of the Preliminary Draft OHADA Uniform Act on Contract Law.

[51] Giancarlo Spagnolo op cit note 29 at 88.

person of the same kind would understand in the same circumstances.[52] The knock-out approach enhances contractual certainty by reflecting the actual bargain between parties.[53] It is argued that if the parties were asked in advance which default rule should apply, the one in terms of the last shot or the one reflecting the common intention of both parties, the outcome in the case of the knock-out approach would be much closer to the parties' intentions.[54] The CISG does not contain a provision that expressly deals with the battle of the forms, and Article 7 of the CISG stipulates that in these situations, one must settle the matter within the confines of the general principles on which the convention is based.

The value of good faith could be seen as a general principle on which the convention is based, and this value has been used to apply the knock-out approach.[55] As an alternative, the UPICC can further be used as a point of reference for general principles of international law because it is a readily available outcome of comparative analysis, which can be used to fill an internal gap in the CISG.[56] The UPICC can further interact with the CISG if one of the parties to the dispute can prove that one of its principles is so well known that it represents a trade usage.[57] It is therefore regarded as a compromise-compromise outcome which might be more in line with traditional conceptions of African dispute resolution that are more conciliatory.[58] The third aspect of interpretation in the CISG which could create uncertainty is whether the doctrine of hardship is part of the CISG. The key difference is that Article 79 of the CISG only applies to non-performance, while hardship can be invoked even without a breach.[59] The exemption in Article 79 merely exempts parties from damages without altering the contract, while hardship may lead to renegotiation, adaptation, or termination, suggesting that the CISG drafters did not intend to include hardship under Article 79.[60]

The CISG Advisory Council Opinion Number 7 provides clarity in this regard as it indicates that a change in circumstances in a case where there could not have been reasonable foresight

[52] Art 8 of the CISG.
[53] Giancarlo Spagnolo op cit note 29 at 54.
[54] Ibid.
[55] Maria Del Pilar Perales Viscasillas op cit note 47 at 157.
[56] Juraj Kotrusz op cit note 23 at 148.
[57] Ibid at 147.
[58] Adenike Aiyedun & Ada Ordor 'Integrating the traditional with the contemporary in dispute resolution in Africa' (2016) 20 *Law Democracy & Development* 154 at 168.
[59] N. Nwafor & C. Lloyd 'Re-Imagining the Doctrines of Hardship and Exemption/Force Majeure under the CISG and UNIDROIT Principles of International Commercial Contracts' (2019) 8 *GJCL* 52 at 61.
[60] Ibid.

of such a risk, and further, in a case where such a change renders performance excessively onerous, that such a hardship may qualify as an impediment, as Article 79 does not stipulate that an impediment requires objective impossibility.[61] The court or tribunal may further provide relief that is consistent with the general principles.[62] While the language of the CISG is neutral about *rebus sic stantibus*, an interpretation of the CISG favouring the inclusion of hardship in the CISG is pragmatic, because it favours contract maintenance. The complexities above are counteracted by the considerable amount of jurisprudence on the interpretation of the CISG; for instance, on the Unilex database, there are around 210 cases based on the interpretation of Article 7, 93 on the interpretation of Article 8 and 49 based on the interpretation of Article 19.[63]

From the analysis of issues such as good faith, hardship and battle of the forms, it seems that these interpretational difficulties can be overcome through the application of transnational sources.[64] Unfortunately, a further barrier to the adoption of the convention is political will, due to the fact that it is at the bottom of the list of priorities among the government's other legislative priorities dealing with core human rights.[65] Another possible issue is that there could be a lack of lobbying from the business sector due to large corporations that can pay the transactional costs relating to the uncertainty of foreign laws being applicable to the contract.[66] Under the circumstances, SME's and individuals are more likely to benefit from harmonisation of commercial laws (such as the CISG) due to the fact that they cannot cover such transactional costs, and therefore lobbying must happen from industry and not necessarily from business.[67] Lobbying from industry for the adoption of the CISG in African countries might be a bit more problematic since the CISG does not apply to only one specific industry such as textile, or agricultural or consumer goods for instance.[68] Despite this lack of ratification within the AU, it has had an impact on a domestic and regional level which can be seen through its influence

[61] Ibid at 62. CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.
[62] Ibid.
[63] CISG 'Selected Cases by Article & Issues' available at *https://www.unilex.info/cisg/cases/article /all*, accessed on the 21st of December 2023.Unidroit Principles 'Selected Cases by Article & Issues' available at *https://www.unilex.info/principles/cases/article/all*, accessed on the 21st of December 2023.
[64] Sieg Eiselen op cit note 32 at 21.
[65] Ibid at 22. Johanna Hoekstra 'Political Barriers in the Ratification of International Commercial Law Conventions' (2021) 26 *Uniform Law Review* 43 at 54.
[66] Ibid at 55.
[67] Ibid.
[68] Ibid.

on the German BGB as well as the OHADA Uniform Act relating to General Commercial Law (OUAGCL).[69]

The CISG is a good example of a workable global harmonised sales law. Next, attention will turn to national and regional efforts aimed at harmonising sales law, such as the Uniform Commercial Code (UCC) in the United States, the harmonisation of sales law under OHADA in Africa, and in the European Union with the Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods (which amends Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repeals Directive 1999/44/EC).

### *2.2. UCC in the United States*

This section examines a national framework of legal integration to draw lessons that can inform regional efforts to harmonise sales law in Africa. To better understand how such frameworks address the harmonisation of sales law, the UCC in the United States (U.S.) serves as a useful example.

#### *2.2.1 Background and history*

Under the federal structure of the U.S., private law falls under the jurisdiction of individual state governments.[70] Historically, state laws governing contracts and commercial transactions evolved through judicial decisions, resulting in a fragmented and inconsistent system of commercial rules across states that created uncertainty.[71] The UCC was developed to address these challenges. In the 1940s, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission, or ULC) collaborated with the American Law Institute (ALI) to create a comprehensive model code aimed at improving uniformity in commercial law.[72] The ULC, composed of commissioners from each state, operates as an

[69] Ulrich G. Schroeter 'Global Uniform Sales Law - with a European twist? CISG Interaction with EU Law' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 179. Karl Marxen 'The cycle of harmonisation-from domestic laws to the CISG and bank' (2015) 132 *SALJ* 546 at 553 -555.

[70] Sarah Howard Jenkins 'Construing laws governing international and U.S domestic contracts for the sale of goods: a comparative evaluation of the CISG and UCC rules of interpretation' (2012) 26 *Temple International & Comparative Law Journal* 181 at 196.

[71] Ibid.

[72] Michael L. Rustad & Elif Kavusturan 'A Commercial Law for Software Contracting' (2019) 76 *Washington & Lee Law Review* 775 at 777.

independent body with close ties to state governments and the American Bar Association.[73] Underscoring its independence, the ULC's work is shaped by legal experts rather than state political representatives, allowing it to produce neutral and unbiased legal frameworks.[74]

All 50 U.S. states have adopted the UCC, though some have not implemented every article or have adopted updated versions of the code, resulting in slight variations across jurisdictions.[75] The UCC is divided into nine sections covering areas such as sales, leases, negotiable instruments, bank deposits, letters of credit, investment securities, and secured transactions.[76] Its primary purpose is to simplify, clarify, and modernise commercial laws, fostering growth in commercial practices by allowing flexibility while maintaining consistency across jurisdictions.[77]

### *2.2.2 Key principles of article 2 of the UCC*

Article 2 of the UCC specifically governs the sale of goods. It addresses critical aspects of sales contracts, including:

- The form, formation, and modification of contracts,
- General obligations and interpretation of contractual terms,
- Transfer of title, creditor rights, and good-faith purchases,
- Performance standards, and
- Remedies for breach of contract.[78]

The UCC applies to domestic sales of goods, whereas the CISG governs international sales where both parties operate in countries that have ratified the convention or where private

[73] Kathleen Patchel 'Interest group politics, federalism, and the uniform law process: some lessons from the Uniform Commercial Code (1993) 78 *Minnesota Law Review* 83 at 88.
[74] Ibid at 92.
[75] Michael L. Rustad & Elif Kavusturan op cit note 72 at 778.
[76] The American Law Institute and the National Conference of Commissioners on Uniform State Laws 'Uniform Commercial Code' available at https://www.law.cornell.edu/ucc, accessed on the 27th of January 2025. (hereinafter the UCC)
[77] Art 1-102 of the UCC.
[78] Art 2 of the UCC.

international law applies the law of a ratifying country.[79] The UCC is further state law whereas the CISG is considered a federal law in the United States.[80]

*2.2.3 Lessons from the UCC*

First, the harmonisation of sales law in the U.S. was part of a larger effort to unify commercial law, ensuring the involvement of influential stakeholders such as large corporations and financial institutions.[81] Article 2 of the UCC, being industry-neutral, was shaped largely by academic input.[82] Its success in gaining ratification was due in part to its inclusion within a broader commercial law framework that appealed to key interest groups.[83]

Secondly**,** the U.S. experience demonstrates that harmonisation can be achieved through collaboration between expert bodies and subsequent state-level adoption rather than relying solely on centralised political structures.[84] These lessons underscore the importance of engaging influential stakeholders, and aligning harmonisation efforts with broader commercial objectives to achieve legal integration. Having considered the harmonisation of sale law on a global level through the CISG, as well as on a national level in the U. S, one will now consider frameworks for the integration of sale law on a regional scale within Africa as well as the European Union.

*2.3 The harmonisation of sale law in OHADA*

The following section will consider the role of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) in harmonising business laws across francophone Africa. One will further identify the key features of the OUAGCL as well as the OHADA Preliminary Draft Uniform Act on Contract Law (Preliminary Draft) and its effectiveness for Africa. Finally, this section will highlight possible limitations and challenges to harmonisation of sale law within OHADA and beyond.

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[79] Kina Grbie 'Putting the CISG where it belongs: the Uniform Commercial Code' (2012) 29 *Touro Law Review* 173 at 174 & at 176.
[80] Ibid.
[81] Kathleen Patchel op cit note 73 at 125.
[82] Robert E. Scott 'The Uniform Commercial Code and the ongoing quest for an efficient and fair commercial law' in Andrew S Gold & Robert W Gordon (eds) *The American Law Institute A Centennial History* (2023) 279.
[83] Ibid.
[84] Kathleen Patchel op cit note 73 at 93.

### *2.3.1 OHADA in context*

OHADA, primarily adopted in West and Central Africa, initially had 14 member states, and later expanded to 17 with the addition of Guinea, Guinea-Bissau, and the Democratic Republic of Congo in 2012.[85] The framework of harmonisation in OHADA has been described as the pioneer of harmonisation of business laws in Africa.[86] The organisation unifies business law between its member states.[87] At the top, the Conference of Heads of State sets the overarching direction for the organisation and oversees any amendments to the treaty.[88] The Council of Ministers plays a pivotal role in enacting new Uniform Acts and updating existing ones.[89] The permanent secretariat of OHADA prepares Uniform Acts through consultation processes with the governments of the members of the treaty.[90] The treaty further established the Common Court of Justice and Arbitration (CCJA), which gives the Council of Ministers guidance on the adoption of the uniform acts.[91] Secondly, the CCJA oversees and administers arbitral proceedings within its arbitration centre.[92]

A crucial aspect of its harmonisation role is serving as the final court of appeal for decisions by appellate courts in member states concerning the application of the uniform acts, the treaty, and its regulations.[93] This makes the CCJA responsible for ensuring the consistent application of these legal frameworks. The uniform acts become binding once published in the official gazette of OHADA.[94] Domestic laws that are not in line with the OHADA Uniform Acts are repealed.[95] As a result of this provision, the treaty limits the sovereign's law-making powers by entrenching that the Uniform Acts are directly applicable in member states irrespective of the domestic laws.[96]

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[85] Tapiwa Shumba 'Harmonising business laws in the Southern African development community ("SADC"): Should SADC member states join OHADA? (2016) *Stell LR* 59 at 61.
[86] Ibid at 59.
[87] Salvatore Mancuso 'The new African Law: beyond the difference between common Law and civil law' (2008)14 *Annual Journal of International & Comparative Law* 39 at 41.
[88] Jonathan Bashi Rudahindwa 'OHADA and the making of transnational commercial law in Africa' (2018) 11 *Law and Development Review* 371 at 377.
[89] Ibid.
[90] Salvatore Mancuso op cit note 87 at 41.
[91] Art 6 of the Treaty on the harmonization of business law in Africa of 1993 as amended (Hereafter the OHADA Treaty).
[92] Claire Moore Dickerson 'The Ohada Common Court Justice and Arbitration: Exogenous Forces Contributing to its influence' (2016) 79 *Law and Contemporary Problems'* 63 at 64. Art 21 of the OHADA Treaty.
[93] Ibid.
[94] Art 9 of the OHADA Treaty at 381.
[95] Art 10 of the OHADA Treaty.
[96] Jonathan Bashi Rudahindwa op cit note 88 at 371.

The OUAGCL and the Preliminary Draft are two important instruments of unification relating to sale law in West and Central Africa. The Uniform Acts should be an accurate reflection of legal traditions and laws relating to commercial sales in the West and Central African region, as the acts were drafted in consultation with member states.[97] The Uniform Acts on its own do not ensure harmonisation, it is when the texts are interpreted and applied consistently, that it will ensure this outcome.[98] The underlying framework of OHADA through bodies such as the CCJA and ERSUMA underscores the importance of academic literature as well as the publication of cases and laws relating to the Uniform Acts.[99] OHADA has therefore been praised for enhancing legal certainty and predictability, an improved business climate as well as making the law more accessible within the region due to the fact that members can access the law through the publication of the Uniform Acts.[100]

### *2.3.2 Key features of the provisions on sale of goods*

Book VIII of the Uniform Act on General Commercial Law deals with commercial sales and the book applies to contracts of sale of goods between merchants, natural persons, and legal entities, including contracts for the supply of goods intended for manufacturing or production.[101] Book VIII applies to a commercial sale insofar as the contracting parties have their registered office in a country which is a state party to the treaty, or when the rules of private international law lead to the application of the law of a state party.[102] Further, Article 237 states that a sale will be subject to common law rules of sale insofar as it is not inconsistent with the Uniform Act.[103]

The CISG has influenced Book VIII substantially.[104] The OUAGCL has almost identical wording to the CISG under the formation of contract, and also does not have an explicit

[97] Art 7 of the OHADA Treaty.
[98] Juana Coetzee & Mustaqeem de Gama 'Harmonisation of Sales Law: An International and Regional Perspective' 10 *Vindobona Journal of International Commercial Law and Arbitration* 15 at 20.
[99] Ibid.
[100] Tapiwa Shumba op cit note 85 at 70-72.
[101] Art 234 of the OHADA Uniform Act relating to General Commercial Law.
[102] Ibid
[103] Art 236 of the OHADA Uniform Act relating to General Commercial Law.
[104] Roland Djieufack 'Conformity of goods to the contract of sale under the OHADA Uniform Act of General Commercial Law' (2010) 20 *Uniform Law Review* 271 at 272. Aristide Kahindo Nguru 'The Attitude of OHADA Law Countries Towards the CISG' (2016) 3 *JLSD* 99 at 112.

provision for the battle of the forms.[105] The OHADA Uniform Act relating to General Commercial law further does not have an explicit clause relating to hardship and deals only with force majeure, similar to Art 79 of the CISG, although Art 79 of CISG is a bit more all-encompassing.[106] In contrast to the CISG, good faith is an explicit obligation in the Book VIII OUAGCL.[107] On the other hand, the UPICC has influenced the Preliminary Draft.

The background to the Preliminary Draft started in February 2002, when the Permanent Secretariat of OHADA was requested to approach the UNIDROIT to assist it in drafting a uniform act on contract law.[108] The rapporteur completed missions to Senegal, Mali, Burkina-Faso, Gabon, Cameroon, Congo-Brazzaville, Togo, Guinea-Bissau and Guinea-Conakry. Each country had a facilitator who organised meetings between the rapporteur and specialists in the various legal communities.[109] These talks were very successful, and a large range of facts, reactions and suggestions were collated on the state of contract law in each country, on the choice of the UPICC as the model as well, as the uniquely African features to be taken into account in the drafting process.[110] The reception of the countries to the choice of the UPICC was favourable.[111] Unfortunately, the UNIDROIT stopped assisting OHADA and the draft act was never adopted.[112] The project was relaunched by the Council of Ministers in 2007 and the working group submitted a preliminary draft text on the law of obligations in 2015, which focused on conflict of laws in addition to contract law.[113] This preliminary draft has not been adopted and recommendations have been made for the text to be a model law as opposed to a uniform act.[114] In 2021, the matter was placed on the agenda of the Council of Ministers.[115] It remains to be seen whether the text will be finalised.

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[105] For instance, Art 211 of the OHADA Uniform Act relating to General Commercial Law has the same effect as Art 15,16 and 17 of the CISG.
[106] Art 79 of the CISG. Art 267 of the OHADA Uniform Act relating to General Commercial Law.
[107] Art 237 of the OHADA uniform Act relating to General Commercial Law.
[108] Marcel Fontaine 'OHADA Uniform Act On Contract Law Explanatory Notes to the Preliminary Draft' available at *https://www.unidroit.org /English /legalcooperation / OHADA% 20explanatory%20note-e.pdf*, accessed on 5 February 2023 at 7.
[109] Ibid at 4.
[110] Ibid at 5.
[111] Ibid at 7.
[112] Justin Monsenepwo 'Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the codification of party autonomy under OHADA Law.' (2019) 15 *Journal of Private International Law* 162 at 167.
[113] Ibid.
[114] Ibid at 168.
[115] JL Neels op cit note 22 at 6.

It is argued that the Preliminary Draft sought to deal with gaps in the OUAGCL. The Uniform Act relating to General Commercial Law does not make explicit provision for hardship, whereas the Preliminary Draft, in line with the widely recognised UPICC, provides a remedy for hardship.[116] African culture and traditions are often based on consultation, unanimous decision-making and communal values.[117] Concepts of equilibrium and good faith are values and principles that underscore African values such as *Ubuntu*.[118] It was held that the term 'Uniquely African features' were circumstances that had to be taken into account to find the most appropriate terms to include in the harmonised instrument.[119] For instance, a large number of people in the region were illiterate, which meant that the part of the instrument that dealt with the formation of contract, for example, could not overlook this reality.[120]

Therefore, the Book VIII in the OUAGCL could be suitable for use within the AU in order to govern matters related to the sale of goods, if further complemented by the Preliminary Draft or if amended with explicit provision for hardship as well as the inclusion of African values (by making explicit reference to such values or taking into account African particularities as in the Preliminary Draft). Having regard to its substantive efficiency one will further have to evaluate possible challenges posed by the underlying integration framework supporting the harmonisation of sale law within OHADA and beyond.

### *2.3.3 Limitations and challenges to harmonisation of sale law in OHADA and beyond*

Firstly, within OHADA, the interpretations given to the Uniform Acts by the CCJA is difficult to obtain even for the most senior of judges of national courts in both anglophone and francophone regions.[121] A further issue is its French trend to interpretation as opposed to the inclusion of African norms which limits the authority of the CCJA within the region.[122]

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[116] Art 6/23 of the Preliminary Draft OHADA Uniform Act on Contract Law. Art 6.2.2 of the UPICC.
[117] Salvatore Mancuso 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 *Annual Survey of International and Comparative Law* 175.
[118] *S v Makwanyane and Another 1995* (6) BCLR 665 (CC) para 224 defines *Ubuntu* as a culture which emphasises communitarianism. Reasonableness, fairness and justice constitute good faith, and this can similarly not be separated from public policy, which is informed by constitutional values such as Ubuntu *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 80 and 159.
[119] Marcel Fontaine 'Law harmonization and local specificities - a case study: OHADA and the law of contracts' (2013) 18 *Uniform Law Review* 50 at 52.
[120] Ibid.
[121] Claire Moore Dickerson op cit note 92 at 83.
[122] Ibid.

Secondly, there is a hesitation by national courts to refer business cases to the CCJA due to financial barriers and concerns over losing significant cases, reflecting a desire to maintain national sovereignty that may hinder OHADA's progress.[123] Most of the cases referred to the CCJA are from the Ivory Coast near Abidjan where the CCJA is located and the court does not utilise its Article 19 discretion to have sessions outside in other member states.[124] Further, the CCJA was initially praised for its efficiency as a centralised institution but also faced criticism for potential conflicts of interest.[125] The same judges who handle administrative tasks, such as forming arbitral tribunals and assessing arbitration agreements later rule on challenges or requests for enforcement.[126] Arbitral centres within OHADA have a low caseload due to lack of funding and therefore the mechanism is underutilised.[127]

Regarding members beyond OHADA, the OHADA Treaty welcomes members of the AU in terms of Article 53 through allowing accession to the treaty without approval. This underscores its continental goal of harmonisation.[128] A significant challenge is the fact that other members of the AU, perhaps still view OHADA laws as a French and civil law solution as opposed to a transnational African solution to commercial laws. This is in part due to the fact that even though the working language of the treaty now includes French, Spanish, English as well as Portuguese, if there is a conflict between a French Uniform Act and a translated act, the French provision will prevail.[129] The English translations of the OHADA Uniform Acts have further been criticised as imprecise because they fail to accurately convey common law concepts, forcing judges to interpret them by approximation.[130] As a result, some courts continue applying outdated pre-OHADA laws.[131]

Lastly, a possible barrier to the accession by other members of the AU, is the fact that there are no provisions in the OHADA Treaty that allows member states to make reservations.[132]

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[123] Babatunde Fagbayibo 'Towards the Harmonisation of laws in Africa: is OHADA the way to go' (2009) 42 *Comparative and International Law Journal of Southern Africa* 309 at 315. Tapiwa Shumba op cit note 85 at 74.
[124] Ibid.
[125] Michael W. Buhler 'Out of Africa: The 2018 OHADA arbitration and mediation law reform' (2018) 35 *Journal of International Arbitration* 517 at 527.
[126] Ibid.
[127] Ibid at 528.
[128] Tapiwa Shumba op cit note 85 at 81.
[129] Babatunde Fagbayibo op cit note 123 at 317-318.
[130] Akere T. Muna 'Is OHADA "Common Law Friendly"?' (2001) 3 *International Law FORUM du Dtroit International* 172 at 175.
[131] Ibid.
[132] Tapiwa Shumba op cit note 85 at 81.

However, there are promising developments ahead. Instead of adhering strictly to the traditional French civil law, the creators of the Preliminary Draft chose a framework inspired by the UPICC.[133] These principles are not solely based on common law or civil law but represent a true global blend of key contract law concepts which could mean that there is more of a likelihood of common law jurisdictions becoming part of OHADA.[134]

### *2.4 Harmonisation of sale law in the European Union*

The Treaty on the functioning of the EU in paragraph 288, stipulates that, in order for the EU to achieve its objectives, the institutions of the union shall adopt regulations, and directives, including decisions, recommendations as well as opinions.[135] Regulations are generally applicable and entirely binding in every member state, whereas directives bind member states to achieve a certain result; it therefore leaves it to the domestic legislatures to decide how it will bring its laws and policy in line with the directives.[136] Not all directives are necessarily flexible and may include provisions for total harmonisation and not just a minimum amount of harmonisation.[137] The EU law relating to the sale of goods, are governed by the Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods which focuses on consumer protection and business to consumer sales.[138] Regarding business-to-business sales, the CISG has been adopted by all EU member states except Ireland and Malta, making it a key framework for cross-border commercial sales within the EU.[139] The directive applies when a buyer purchases goods for personal use, whereas the CISG explicitly excludes goods bought for personal, family, or household use.[140] Because of this distinction, the two legal frameworks

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[133] Babatunde Fagbayibo op cit note 123 at 317-318.
[134] Ibid.
[135] Art 288 of *Consolidated Versions of the Treaty on the functioning of the European Union and The Treaty Establishing the European Community* (2012) Official Journal of the European Union 326/12.
[136] John Fairhurst *The Law of the European Union* 8 ed (2010) 65.
[137] Tomasz P Milej 'Legal Harmonisation in Regional Economic Communities - The Case of the European Union' in Johannes Döveling, Hamudi I. Majamba & Richard Frimpong Oppong et al (eds) *Harmonisation of Laws in the East African Community The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (2018)142-144. Bruno de Witte 'Legal Instruments, Decision-Making and EU-Finances' in PJG Kepteyn et al *The Law of the European Union and the European Communities* 4ed (2008) at 317.
[138] Art 1 of the Directive 2019/771 of the European Parliament and the Council of 2019 on certain aspects concerning contracts for the sale of goods, available at https://eur-lex.europa.eu/legal content/EN/TXT /?uri=CELEX% 3A32019L0771&qid=1738581359752, accessed on the 3rd of February 2025. (Hereafter Directive (EU) 2019/771).
[139] Katarzyna Kryla-Cudna 'The update obligation for smart products under the EU Sales of Goods Directive: the seller's right of redress and the CISG' (2024) 29 *Uniform Law Review* 287 at 288.
[140] Ibid.

do not overlap, ensuring that commercial and consumer sales are regulated separately within the EU.[141]

### *2.4.1 The integration of consumer law with the harmonisation of sale law*

The intersection of consumer law and the harmonisation of sale law took place with the development of the Common European Sales Law. In 2003, the commission introduced an action plan aimed at enhancing European Contract Law coherence, advocating for a Common Frame of Reference that leaned towards a non-binding approach akin to restatements.[142] Four years after the submission of the Draft Common Frame of Reference, the European Commission put forward a proposal for a regulation regarding a Common European Sales Law, known as the CESL.[143] This law was partially based on the Draft Common Frame of Reference, which in turn was heavily informed by the Principles of European Contract Law.[144] The proposed regulation of a CESL aimed to establish an optional EU-wide sales law to facilitate digital product purchases, stimulate cross-border trade, and enhance consumer trust in international transactions, benefiting consumers and SMEs.[145] The CESL raised debates over its optional nature as well as its legal basis under Article 114 TFEU, amidst concerns about disadvantaging consumers.[146]

The Commission placed the CESL proposal on the list of proposals for modification or withdrawal in December 2014, aiming to boost e-commerce.[147] Unfortunately, after five years of inactivity, the ministers of justice of Austria, Finland, France, Germany, Netherlands and the

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[141] Ibid.

[142] Communication from the Commission to the European Parliament and the Council 'A more coherent European contract law- an action plan' (2003) 68 COM 1.

[143] Christian von Bar, Eric Clive & Hans Schulte Nolke *Principles, Definitions and Model Rules of European Private Law* outline ed (2009) 1. European Commission 'Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law' (2011) 635 COM 1.

[144] Ibid. Larry A. Di Matteo 'Common European Sales Law: a critique of its rationales, functions, and unanswered questions' (2012) 11 *Journal of International Trade Law and Policy* 222 at 225. Soterios Loizou 'International Sales Law in Europe: Pitfalls & Opportunities' (2021) 54 *Cornell International Law Journal* 553 at 607.

[145] European Commission 'Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law' (2011) 635 COM 1 at 25.

[146] Law Commission & Scottish Law Commission *an Optional Common European Sales Law: Advantages and Problems: advice to the UK Government* (2011) 1 at 6-13.

[147] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions 'Commission work programme 2015: A new start' (2014) COM 910.

United Kingdom requested the withdrawal of the CESL in October 2019.[148] The CESL was controversial due to the fact that it was an optional instrument and there was a strong doubt whether businesses would in fact choose the CESL as the applicable law to the contract which would negatively impact consumers.[149]

During this time aspects such as delivery conditions, pre-contractual information requirements for distance and off-premises contracts, and the right of withdrawal was fully standardised under Directive 2011/83/EU.[150] Unfortunately, other essential contractual aspects—including conformity criteria, remedies for non-conformity, and how these remedies are applied—were only subject to minimum harmonisation under Directive 1999/44/EC.[151] This allowed member states to implement additional consumer protection measures beyond the Union's standards, leading to variations in national regulations.[152] To address these inconsistencies, rather than adopting the Common European Sales Law (CESL), the EU introduced Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.[153] This new directive took a maximum harmonisation approach, replacing the minimum harmonisation framework of Directive 1999/44/EC.[154] By doing so, it aims to create a more uniform legal framework across Member States, reducing fragmentation and ensuring a higher level of consumer protection throughout the Union.[155]

The development in the EU is significant in that the EU's initial approach of minimum harmonisation led to variations in national regulations, as individual states introduced additional consumer protection measures. Africa must strike a balance between allowing national flexibility and ensuring certainty to prevent divergence that could hinder integration.

[148] Soterios Loizou op cit note 144 at 558.
[149] Larry A. Di Matteo op cit note 144 at 236.
[150] Para 6 of Directive (EU) 2019/771.
[151] Ibid.
[152] Ibid.
[153] Soterios Loizou op cit note 144 at 558.
[154] European Parliament 'Briefing EU Legislation in Progress' available at chrome extension: https://www.europarl.europa.eu /RegData/etudes/BRIE/2019/635594 /EPRS_BRI(2019)635594_EN.pdf, accessed on the 4th of February 2025 at 3.
[155] Ibid at 5.

## 3. CHALLENGES TO THE HARMONISATION OF SALE LAW IN AFRICA

Firstly, when evaluating OHADA, there are various institutional challenges that influence the enforcement of harmonised laws. This can be clearly examined by the fact that national courts outside of Abidjan do not refer matters to the CCJA due to financial implications.[156] The CCJA has an immense backlog due to political conflict that took place within the area.[157] This indicates that an enforcement mechanism should withstand political unrest as well as financial barriers to access the mechanism which will require funding.

Secondly, the extent of the impact of colonial legacies on the existing legal framework poses a significant challenge to the harmonisation project. This is due to the fact that the legal landscape of Africa is marked by significant diversity. For instance, the former British colonies adhere to the common-law tradition rooted in English law, whereas former French, Belgian, Portuguese, and Italian colonies primarily operate within the civil-law tradition, with French law exerting predominant influence.[158] Furthermore, several African states, including Cameroon and Mauritania, maintain mixed legal systems that blend common-law and civil-law principles, while countries in Southern Africa, such as Namibia, Zimbabwe, and South Africa, apply Roman-Dutch law shaped by English legal principles.[159] Despite these classifications there are even further differences in socio-economic conditions, historical development, and legal reform trajectories. [160]

A further challenge is the relevance of customary and informal trade practices in the development of harmonised laws. For instance, the success of harmonisation will depend on the authority the instrument has over the individuals it governs.[161] For instance, when creating the Preliminary Draft, it was held that one should take into account unique African peculiarities.[162] Coleman stated that the emphasis on party autonomy above African values to ensure certainty and predictability in commercial relations undermines the calls by the courts

[156] Babatunde Fagbayibo op cit note 123 at 315. Tapiwa Shumba op cit note 85 at 74.
[157] Ibid.
[158] Paulina Dlagnekova op cit note 8 at 21-22.
[159] Ibid.
[160] Ibid.
[161] Claire Moore Dickerson op cit note 92 at 87.
[162] Marcel Fontaine op cit note 119 at 52.

of African countries to integrate African values in African jurisprudence.[163] He further stated that;

> *'Accordingly, the general judicial approach that must be adopted is carefully balancing and considering the economic significance of allowing parties to advance their economic interests and using the values underpinning African philosophy to check the obscene excesses of individual freedom and autonomy'*[164]

## 4. THE CASE FOR A HARMONISED AFRICAN SALE LAW

From the analysis of the available frameworks for harmonised sales law, the CISG that was effectively implemented at a global level, the UCC framework that was implemented on a national level in the US, OHADA in francophone countries and the directives in the European Union, the OHADA framework offers a solution for integration of sales law in Africa.

The CISG has made a commendable global effort towards the harmonisation of sale law, and the interpretations on the value of good faith, hardship and the battle of the forms expanded above could be in line with African norms. It could therefore be used as a model for a unique African harmonised sale law. However, this does not solve the problem relating to political will and the significant lobbying that will have to take place in Africa to ensure continental adoption as was the issue with the CISG as it currently stands. Taking cues from the UCC, the harmonised instrument could be encapsulated with other harmonised commercial laws to ensure lobbying from big business continent wide.[165] This would further ensure the involvement of multiple stakeholders such as legal experts, businesses and trade bodies.[166]

Next one should consider possibly who should have the mandate to develop such a unique harmonised sale law? Although the UCC indicates decentralised methods of harmonisation can be effective, it will be costly and timely if each African country's legislature had to enact the instrument into domestic law. It could be more efficient if a centralised institution created laws with direct effect. The EU and OHADA, as supra-national organisations, can enact

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[163] Theophilus Edwin Coleman 'Reassessing the African Principles on the Law Applicable to International Commercial Contracts through the prism of African traditional values' (2024) *TSAR* 75 at 92.
[164] Ibid at 93.
[165] Robert E. Scott op cit note 82 at 279.
[166] Ibid.

regulations that have direct domestic legal effect.[167] Whereas international organisations like the UN or the AU can only bind member states, if a member state signs, or ratifies a treaty or if the member enacts legislation incorporating such law in domestic law.[168] This ultimately depends on the law of the country.[169] Successful unification requires significant capacity and resources posing a significant challenge for Africa as it took the EU decades to be established.[170] Therefore, it could be beneficial for members of the African Union to utilise the existing framework established by OHADA through becoming members of OHADA.

However, OHADA has its challenges as identified above. Overcoming such challenges requires resources and concerted effort. Within Africa, there are significant concerns, such as the need to end conflicts, ensure food security, and enhance Africa's role in global sustainable energy.[171] Given these pressing issues, why should the harmonisation of sales law be prioritised by the members of the AU?

Harmonising sales law will directly support the AfCFTA by fostering legal certainty and eliminating non-tariff barriers to trade.[172] The AfCFTA has created a unified market of over 1.3 billion people and a combined GDP of $3.4 trillion, making its success critical to the implementation of the African monetary union and single African currency transforming Africa into a global economic powerhouse, as envisaged by Agenda 2063.[173]

In addition to reducing transaction costs, a harmonised sales law would promote unity and regional integration, facilitating the flow of resources and knowledge across the continent.[174] It would also help establish clearer African commercial norms, incorporating African values

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[167] Art 249 of *Consolidated Versions of the Treaty on the functioning of the European Union and The Treaty Establishing the European Community* (2012) Official Journal of the European Union 326/12. Art 10 of the OHADA Treaty.

[168] Art 11 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations Vienna, 21 March 1986. s231 of the Constitution of the Republic of South Africa, 1996. In South Africa, the power to conclude treaties is shared between the Executive and Parliament.

[169] Ibid.

[170] See development from the aftermath of the second world war in John Fairhurst op cit note 136 at 11. The Treaty of the European Union of 1993.

[171] Goals and Priority Areas of Agenda 2063, available at https://au.int/agenda2063/goals, accessed on the 4th of February 2025.

[172] Richard Frimpong Oppong op cit note 21 at 112.

[173] W Shumba op cit note 10 at 23.

[174] Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* (2011) at 108.

and addressing region-specific issues.[175] This alignment would strengthen the concept of a shared African identity within the context of commerce.[176]

## 5. RECOMMENDATIONS

Having regard to the lack of political will regarding the further adoption of the CISG in Africa, and the hesitancy of common law countries to join OHADA as it currently stands, it is evident that a harmonised African sale law should be developed specifically for the AU based on the OHADA framework with adjustments to overcome such hesitancy.

Members of the African Union can utilise the existing framework of OHADA for the harmonisation of laws and more specifically the harmonisation of sale law within the AU as a whole if the institutions of OHADA are stregthened.[177] In order to encourage further membership, one could further amend the OHADA treaty and the Uniform acts in order to allow for reservations by states, thereby being more akin to harmonisation as opposed to unification, and preserving state sovereignty.[178] From a substantive perspective, the Book VIII in the OUAGCL could be suitable for use within the AU as it already used the CISG as a model in order to govern matters related to the sale of goods, if further complemented by the Preliminary Draft or if amended with explicit provision for hardship as well as the inclusion of African values (by making explicit reference to such values or taking into account African particularities as in the Preliminary Draft). This unique harmonised sale law for Africa will replace book VIII, amongst other possible revisions to the OUAGCL since the provisions must have continent wide input and not just the original francophone members. This will help to overcome the challenge relating to the scepticism by member states regarding the French influence on the framework. Perceived as a revived continental project, OHADA could attract additional funding from the World bank and the African bank. This revived approach can further focus on a separate Uniform Act relating to sale of goods between merchants and consumers as in the European Union. As identified by Shumba, OHADA will need to co-

[175] Ibid.
[176] Ibid.
[177] Tapiwa Shumba op cit note 85 at 85.
[178] Ibid at 83.

operate with members of the African Union as well as each regional economic community in Africa to guard against regional incompatibilities.[179]

What would then happen should the Pan African Parliament of the AU enact regulations with similar content to the Uniform Acts and what will the role of the Court of Justice of the African Union be? Although, the answer being beyond the scope of this research, one could recommend that the regulations or the uniform acts make provision for hierarchy of laws between the two. To date, the Parliament has only acted as a consultative body and has not exercised legislative powers.[180] With regards to the courts, the Protocol on the Statute of the African Court of Justice and Human Rights aims to merge two African Union courts: the African Court on Human and Peoples' Rights (established in 2004) and the Court of Justice of the African Union (established in 2009), though the latter is not yet operational.[181] While the new protocol has been adopted, it is not yet in force due to insufficient ratifications.[182] The new protocol stipulates that the court can hear matters and appeals referred to it in any other agreements that the member states or the regional economic communities or other international organisations recognised by the AU may conclude among themselves or with the AU.[183] Currently, the OHADA treaty grants jurisdiction to the CCJA.[184] However, OHADA could amend its treaty to allow appeals to the AU court in the future.

## 6. CONCLUSION

The challenges facing the harmonisation of sales law in Africa are rooted in institutional constraints, legal diversity, and socio-economic disparities. Africa's colonial legal legacy complicates the harmonisation process.[185] However, the harmonisation of sales law in Africa remains a priority, particularly in supporting the AfCFTA because a harmonised sales law would promote economic integration and facilitate cross-border transactions. This is possible through the amendment of and a wider adoption of the OHADA framework within the AU and

[179] Ibid at 86.
[180] Oppong op cit note 174 at 170.
[181] Ibid at 171.
[182] The Protocol on amendments to the Protocol on the statute of the African Court of Justice and Human Rights (2014), available at https://www.african-court.org/wpafc/documents/, accessed on the 27th of March 2025. (Hereafter the 'New Protocol')
[183] Art 3 of the New Protocol.
[184] Art 14 of the OHADA Treaty.
[185] Paulina Dlagnekova op cit note 8 at 21-22. Oppong op cit note 174 at 108.

drawing learnings from the global, regional, cross-border and national frameworks. It is recommended that a revised unique harmonised sales law for Africa replace Book VIII of the OUAGCL amongst other possible revisions, ensuring continent-wide input addressing concerns over French influence. OHADA offers a promising institutional framework that could be expanded to serve as the foundation for a broader African initiative. Africa's approach should consider direct effect mechanisms to avoid prolonged legislative adoption processes in individual countries. The revival of the OHADA framework across the African continent can be funded by institutions like the World Bank and African Bank considering the benefits it would reap for the continent and the global economy. Ultimately, policymakers and members of the AU, can no longer exclude the harmonisation of sale law in Africa from the political agenda and the success of a unified African economy is dependent on it.

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