The harmonisation of international trade laws in Africa, with reference to the European Example

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LIST OF ABBREVIATIONS AND ACRONYMS

AEC	African Economic Community
AU	African Union
CCJA	OHADA Common Court of Justice and Arbitration
CEN-SAD	Economic Community of Sahelo-Saharian States
CFR	Common Frame of Reference
CISG	Vienna Convention on Contracts for the International Sale of Goods
CMI	*Comité Maritime International* (International Maritime Committee)
CoE	Council of Europe
COMESA	Common Market of East and Southern Africa
DCFR	Draft Common Frame of Reference
EAC	East African Community
EC	European Community
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
ICC	International Chamber of Commerce
IGAD	Intergovernmental Authority for Development
OAU	Organisation for African Unity
OHADA	*Organisation pour l'Harmonisation du Droit des Affaires en Afrique* (Organisation for the Harmonisation of Business Laws in Africa)

OTIF	*Organisation Intergouvernementale Pour Les Transports Internationaux Ferroviaires* (Intergovernmental Organisation for international Carriage by Rail)
PAP	Pan-African Parliament
PECL	Principles of European Contract Law
REC	Regional Economic Community
SADC	Southern African Development Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UMA	*Union du Maghreb Arabe* (Arab Maghreb Union)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission on Trade and Development
UNIDROIT	*Institut International pour l'Unification du Droit* (International Institute for the Unification of Private Law)

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1 HARMONISATION: DEFINITIONS AND CONCEPTS

1.1 Introduction

The issue of legal harmonisation is important for the Africa continent in the light of the current fragmentation of legal systems and the need to realise of the idea of African Unity and the African Economic Community.[1] A key issue in Africa's economic integration will be overcoming the challenges posed by differences in legal traditions and laws. Differences in national laws will become more significant as economic integration progresses and cross-border transactions (international trade) increase. The harmonisation of laws is an important part of the legal infrastructure of integrated economies, and will be a key component of Africa's economic integration process.[2]

The paper will discuss the harmonisation if international trade laws in Africa, with reference to the European example, as the most advanced model of legal harmonisation. The first part of the paper will define certain concepts and focus on the various techniques, approaches and instruments that are generally used in the harmonisation process. The second part will compare the African Union (AU), which provides the regulatory framework for the harmonisation of laws in Africa, with the European Union (EU), which in turn provides the most advanced model of regional integration. Thereafter the extent of the divergence between the laws of AU Member States will be discussed, as well as the current efforts towards harmonisation of international trade laws.

The third and fourth parts will look at the two different methods that have been suggested to achieve the harmonisation of international trade laws, namely the harmonisation of private international law rules and the harmonisation of substantive laws rules that apply to international business transactions. Mention will also be made of the relevant international organisations in each of the respective areas and their prospective role in the harmonisation process.

The paper will conclude with a discussion of certain measures which may be adopted to achieve a greater degree of harmonisation on the continent.

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[1] 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 312.

[2] Richard Frimpong Oppong *Relational issues of law and economic integration in Africa – perspectives from constitutional, public and private international law* (2009) PhD Thesis, University of British Columbia at 110.

1.2 Definitions and concepts

1.2.1 Law of International Trade

For the purposes of the paper the definition of 'law of international trade' used in the Report of the United Nations on the Progressive Development of the law of international trade[3] will be used, namely 'the body of rules governing commercial relationships of a private law nature involving different countries'.[4] Commercial relationships of a purely domestic relationship or of a public law nature therefore fall outside the scope of the paper.

1.2.2 Harmonisation

In its most common modern form, harmonisation (also referred to as 'approximation' or 'legal integration') brings about a convergence or co-ordination of different legal provisions or systems by eliminating the major differences between them.[5] Harmonisation can involve the adoption a legal system in place of another, which can be voluntary or coerced. Alternatively, harmonisation may require that all state parties to an agreement are obliged to amend their laws to conform to their mutual agreement, whether such agreement is unanimous (the usual type of this arrangement, as is the case in OHADA), or approved by a majority (applicable to some forms of legislation in the EU).[6]

Different methods of harmonisation may be identified. *Total harmonisation* does not allow any derogation in the anticipated area, except to the extent permitted in the harmonising instrument. *Optional harmonisation* allows parties to apply national norms *or* community norms, while some instruments also allow member states to exercise an option, therefore providing for opting-out. *Partial harmonisation* regulates some aspect of the subject, for example those rule which apply in cross-border transactions. *Minimum harmonisation* allows Member States to provide for more stringent rules and *alternative harmonisation* allows Member States to choose between alternative methods of harmonisation.[7]

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[3] United Nations *Progressive Development of the law on international trade: Report of the Secretary-General of the United Nations* (1966). Available at http://www.jus.uio.no/lm/un.sg.report.itl.development.1966 [Accessed 5 September 2010].
[4] UN Report (note 3) at 5.
[5] Larry Catá Backer (ed) *Harmonising law in an era of globalisation – convergence, divergence and resistance* (2007) Carolina Academic Press, North Carolina at 13.
[6] Backer (note 5) at 13-14.
[7] Eugene Stewart *Principles of Law Harmonisation and Approximation*. Available at http://cstp.undp.ba/download.aspx?id=736 [Accessed 2 September 2010].

In contrast to harmonisation, *unification* refers to the process whereby conflicting rules of two or more legal systems are replaced by a single supranational rule.[8]

1.2.3 Regional Integration and the European Model

Regional integration is the undertaking by geographically proximate states to achieve 'peace through cooperation, security from neighbouring or distant enemies, the creation of greater economic opportunities, shared values, convenience [and] efficiency'.[9] Regional initiatives, in spite of their regional limited scope, are believed to be the most successful examples of organisations promoting the harmonisation of law. The integration of markets on a regional basis has encouraged member states towards legal harmonisation and integration, in order to regulate and organise the whole common economic structure.[10] Legal integration is critical to the progress of integration and will promote intra regional trade and consolidate economic and political integration.[11]

In many respects the European Union (EU) represents the most advanced example of regional integration in the modern international nation state system. The African Union (AU) so far represents a less successful effort towards integration. As the AU is to be modelled on the EU according to some of its founding members,[12] the EU will be used as model for the African integration process. Various features of the two organisations, as well as the current efforts towards the harmonisation laws will be compared to draw inspiration for the African process.

The focus of this paper is therefore not on regional integration in its broad sphere, but on the harmonisation of international trade laws within the context of the regional integration currently taking place on the African continent, with reference to the European example.

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[8] J Church et al *Introduction to Comparative Law* (2007) Department of Mercantile Law, University of South Africa, Pretoria at 22.

[9] Gerrit Olivier and Michele Olivier 'Models of regional integration: the European Union and the African Union' (2004) 19 *SAPR/PL* 351 at 351.

[10] Silvia Fazio *The harmonisation of international commercial law* (2007) Kluwer Law International, The Netherlands at 14.

[11] Munda Ndulo 'The need for harmonisation of trade laws in the Southern Africa Development Community (SADC)' (1996) 4 *African Yearbook of International Law* 195 at 196.

[12] Olivier and Olivier (note 9) at 351.

1.2.4 Supranationalism

International organisations operate on either an intergovernmental or supranational basis, with intergovernmental organisations having the possibility of evolving into a supranational organisation. [13]

The term 'supranationalism' has been defined as 'the development of authoritative institutions of governance and network of policy-making activity above the nation state'. [14] A supranational organisation is a *sui generis* international organisation which acts independently of its member states. It takes binding decisions and is responsible for the supervision and implementation of these decisions. It constitutes a separate legal order.[15]

In an analysis of supranationalism within the EU, a distinction can be made between normative and decisional supranationalism. [16]

Normative supranationalism entails the relationship and hierarchy which exists between the EU policies and legal measures, and competing policies and legal measures of member states. [17] In determining the existence of normative supranationalism within an organisation, the legal inquiry should be based on whether, in respect of specific areas of common interest and competence, the policies and laws of the organisation have direct effect in member states. The doctrine of direct effect is described as 'a provision which is clear and unconditional and bestows a legal right on a natural or legal person, exercisable against another natural person, or against the authorities of a member state'.[18]

The other parts of the enquiry are whether the laws of the organisation are superior to the laws of the member states, and whether member states are pre-empted from enacting contradictory legislation. [19] The doctrine of supremacy is defined as 'the capacity of that norm of Community law to overrule inconsistent norms of national law in domestic law proceedings'.[20]

Decisional supranationalism relates to the institutional framework and the autonomy of the institution in decision-making procedures and policy formulation. At

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[13] B Fagbayibo 'A supranational African Union? Gazing into the crystal ball' 2008 *De Jure* 493 at 494.
[14] Rosamund *Theories of European Integration* (2000) at 204 in Fagbayibo (note 13) at 495.
[15] Fagbayibo (note 13) at 495.
[16] Joseph Weiler 'The community system: the dual character of supranationalism' 1981 *Yearbook of European Law at* 271.
[17] Weiler (note16) at 271.
[18] *Ibid.*
[19] Fagbayibo (note 13) at 496.
[20] *Ibid.*

the centre of this autonomy is the majority voting system, which ensures that as long as the voting requirement is satisfied, member states will be bound by a decision, whether or not they support it. [21]

When the AU is considered, it appears that while it has little or no measure of normative supranationalism, there is an element of decisional supranationalism. The AU Assembly can ratify decisions by consensus, or failing which, by a two-thirds majority of the AU Member States.[22]

It is the combination of normative and decisional supranationalism that distinguishes a supranational organisation from other intergovernmental organisations. Based on the absence of normative supranationalism within the institutional framework of the AU, it can therefore only be classified as an inter-governmental organisation, although it has the potential to evolve into a supranational organisation.[23]

Based on the above requirements, the Organisation for the Harmonisation of Business Laws in Africa (OHADA) may also be regarded as a supranational organisation. The OHADA Treaty provides a mechanism for promulgating new OHADA laws that is automatically and immediately applicable in member states, without the need for local enactment. [24] The Treaty also creates a single supranational court (Common Court of Justice and Arbitration, CCJA) to ensure uniform interpretation of OHADA laws.[25] The CCJA is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national systems. [26]

It is significant that the two institutions that achieved the greatest level of harmonisation, namely the EU and OHADA, are both supranational organisations. The fact that the AU is not a supranational organisation will result in important differences that will have to be kept in mind when the EU is used is model to achieve harmonisation in Africa.

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[21] Weiler (note 16) at 271.
[22] Fagbayibo (note 13) at 498.
[23] Fagbayibo (note 13) at 499.
[24] CM Dickerson 'OHADA calls the tune' (2005) 44 *Columbia Journal of Transitional Law* 17 at 65.
[25] Dickerson (note 24) at 21.
[26] Dickerson (note 24) at 56.

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[21] Weiler (note 16) at 271.
[22] Fagbayibo (note 13) at 498.
[23] Fagbayibo (note 13) at 499.
[24] CM Dickerson 'OHADA calls the tune' (2005) 44 *Columbia Journal of Transitional Law 17* at 65.
[25] Dickerson (note 24) at 21.
[26] Dickerson (note 24) at 56.

1.3 Problem Statement

For a long time, economic operators have been suspicious toward African countries due to the juridical and judicial insecurity currently prevalent among them. This juridical insecurity stems from the overall antiquity of the laws in force in almost all African countries, the inadequacy of the texts with respect to the needs of the modern economy, and the extreme delay, or even the absence of publication of legal rules. The judicial insecurity mainly comes from the decay in justice due to the slowness of cases, the unpredictability of courts, the corruption of the judicial system, and the difficulty of enforcing the judgments.[27]

The above issues are what legal harmonisation seeks to redress. Harmonisation reduces the legal risks related to international business, and promotes greater legal certainty and predictability, thereby making international legal business less complex.[28] Harmonisation brings about a better understanding of the significance of certain concepts in other legal systems, their modes of rule formation and their recognition of authoritative sources. It aims to bring the effects of a type of transaction in one legal system as close as possible to the effects of similar transactions under the laws of other countries.[29]

A jurisdiction where the judicial system is fast and efficient and where security is guaranteed is attractive to local and international investors and traders. If investors and traders are not convinced that the law gives real protection and remedies, they will not invest or trade.[30] There is a direct relationship between the legal framework and the attitudes of foreign investors and traders.[31]

1.4 Approaches to harmonisation

Two different approaches have been followed to reduce the conflicts and divergences in international trade law rules. The first approach relates to private international law rules and the second to substantive law rules.[32]

The first approach harmonis the rules which regulates three issues: the choice of competing substantive laws; the rules by which the competence of courts is

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[27] Salvatore Mancuso 'The new African law: beyond the differences between common law and civil law' (2008) 14 *Annual Survey of International and Comparative Law* 39 at 39-40.
[28] Church (note 8) at 23.
[29] *Ibid.*
[30] Loukas A Mistelis 'Regulatory Aspects: Globalization, harmonisation, legal transplants and law reform – some fundamental observations' (2000) 34 *The International Lawyer* 1055 at 1056.
[31] Mistelis (note 30) at 1057.
[32] UN Report (note 4) at 6.

determined and the recognition and enforcement of foreign awards.[33] This approach implies that the substantive laws of the states remain intact, but harmonised choice-of-law, jurisdiction and foreign recognition and enforcement rules are provided.[34] This technique and the contributions of the relevant international organisations will be discussed in Part 4 below.

The second technique relates to the harmonisation of substantive law rules of states.[35] This normally requires greater effort to achieve than the harmonisation private international law rules.[36] This technique and the contributions of the relevant international organisations will be discussed in Part 5 below.

1.5 Factors determining eligibility of subjects

Not all subjects are suited to be the object of harmonisation. The eligibility of a subject depends on the willingness of States to accept changes to their municipal law rules in favour of a new international solution on that subject. Legal and other arguments in favour of harmonisation have to be weighed carefully against these considerations. Similar considerations will also tend to determine whether they should be restricted to truly cross-border situations or extended to cover also purely internal situations.[37]

New technologies and commercial practices call for new solutions. Where transactions tend to be transnational by nature, these are generally regarded as areas that should be harmonised. [38]

Within the area of international trade law some subjects which have been identified as suited to the object of harmonisation. These include international sale of goods (formation of contracts; agency arrangements; exclusive sale arrangements), negotiable instruments and banker's commercial credits, insurance, transportation (carriage of goods by sea, carriage of goods by air, carriage of goods by road and rail and carriage of goods by inland waterways) and commercial arbitration.[39]

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[33] UN Report (note 4) at 7.
[34] Oppong (note 2) at 112.
[35] UN Report (note 4) at 7.
[36] Oppong (note 2) at 113.
[37] UNIDROIT 'UNIDROIT – an overview'. Available at http://www.unidroit.org/dynasite.cfm?dsmid=103284 [Accessed 20 September 2010].
[38] *Ibid.*
[39] UN Report (note 4) at 6

1.6 Instruments for harmonisation of law

1.6.1 Soft Law

Soft law currently constitutes one of the most significant sources of harmonised instruments. Model laws, restatements, legal guides and model rules, is increasingly used as an instrument to regulate international relations.[40]

Soft law has a non-binding nature, and therefore facilitate the conclusion of an agreement. The consequences of non-compliance with soft law are more restricted than other forms of binding international law, such as multi-lateral treaties. The process of incorporating international treaties into domestic law is also a difficult and time consuming process. The conclusion of non-binding instruments may avoid the whole national process of ratification, as they can be created by the exclusive action of the executive organs of governments. Treaties take a long time to be changed as it involves the modification of binding law the entire process of ratification by national legislators.[41] For these reasons, States and other international actors increasingly find it more reasonable to adopt soft law measures.

Soft law exist in many forms within the national legal context which may be considered when domestic legislation on the subject covered is drafted.[42] A *model law* is a legislative text that is recommended to States for enactment as part of their national law. A model law is an appropriate vehicle for harmonisation when it is expected that States will wish to make adjustments to the text of the model to accommodate local requirements, or where strict uniformity is not required. This flexibility makes model laws potentially easier to negotiate than a text containing obligations that cannot be altered.[43]

General principles are addressed directly to judges, arbitrators and contracting parties who are left free to decide whether or not to use them. Where the subject is not ripe for the drawing up of uniform rules, another alternative is the preparation

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[40] Fazio (note 10) at 17.
[41] Fazio (note 10) at 18.
[42] UNIDROIT (note 37).
[43] José Angelo Estrella Faria 'Future directions of legal harmonisation and law reform: stormy seas or prosperous voyage?' 2009 *Uniform Law Review* 5 at 13.

of *legal guides*[44] A legislative guide contains guidance for legislators and includes substantial commentary discussion and analysing outlines of the core issues.[45]

1.6.2 Hard Law

Uniform rules drawn up by international organisations have traditionally taken the form of *international conventions or treaties.* These were designed to apply automatically in preference to a State's municipal law once all the formal requirements of that State's domestic law have been complied with. The low priority which tends to be accorded by Governments to the implementation of such Conventions, and the time it tends to take for them to enter into force has led to the increasing popularity of alternative forms of unification in areas where a binding instrument is not felt to be essential. [46]

'Hard law' solutions are generally required where rules' scope goes beyond the two-party relationship which underlie ordinary contract law, and where the interest of third parties or public interests are at stake. [47] A convention is also used where a high degree of uniformity is to be achieved, thereby reducing the need for a party to undertake research of the law of another State party. The international obligation assumed by a State upon adoption of the convention is intended to provide an assurance that the law in that State is in line with the terms of the convention.[48] Another weakness of international conventions is that it results from compromises with the result that the degree of unification achieved is often restricted.[49]

UNIDROIT provides an example of how the approach of international organisations has changed. Until recently UNIDROIT directed its activities exclusively towards international conventions, but several conventions were never signed or ratified by the required number of states. As a result, the project which originally started out as the 'Progressive Codification of International Commercial Law' was later categorised as a legal guide to show its flexibility for adaptation and termed the 'Principles for International Commercial Contracts'. The Principles are accompanied by comments, which include illustrations of their content and scope

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[44] UNIDROIT (note 37).
[45] D Sridhar Patnaik & Fabrizio Lala 'Issues of harmonisation of laws on international trade from the perspective of UNCITRAL: the past and the current work' in Stefano D'orilia (ed) *Participants Review of International Trade Law Post-Graduate Course* (2006) at 12.
[46] UNIDROIT (note 37).
[47] *Ibid.*
[48] Faria (note 43) at 12.
[49] Mistelis (note 30) at 1060.

and references to other pertinent international instruments of unified law.[50] The Principles may serve as model law that could inspire legislators who strive for law reform and may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contracts. Parties to an international contract could also choose the Principles as the law applicable to their contract.[51] This illustrates the shift that has taken place at the international sphere from the use of hard law to soft law instruments.

The introductory part considered the concepts of harmonisation and the problem it seeks to address. Different forms of harmonisation have also been introduced, as well as the most appropriate instruments for the harmonisation of laws. The next part of the paper will discuss the organisation within which the harmonisation is to take place, namely the African Union, which will be compared to certain aspects of the European Union.

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[50] Zhang Yuejiao 'Harmonization of contract law and its impact on China's contract law' *Modern Law for Global Commerce* Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007 at 2.
[51] Yuejiao (note 50) at 3.

2 PROVIDING THE FRAMEWORK FOR HARMONISATION: THE EU V THE AU

2.1 Introduction

The African Union (AU) is an intergovernmental organisation consisting of 53 Member States from the African continent.[52] When the harmonisation of trade laws on the continent is considered, it will be within the regulatory framework of this organisation.

From the European perspective, most harmonisation efforts have taken place within the framework of the European Union (EU), although some efforts have also been undertaken by the Council of Europe and private and academic institutions.

The regulatory framework of the EU, as model for the AU will therefore be compared in order to determine what lessons can be learned from the European mode. The aspects that will be compared are the organisations' history and reasons for formation, their institutional frameworks and their legislative procedures.

2.2 History and Formation

2.2.1 European Union (EU)

The starting point for the history of the EU is usually stated to be at the end of World War II, although integration initiatives and ideologies existed long before then.[53]

After the war, European countries decided to take the first significant steps towards European integration. The position adopted by the United States influenced the European integration. The Marshall Plan[54] was of fundamental importance to European Integration, as it provided that recipient states must co-ordinate their activities and planning in order to obtain the maximum benefit from the European Recovery Plan. In 1948 an important step towards formal European economic integration was taken and the Organisation for European Economic Cooperation

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[52] The AU covers the entire continent except for Spanish North Africa, Îles Éparses, Reunion, Mayotte, and Morocco.
[53] Fazio (note 10) at 49.
[54] American economic aid to Europe, as announced by the US Secretary of State, George Marshall, in June 1947.

(OEEC) came into being. The OEEC's main purposes was meeting the requirements set up by the European Recovery Program. [55]

A political body to support European integration, the Council of Europe (CoE), was created in 1949. Its Statute was initially signed by Belgium, Denmark, France, Britain, Ireland, Italy, the Netherlands, Luxembourg, Norway and Sweden. The CoE was not given proper supranational powers, as its decisions required the unanimous votes of government representatives. Its creation is nevertheless seen as a decisive step towards a United Europe.[56] The Council of Europe continues to exist today, as a distinct organisation from the European Union and currently has 47 Member States. The objectives of the Council are to protect human rights, pluralistic democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity; to find common solutions to the challenges facing European society; and to consolidate democratic stability in Europe by backing political, legislative and constitutional reform.[57]

A definitive effort towards European unification was made by the proposals of the Schuman Plan. The Plan proposed that in order to eliminate all tariff barriers in the industry, coal and steel resources in Western Europe should be administrated by both national governments and a new supranational authority. The Plan was not confined to the economic sector and also involved certain political issues.[58] In June 1950 negotiations was started in this regard and the representatives of the six founding states[59] signed the Treaty establishing the European Coal and Steel Community (ECSC) in April 1951 in Paris. [60]

In 1955, the Benelux States proposed the unification of all sectors of the economy of the ECSC members within a European internal market, and with these purposes an Intergovernmental Committee was created. The work developed by the Intergovernmental Committee formed the basis for the drafting of two other Treaties, the 'European Economic Community' (EEC) Treaty, and the 'European Atomic Energy Community' (EURATOM) Treaty, both signed by the six ECSC members. These Treaties proposed not only integration at an economic level, but also provided for the possibility of harmonisation of a wide range of political areas. The

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[55] Fazio (note 11) at 50.
[56] Fazio (note 11) at 51.
[57] *Council of Europe* 'Our Objectives'. Available at http://www.coe.int/aboutcoe/index.asp?page=nosobjectifs&l=en [Accessed 20 September 2010].
[58] Fazio (note 11) at 51.
[59] Belgium, France, Germany, Italy, Luxembourg and The Netherlands.
[60] Fazio (note 11) at 51.

main purposes of the EEC Treaty were to direct European integration towards the creation of a Common Market. [61] The first enlargement occurred in 1973 when Denmark, Ireland and the United Kingdom formally joined the EEC, followed by Greece in 1981 and Spain and Portugal in 1986.[62]

The Treaty on the European Union, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. The Maastricht Treaty introduced new forms of cooperation between the Member States' government and in the area of justice and home affairs. By adding this inter-governmental cooperation to the existing Community system, the Maastricht Treaty created a new structure with three 'pillars' which formed the 'European Union'. [63] A further enlargement took place in 1995 with the new membership of Finland, Austria and Sweden.[64]

New European policies were developed under the auspices of the Treaty of Amsterdam in June 1997, which laid down plans to reform EU institutions. The main reforms introduced by the Treaty of Amsterdam are in the areas of freedom, security and justice, the Union and the citizen, effective and coherent external policy, and institutional reforms. The strengthening of the role of Parliament was an important feature of the Treaty of Amsterdam.[65]

The principles objectives of the Treaty of Nice, which entered into force on 1 February 2003, were to adopt measures to prepare the EU for enlargement. The Intergovernmental Conference which resulted in the Treaty had a mandate of preparing the EU for enlargement by revising the Treaty in four key areas: size and composition of the Commission, weighting of votes in the Council, extension of qualified-majority voting and enhanced cooperation. The Treaty did not drastically change the institutional balance of the EU, but rather made some adjustments,

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[61] Fazio (note 10) at 52.
[62] European Union 'The history of the European Union'. Available at http://europa.eu/abc/history/1980-1989/index_en.htm [Accessed 3 September 2010].
[63] European Union 'Treaties and law'. Available at http://europa.eu/abc/treaties/index_en.htm [accessed 20 July 2010].
[64] European Union 'The history of the European Union: 1990-1999 A Europe without frontiers'. Available at http://europa.eu/abc/history/1990-1999/index_en.htm [Accessed 30 July 2010].
[65] European Union 'The Amsterdam Treaty: introduction'. Available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a09000_en.htm [Accessed 30 July 2010].

mainly to the function and composition of the institutions and enhanced cooperation.[66]

The European Council meeting in Laeken 2001 put forward the reform that led to the drafting of a Constitutional Charter for Europe. In October 2004, the then 25 EU Member States signed a Treaty Establishing a European Constitution, which was designed to streamline democratic decision-making and management in the larger EU countries. The Constitution had to be ratified by all 25 countries before it could come into force, and when citizens in both France and the Netherlands voted against the Constitution in referendums in 2005, the EU leaders declared a 'period of reflection'.[67]

In 2004, a mainly Eastern enlargement took place when the EU was joined by the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia, Cyprus and Malta. Bulgaria and Romania joined the EU in January 2007, bringing the total membership to 27 countries. [68]

In December 2007, the 27 EU countries signed the Treaty of Lisbon, which amended the previous treaties. The Treaty entered into effect on 1 February 2009 and brought to an end several years of negotiations regarding institutional matters. The Treaty makes it possible to adapt the European institutions and their working methods, strengthen democratic legitimacy and consolidate the Union's core values.[69]

The history of the formation of the EU into its current model was therefore not created by a single treaty. It is marked by a period of more than fifty years (1952 to 2009) of amendments and revising Treaties to address certain issues and expand its powers.

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[66] European Union 'Treaty of Nice: a comprehensive guide'. Available at 'http://europa.eu/legislation_summaries/institutional_affairs/treaties/nice_treaty/nice_treaty_introduction_en.htm [Accessed 30 July 2010].

[67] European Union '2000 – Today: a further enlargement'. Available at http://europa.eu/abc/history/2000_today/index_en.htm [Accessed 30 July 2010].

[68] *Ibid.*

[69] European Union 'The Lisbon Treaty: a comprehensive guide'. Available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/index_en.htm [Accessed 30 July 2010].

2.2.2 African Union (AU)

The AU was preceded by the Organisation for African Unity (OAU) which was formed 1963 as the culmination of a long struggle by Pan Africanists, which dates from the 19th Century.[70]

The Charter of the OAU was essentially designed to protect the fragile sovereignty recently achieved by African states, and to help those still under colonial or racist rule to achieve sovereign independence.[71] The main objectives of the OAU were to rid the continent of the remainders of colonisation and apartheid; to promote unity and solidarity among African States; to co-ordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations.[72]

The Treaty establishing the African Economic Community (AEC)[73] (Abuja Treaty) was adopted at the OAU Heads of State meeting in Abuja, Nigeria on 3 June 1991 and came into force in May 1994.[74] The Treaty provides for the AEC to be set up through a gradual process, to be achieved by coordination, harmonisation and the progressive integration of the activities of existing and future Regional Economic Communities (RECs) in Africa. The ultimate goal of the AEC is to transform the 53 economies of the AU into a single economic and monetary union, with a common currency, free mobility of capital and labour and, when the AEC is fully functional, to have an African Central Bank, an African Monetary Fund and an African Investment Bank.[75]

With the emergence of globalisation, and with colonialism and apartheid out of the way, the OAU became a largely dysfunctional organisation.[76] The OAU initiatives paved the way for the birth of the AU. In July 1999, the Assembly decided to convene an extraordinary session to expedite the process of economic and political integration in the continent. Four Summits lead to the creation and establishment of the AU: the Sirte Extraordinary Session (1999) where it was

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[70] Abdala Burja 'Africa: transition from the OAU to the AU' Lecture developed at ACARTSOD Tripoli, Libya on 23 September 2002. Available at http://www.dpmf.org/meetings/From-OAU-AU.html [Accessed 3 September 2010].
[71] *Ibid.*
[72] African Union 'African Union in a nutshell'. Available at www.africa-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm [Accessed 2 September 2010].
[73] *Treaty establishing the African Economic Community*, 3 June 1991, 30 ILM 1241 [AEC Treaty].
[74] Burja (note 70).
[75] Constitutive Act of the African Union, 11 July 2000 [AU Act] Art 19.
[76] Olivier and Olivier (note 9) at 355.

decided to establish an African Union; the Lome Summit (2000) that adopted the Constitutive Act of the Union; the Lusaka Summit (2001) which drew the road map for the implementation of the AU; and the Durban Summit (2002) which launched the AU on 9 July 2002 and convened the first Assembly of the Heads of States of the African Union.[77]

The AU is an ambitious model of integration that goes beyond the classical trade agreements widely treated as regional integration. The treaty contains a long-term development strategy, aims to integrate economic and non-economic sectors, upholds democratic principles and fosters new social and cultural values.[78] The objectives of the AU include achieving greater unity and solidarity between the African countries and the peoples of Africa;[79] establishing the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;[80] and coordinating and harmonising policies between the existing and future RECs for the gradual attainment of the objectives of the Union.[81]

2.3 Institutional Frameworks

The institutional framework of the AU will be compared with that of the EU to determine whether the AU has created a body with a clear mandate and capacity to undertake the economic integration and legal harmonisation of member states.

As the AU has been formed in 2000, not many years have passed since its inception, and not all of its organs are fully functional and it is still to be determined whether the AU institutions will eventually develop the sophistication, regulation and expertise with which the EU counterparts are associated.[82]

The AU is decidedly hierarchical and does not reveal the same integration between organs as the EU. It is on the whole a revamped version of the OAU. The fact that it has nine principal organs, against the five of the OAU, gives it a new appearance, but it is still to be determined whether these differences are more apparent than real.[83] The AU Assembly is composed of Heads of States, and is the supreme organ of the AU; the Executive Council is composed of Ministers and is

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[77] African Union (note 72).
[78] United Nations Economic Commission for Africa and the African Union (UNECA) *Assessing Regional Integration in Africa II, Rationalising Regional Economic Communities* (2006) (ARIA II) at 18.
[79] AU Act (note 75) Art 3(a).
[80] AU Act (note 75) Art 3(i).
[81] AU Act (note 75) Art 3(l).
[82] Olufemi Babarinde 'The European Union as a model for the African Union: the limits of imitation' paper prepared for presentation at the *UESA Tenth Biennial International Conference*, Le Centre Sheraton, Montreal, Canada, May 17-19, 2007 at 17.
[83] Olivier and Olivier (note 9) at 359.

responsible to the Assembly; and the Permanent Representatives' Committee is composed of permanent representatives of Member States and is responsible for the preparing of the work of the Executive Council. The Commission is composed of a Chairperson and Deputy Chairpersons and eight Commissioners, [84] each responsible for a portfolio. [85]

Some of the European institutions, the European Council, the Council and the Committee of Permanent Representatives are broadly intergovernmental, while the Commission, the Court of Justice and the European Parliament (EP) reflect a supranational character. The EP represents the EU citizens and is directly elected by them; the Council of the European Union represents the individual member states; and the European Commission seeks to uphold the interest of the EU as a whole. These institutions do not stand in hierarchical relation to one another, as decision-making power is dispersed among them in a complex way, reflecting the undefined, open-ended relationship between state power and union power. [86]

While the Commission, the Court of Justice and the Parliament are firmly entrenched in the decision-making structures of the EU, respectively as the cabinet/bureaucracy, the judiciary, and the *de facto* lower legislative chamber of the EU, the AU's institutions are still evolving.[87]

The institutional frameworks of the AU and EU share certain similarities, illustrated by the following table:[88]

TABLE 1: STRUCTURAL COMPARISON OF AU AND EU

Role/Function of institution	**African Union**	**European Union**
Provides overall strategy and political direction	The Assembly of Heads of States and Governments	The European Council (of Heads of Government/State) & Commission President
Coordination and formulation of policies	The Executive Council of the Ministers of Foreign Affairs, or other ministers	The General Affairs Council, or The Council of the EU
Legislature	Pan-African Parliament (PAP); presently an advisory body	European Parliament (EP); power is a function of the legislative procedure being employed; assent power
Judicial review	African Court of Justice (ACJ)	European Court of Justice (ECJ); apex court of the EU
The secretariat— the	The Commission of the AU;	The Commission of the EU;

[84] The eight portfolios are: peace and security; political affairs; infrastructure and energy, human resource, science and technology, trade and industry, rural economy and agriculture and economic affairs.
[85] African Union (note 72).
[86] Olivier and Olivier (note 9) at 359.
[87] Babarinde (note 82) at 16.
[88] Babarinde (note 82) at 359.

cabinet and the bureaucracy	headed by an appointed Chairman	headed by an appointed President
Ambassadors	Permanent Representatives Committee (PRC) of member states to the AU	Committee of Permanent Representatives (COREPER II, consisting of ambassadors, deals with political, commercial or economic matters) of member states to the EU
Expert committees	Specialised Technical Committees (STCs)	COREPER I (Consists of the deputy permanent representatives, deals with technical matters)
Financial Institutions	African Central Bank African Investment Bank African Monetary Fund	European Central Bank European Investment Bank European Investment Fund
Advisory corporatist structure	The Economic, Social, and Cultural Council (ECOSOCC)	Economic and Social Committee (ECOSOC)

2.3.1 Strategy and Political Direction: AU Assembly / European Council

The Assembly is the supreme organ of the AU[89] and its functions include: determining the common policies of the AU, taking decisions on reports and recommendations from the other organs of the AU, considering requests for membership of the AU, establishing any organ of the AU, monitoring the implementation of policies and ensures compliance by all Member States and adopting the budget of the Union.[90] It must also accelerate the political and socio-economic integration of the continent.[91] The European Council, the AU Assembly's EU counterpart, in turn provides the EU with the necessary impetus for its development and defines the general political directions and priorities thereof. It does not exercise legislative powers.[92] The European Council identifies the Union's strategic interests and determines the objectives and general guidelines for the common foreign and security policy. It also adopts the necessary decisions.[93]

With regards to its composition, the European Council consists of the Heads of States or Governments of the Member States, together with its President and the President of the EU Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work.[94] The AU Assembly is composed of Heads of States or Governments or their duly accredited representatives.[95] The European Council's President, who may not hold a national office, is elected by a

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[89] AU Act (note 75) Art 6(2).
[90] AU Act (note 75) Art 9(1).
[91] Rules of Procedure of the Assembly of the Union ASS/AU/2(I)-a July 2002 (Assembly Rules) Rule 4(c).
[92] Consolidated Version of the Treaty on European Union C83/3 30 March 2010 (TEU) Art 15(1).
[93] Consolidated Version of the Treaty on the Functioning of the European Union, 30 March 2010, C83/47 (TFEU) Art 26(1).
[94] TEU (note 92) Art 15(2).
[95] AU Act (note75) Art 6(1).

qualified majority for a term of two and a half years, renewable once.[96] The Office of the Chairman of the AU Assembly is held for a period of one year by a Head of State or Government, elected after consultations among the Member States.[97]

The European Council meets twice every six months, convened by its President. When the agenda requires, the members may decide to be assisted by a minister, and in the case of the President of the Commission, by a member of the Commission.[98] The AU Assembly meets at least once a year in ordinary session, and at the request of any Member State and on approval by a two-thirds majority, may meet in extraordinary session.[99]

The AU Assembly takes its decisions, excluding procedural matters, by consensus, or failing which, by a two-thirds majority of the Member States. Two thirds of the total membership of the AU forms a quorum at any meeting of the Assembly. [100] Except where the Treaties provide otherwise, decisions of the European Council are taken by consensus. In some cases, it adopts decisions by unanimity or by qualified majority, depending on what the Treaty provides for. [101]

2.3.2 Coordination and formulation of policies: AU Executive Council / Council of the European Union

The Executive Council of the AU is analogous to the Council of the European Union ('Council', distinct from the 'European Council'), and these organs are responsible for the coordination and formulation of policies.

The EU Council is responsible for decision-making and co-ordination. The Council passes laws, usually legislating jointly with the European Parliament and co-ordinates the broad economic policies of the Member States. It also defines and implements the EU's common foreign and security policy, based on guidelines set by the European Council. Its other functions are to conclude international agreements between the EU and one or more states or international organisations and to co-ordinates the actions of Member States. The Council and the European Parliament constitute the budgetary authority that adopts the Community's

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[96] TEU (note 92) Art 15(5).
[97] AU Act (note 75) Art 6(4).
[98] TUE (note 92) Art 15(3).
[99] AU Act (note 75) Art 6(3).
[100] AU Act (note 75) Art 7.
[101] European Council 'The European Council - an official institution of the EU'. Available at http://www.european-council.europa.eu/the-institution.aspx?lang=en [Accessed 18 September 2010].

budget.[102] A Committee of Permanent Representatives of the Governments of the Member States is responsible for preparing the work of the Council.[103]

The AU Executive Council functions both as a political and an economic body. It decides on matters in areas of common interest to the Member States, such as foreign trade, social security, food, agriculture and communication.[104] The Executive Council is responsible to the Assembly and must consider issues referred to it and monitor the implementation of policies formulated by the Assembly. It may delegate any of its power and functions to the Specialised Technical Committees.[105]

The EU Council consists of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.[106] Depending on the issue on the agenda, each country will be represented by the minister responsible for that subject (such as foreign affairs, finance, transport, etc).[107] The EU Council meets in different configurations and the General Affairs Council ensures the consistency in the work of the different Council configurations. The Foreign Affairs Council must elaborate the EU's external action on the bases of strategic guidelines laid down by the European Council and ensure that the EU's action is consistent.[108] The AU Executive Council is composed of the ministers of Foreign Affairs or such Ministers or authorities designated by the Member States. The Council must meet at least twice a year in ordinary session.[109]

2.3.3 Legislature: Pan-African Parliament / European Parliament

The European Parliament (EP), jointly with the Council, exercises legislative and budgetary powers. It must exercise functions of political control and consultation as laid out in the Treaties, and elects the President of the Commission.[110] The EP exercises democratic controls over all the European institutions. It shares legislative power equally with the Council and is empowered to adopt European laws (directives, regulations, etc). It can accept, amend or reject the content of European legislation.[111]

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[102] TEU (note 94) Art 16(1).
[103] TUE (note 92) Art 16(7).
[104] AU Act (note 75) Art 11; Art 13.
[105] AU Act (note 75) Art 13.
[106] TUE (note 92) Art 16(2).
[107] European Council 'The Council of the European Union'. Available at http://www.consilium.europa.eu/showPage.aspx?id=242&lang=EN [Accessed 16 September 2010].
[108] TUE (note 92) Art 16(6).
[109] AU Act (note 75) Art 9.
[110] TUE (note 92) Art 14(1).
[111] *Ibid.*

The ultimate aim of the PAP is to evolve into an institution with full legislative powers but initially and until the Member States decide otherwise, the PAP has consultative and advisory powers only.[112] At this stage therefore, much of the corresponding responsibilities of the EU Parliament are exercised by the AU Assembly, and not the Pan-African Parliament.

The members of the European Parliament are elected for a term of five years by direct universal suffrage in a free and secret ballot.[113] The EP is made up of 736 members elected in the 27 Member States. The seats are, as a general rule, shared out of proportionality to the population of each Member State. Representation of citizens is degressively proportional, with a minimum threshold of six per Member State. No Member State is allowed more than 96 seats.[114] The members are grouped by political affinity and not by nationality. There are currently seven political groups in the European Parliament.[115]

The ultimate aim of the PAP is to evolve into an institution whose members are elected by universal adult suffrage but initially and until the Member States decide otherwise, the members of the PAP are appointed as provided for by the Protocol.[116] Member States are represented in the PAP by an equal number of parliamentarians.[117] Each Member State is represented by five members, at least one of whom must be a woman.[118] The representation of the Member States must reflect the diversity of political opinions in each national parliament.[119] The term of a member of the PAP runs concurrently with his term in the national parliament.[120]

The consultative and advisory powers of the AU Assembly includes working toward the harmonisation or coordination of the laws of Member States[121] and promoting the coordination and harmonisation of policies, measures, programmes and activities of the RECs and the parliamentary forums of Africa.[122] The Parliament

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[112] Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament, 2 March 2001, (2005) 13 *African* Journal of International and Comparative Law 86 (Protocol on Pan-African Parliament) Art 2(1).
[113] TUE (note 92) Art 14(3).
[114] TUE (note 92) Art 14(2).
[115] Group of the European People's Party (Christian Democrats); Group of the Progressive Alliance of Socialists and Democrats in the European Parliament; Group of the Alliance of Liberals and Democrats for Europe; Group of the Greens/European Free Alliance; European Conservatives and Reformists Group; Confederal Group of the European United Left - Nordic Green Left; and Europe of Freedom and Democracy Group.
[116] PAP Protocol (note 112) Art 2(1).
[117] AU Act (note 75) Art 4.
[118] *Ibid.*
[119] *Ibid.*
[120] AU Act (note 75) Art 5(3).
[121] PAP Protocol (note 112) Art 11(3).
[122] PAP Protocol (note 112) Art 11(7).

must work in close cooperation with the Parliaments of the RECs and the National Parliaments of Member States.[123]

2.3.4 Judicial Review: African Court of Justice and Human Rights / European Court of Justice

The AU Act provides for the establishment of an African Court of Justice, whose statute, composition and functions are to be set out in a separate Protocol. The Protocol on the African Court of Justice was adopted on 11 June 2003 in Maputo, Mozambique.

In 2009, a Protocol on the Statute of the African Court of Justice and Human Rights[124] entered into force and provided for the African Court on Human and People's Rights and the Court of Justice of the AU to be merged into a single court and established as the 'African Court of Justice and Human Rights' ('African Court of Justice' / 'ACJ'). The ACJ is the main judicial organ of the AU.

The Court of Justice of the European Union (ECJ) consists of the Court of Justice, the General Court and specialised courts. [125] The ECJ must rule on actions, give preliminary rulings on the interpretation of EU law and the validity of acts adopted by the institutions.[126]

The ACJ has two sections, a General Affairs Section and a Human Rights Section, composed of eight judges each. The General Affairs section is competent to hear all cases submitted under art 28 of the Protocol, except those concerning human and/or peoples' rights, which falls under the exclusive jurisdiction of the Human Rights Section. [127] The subject matter of the ACJ includes the interpretation and application of all AU acts, decisions, regulations and directives.[128] ACJ has jurisdiction over the interpretation and application of all AU laws, any question of international law and all matters specified for in any other agreements.[129]

The ECJ is composed of one judge from each Member States, assisted by Advocates-General.[130] The ACJ will consist of 16 judges from Member States.

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[123] PAP Protocol (note 112) Art 18.
[124] Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, (2009) 17 *African Journal of International and Comparative Law* [Protocol on the African Court of Justice] Art 2.
[125] TUE (note 92) Art 19(1).
[126] TUE (note 92) Art 19(3).
[127] ACJ Protocol (note 124) Art 16, Art 17.
[128] ACJ Protocol (note 124) Art 28.
[129] *Ibid.*
[130] TUE (note 92) Art 19(2).

These judges must where possible, represented by three judges from each geographical region, except the Western Region, which must have four judges.[131]

Parties that may bring actions to the ECJ are Member states, institutions and natural or legal persons.[132] The only parties who are entitled to submit cases to the ACJ are State Parties to the Protocol, the AU Assembly, the Parliament and other organs of the AU authorised by the Assembly, and a staff member of the AU. A state that is not party to the protocol may not submit a case to the African Court of Justice and the court has no jurisdiction to hear a dispute involving a Member State that has not ratified the Protocol.[133]

2.3.5 Secretariat: AU Commission/EU Commission

The European Commission is responsible for initiating laws and policies, but the final decision taken by the Council, in interaction with the European Parliament. The European Commission is also responsible for overseeing the implementation of laws and policies by the member states.[134] EU legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.[135] The Commission is responsible to the European Parliament.[136]

The AU Commission is the Secretariat of the AU and plays a central role in the AU's day-to-day management.[137] The Commission represents the AU and elaborates draft common positions of the AU, prepares strategic plans and studies for the consideration of the Executive Council and elaborates, promotes co-ordinates and harmonises the programmes and policies of the Union with those of the RECs.[138]

The members of the EU Commission are chosen on ground of their general competence and must be completely independent and may not take instructions from any Government or other institution, body, office or entity.[139] Until 31 October 2014, it will be composed of a national of each Member State as well as a President and the High Representatives of the EU for Foreign Affairs and Security Policy. From 1 November 2014, the Commission will consist of a number of members,

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[131] ACJ Protocol (note 124) Art 3.
[132] TUE (note 92) Art 19(3).
[133] ACJ Protocol (note 124) Art 29.
[134] Olivier and Olivier (note 9) at 361.
[135] TUE (note 92) Art 17(2).
[136] TUE (note 92) Art 17(8).
[137] AU Act (note 75) Art 20.
[138] African Union (note 72).
[139] TUE (note 92) Art 17(3).

including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council decides to alter this number.[140] The members of the AU Commission are the Chairperson, Deputy Chairperson, Eight Commissioners who each have a portfolio (peace and security; political affairs; infrastructure and energy, human resource, science and technology, trade and industry, rural economy and agriculture and economic affairs), and staff members.[141]

2.4 Legislative Procedures

The EU's decision-making process in general and the co-decision procedure in particular, involves three main institutions: the European Parliament, the Council and the European Commission. This 'institutional triangle' produces the policies and laws that apply throughout the EU. In principle, it is the Commission that proposes new laws, but it is the Parliament and Council that adopt them.[142] It is the Commission's role to ensure that EU law is properly applied, by individuals, national authorities and other EU institutions.

2.4.1 Legal Acts of the AU / EU

Both the AU and EU provide for the legal instruments to be in the form of (a) regulations, (b) directives and (c) recommendations, declarations, resolutions, opinions, etc.[143] Even though the instruments are the same, the implementation and applicability thereof are some of the major differences between the AU and EU.

Regulations are the most direct from of EU law and as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU regulations. Art 288 TFEU (ex art 249 TEC) provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.[144] AU Regulations are not directly applicable. They apply in all Member States who must 'take all necessary measures to implement them'.[145] The importance of the direct applicability of laws in the harmonisation process will be discussed below.

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[140] TUE (note 92) Art 17(4) and 17(5).
[141] African Union (note 72).
[142] European Union 'EU institutions and other bodies'. Available at http://europa.eu/institutions/index_en.htm [Accessed 20 September 2010].
[143] AU Assembly Rules (note 92) Rule 33.
[144] TFEU (note 93) Art 288.
[145] AU Assembly Rules (note 91) Rule 33.

Directives are important harmonising instruments, as they used to bring different national laws in line with each other.[146] EU directives are binding as to the result to be achieved, but leaves it to the national authorities the choice of form and methods.'[147] A Member State is required the incorporate the EU directive into its domestic legal system before it will become effective. However, when a State fails to incorporate a directive within the specified time limit, the directive will have direct effect in its territory, and individuals will be able to derive rights from the directive despite the fact that it still has to be incorporated.[148] Directives are particularly common in matters affecting the operation of the single market.[149] AU Directives may be addressed to any or all Member States, to undertakings or to individuals. They bind Member States to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation. [150]

AU recommendations, declarations, resolutions, opinions etc are not binding and are intended to guide and harmonise the viewpoints of Member States.[151] EU decisions are binding in its entirety but recommendations and opinions have no binding force.[152]

2.4.2 Direct Applicability of regulations

The EU's success in the harmonisation of laws may be attributed to the fact that regulations are directly applicable. OHADA, the only significant attempt at the harmonisation of laws in Africa, also incorporates this doctrine. Its Treaty provides that OHADA 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.[153]

This is significant for the following reasons: once harmonisation instruments are drafted a principal problem may be experienced in the implementation at the national level. In dualist countries (as opposed to monist countries) international law must be implemented nationally using national constitutional procedures or

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[146] European Union 'Application of EU law'. Available at http://ec.europa.eu/community_law/introduction/what_directive_en.htm [Accessed 18 September 2010].
[147] TFEU (note 93) Art 288.
[148] Mistelis (note 30) at 312.
[149] European Union (note 142).
[150] AU Rules (note 91) Rule 33.
[151] AU Assembly Rules (note 91) Rule 33.
[152] TFEU (note 93) Art 288.
[153] *Treaty on the Harmonisation of Business Law In Africa* (JO OHADA N° 4), 1 November 1997available http://www.ohada.com/traite.php [OHADA Treaty] at Art 54(3).

measures. This opens the way to a number of difficulties: states may delay the implementation; they may implement it incompletely or partially; or may not implement international law at all. [154] The principle of direct applicability addresses this problem and allows for the integration of community law into member states' legal systems without requiring any intervening national implementation procedures or measures.[155]

The importance of harmonising instruments being directly applicable can be illustrated by a number of examples. In the case of the EU, an Insolvency Convention co-ordinated between members failed to receive the required number of ratifications, and therefore never came into effect. However as a result of the changes brought about by the Treaty of Amsterdam, it was possible for the instrument came into immediate effect immediately as a Regulation.

By contrast, the laws of the CoE are not directly applicable and a number of instruments aimed at harmonisation[156] has been drafted but never entered into force because they did not receive the required number of ratifications. [157] The CoE therefore also illustrates the importance of states transferring some of their legislative sovereignty to a supranational organisation for the harmonisation efforts to be successful.

The above examples suggest that for harmonisation to succeed in Africa, it is imperative that some degree of sovereignty in the law-making process be transferred to the supranational organisation (the AU), to ensure that the instruments aimed at harmonisation come into effect.

In addition to not being part of the AU, the doctrine does also not apply on a regional level, with RECs requiring Member States to take measures to implement laws for them to become effective. The COMESA Treaty provides that Member States must take steps to 'secure the enactment of and the continuation of such legislation to give effect to this Treaty'.[158] The EAC Treaty has the same provision, with the addition that this shall be done 'within twelve months from the date of

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[154] Oppong (note 2) at 43.
[155] *Ibid.*
[156] *European Convention providing a Uniform Law on Arbitration* CETS No. 056 (1966); *European Convention on the Place of Payment of Money Liabilities* CETS No. 075 (1972); *European Convention on Establishment of Companies* CETS No. 057 (1966).
[157] Council of Europe 'Complete list of the Council of Europe's Treaties'. Available at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG [Accessed 10 June 2010].
[158] *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 ILM 1067 Art 5(2).

signing [the] Treaty'.[159] The ECOWAS Treaty[160] require that members must 'take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of [the] Treaty.'[161]

In the light of Africa's limited participation in international legal instruments, and the small number of Conventions that has been adopted and implemented in African states' national laws, the absence of the doctrine and requirement for laws to be implemented is likely to hinder the harmonisation process in Africa.

The absence of the doctrine may be remedied by the newly established the African Union Commission on International Law (AUCIL), whose treaty provides that it is entitled to propose the revision of OAU/AU Treaties with a view to: '(a) ensuring harmony between AU treaties and current legal developments; (b) ensuring that the process of contributing to the development of international law through encouraging standard-setting by member states continues; (c) ensuring that standard-setting within the Union is and remains both relevant and appropriate; and (d) promoting the harmonisation of international obligations'.[162]

2.4.3 Non-implementation of Laws

Within the AU, the non-implementation of Regulations and Directives attract sanctions in accordance with Article 23 of the Constitutive Act.[163] These sanctions include denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity of commitments there from.[164]

In the EU, it is only Regulations are directly applicable and other forms of legislation require implementation into national laws. This entails the adoption of implementing measures before a specified deadline and conformity and correct application within its own legal system. The Commission is responsible for ensuring that EU law is correctly applied. [165] If the Commission considers that a Member State has failed to fulfil an obligation it must deliver a reasoned opinion on the

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[159] *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 UNTS I-37437 Art 8(2).
[160] *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 *African Journal of International Law* 187 [ECOWAS Treaty] Art 5(2).
[161] Oppong (note 2) at 43.
[162] *Statute of the African Union Commission on International Law* EX.CL/478 (XIV)a 30 January 2009 (AUCIL Treaty) Art 8.
[163] Assembly Rules (note 91) Rule 33(2).
[164] AU Act (note 75) Art 23.
[165] European Commission 'Infringements of EU law'. Available at http://ec.europa.eu/community_law/infringements/infringements_en.htm [Accessed 18 September 2010].

matter, after giving the State the opportunity to submit its observations.[166] If the State concerned does not comply with the opinion within the prescribed period, the Commission may bring the matter before the ECJ.[167] If the ECJ finds that a Member State has failed to fulfil an obligation, the State must take the necessary measures to comply with the judgment of the Court. If the court finds that the Member State has not complied with its judgment, it may impose a lump sum or penalty payment on it.[168]

2.5 Summary

The EU has certain important characteristics that favour the process of regional harmonisation that do not exist in the international, or African, sphere. These are the existence of an unique legal framework which regulate cooperation between foreign states; a built-in dynamism whereby the European Commission may make proposals and thereby promote the achievement of the aims of the EU, and the existence of a supra-natural court (the ECJ) which ensures uniform interpretation and application of Community Law.[169]

A brief comparison between the AU and EU therefore show similarities with regard to the institutional frameworks, but sharing the same names with the EU institutions does not guarantee that the AU will have similar experiences as the EU.

The histories and the approaches that have been adopted to integration are unique to each continent and there are several factors that will influence the integration and harmonisation processes. Some of these include challenges due to Africa's post-colonial heritage; continuing armed conflict and wars; famine; drought; poverty; different legal systems, including traditional law and a large geographical area and a large initial membership, as well as a lack of resources.[170]

The next chapter will consider the need for the harmonisation of laws in Africa and the extent of the divergence that exist between legal systems.

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[166] TFEU (note 93) Art 258(1).
[167] TFEU (note 93) Art 258(2).
[168] TFEU (note 93) Art 260(1); Art 260(2).
[169] Michael B. Elmer 'Brief considerations on the harmonisation of civil procedure in Europe and Worldwide' (2003) 8 *Uniform Law Review* 161 at 161.
[170] Babarinde (note 82) at 27.

3 AFRICA: THE NEED FOR HARMONISATION AND CURRENT HARMONISATION EFFORTS

3.1 Introduction

The previous chapter discussed the AU as regulatory framework within which the harmonisation of international trade laws will take place. This chapter will consider the need for harmonisation on the continent, as illustrated by the extent of the divergence between the domestic laws of African states. Thereafter the efforts made in this regard will be considered.

3.2 Diversity of legal systems in Africa

Despite its shared pre-colonial indigenous systems of law there are various differences between the legal systems of African states.

3.2.1 Diversity within individual African countries

The indigenous customary laws which applied in African countries prior the colonisation period presented large differences, even within a single country. These indigenous customary laws continue to apply today, mainly through the members of the rural communities.[171] During the colonisation period, the foreign legal systems of the colonial powers[172] were superimposed on the indigenous law of the colonies, and both the indigenous customary law and foreign legal system continued to apply.[173] After the first African states obtained independence, a federal political structure was adopted in certain states (eg Nigeria), with the result that the different regions of the same country had concurrent legislative powers to make laws on certain matters. These laws were not always uniform, which lead to divergence of laws within a single state.[174]

Therefore, right from the outset there is a need for harmonisation of laws, although the role of customary law and members of rural communities in international trade is minuscule (but may play a role in intra-African trade, however minimal).

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[171] Gbenga Bamodu 'Transnational law, unification and harmonisation of international commercial law in Africa' (1994) 38 *Journal of African Law* 125 at 125.
[172] The colonising power included Belgium, France, Germany, Italy, Portugal, Spain and the United Kingdom.
[173] Bamodu (note 171) at 125.
[174] *Ibid.*

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[173] Bamodu (note 171) at 125.
[174] *Ibid.*

3.2.2 Diversity among African States

The importing of western legal systems during the colonial period has given a specific imprint to the legal system of each African State. This has given rise to a sub-classification of the African legal systems according to the family to which the legal system of the former parent country belongs.[175]

The colonial powers were European countries whose legal systems belonged to different legal families, with the result that the national legal systems of contemporary Africa no longer belong to a unique legal family.[176] The AU membership represents at least four main legal systems: common law (such as Nigeria, Ghana and Kenya), Roman-Dutch law (South Africa), Islamic law, civil law (Togo, Ivory Coast) as well as various systems of customary law. Each of these legal systems in turn has its own legal traditions; system of legal thought; methods of law-making; and process of judicial determination of disputes.[177]

Some African states that were colonies of different powers were merged for political expediency, and the legal systems of the different colonies may continue to operate in the same country.[178] This is combined with customary law and in some cases Islamic law. The spread of the Islam religion to a considerable part of Africa has resulted that the law of many African states reveal certain Islamic influences.[179]

3.2.3 Differences with non-African States

Although the legal systems of African countries are identifiable with European countries, the legal rules in the African countries are not identical to the legal system from which they inherited their legal systems. Since the reception of the European laws by the African countries, further developments in the European countries have not always been reflected in the receiving countries.

African countries have also experienced internal legal development which involved the enactment of indigenous legislation, the new interpretation of legislation, new judicial pronouncements and borrowings from other legislations.[180]

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[175] Mancuso (note 27) at 161.
[176] Bamodu (note 171) at 127.
[177] M Ndulo 'Harmonisation of trade laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101 at 102.
[178] Bamodu (note 171) at 128.
[179] *Ibid.*
[180] *Ibid.*

In order to promote trade on the continent, it is crucial that these differences between legal systems which functions as obstacle to trade be addressed and abolished.

3.3 Lack of participation in international sphere

Africa's developing countries have only had a limited opportunity to participate in the activities that took place in the field of harmonisation, unification and modernisation of the law of international trade. But these are the countries that especially need adequate and modern laws. This is indispensable to gaining equality in international trade.[181]

Africa has largely been excluded from the contexts in which private international laws have been promoted in other jurisdictions.[182] This may be due to a number of factors, such as lack of resources to participate in international meetings at which these instruments were drafted, or a lack of information as a result of the poor communication infrastructure that exists on the continent. It may also be that the harmonisation of trade laws is seen to take an inferior priority in the light of the other challenges facing the continent (such as continuous conflicts and civil wars; political unrests, AIDS, famine, droughts, etc).

It may also be due to a lack of political will of national governments. This lack of participation is ironic as these are the countries that especially need adequate and modern laws which are indispensable to gaining equality in international trade.[183]

Africa's participation in the field of private international law has been especially limited. Only three African states are members to the Hague Conference on Private International Law, namely Egypt, Morocco, and South Africa,[184] and only a few African countries have become parties to treaties dealing with aspects of international judicial cooperation. Egypt is the only African member state to the Hague Convention on the Service abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. Botswana, Malawi and the Seychelles are non-

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[181] UN Report (note 4) at 47.
[182] Richard Fripong Oppong 'Private International law in Africa: the past, present and future' (2007) 55 *American Journal of Comparative Law* 677 at 678-679.
[183] SL Sempasa 'Obstacles to International Economic Arbitration in African Countries' 41 (1992) *International and Comparative Law Quarterly* 387 at 380.
[184] 'Statute of the Hague Conference on Private International Law' 15 July 1955 [1]. Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=29 [Accessed 2 July 2010].

member parties.[185] South Africa is the only African member state party, and Seychelles the only African non-member state party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[186] No African states are Members of the Hague Convention of 30 June 2005 on Choice of Court Agreements.[187]

Africa's lack of participation in the international sphere resulted that most international instruments were drawn up without the involvement of African states. As a result of the non-involvement of African states, these instruments may not be well-suited to their needs. This may be a reason for African states' hesitance to adopt these international instruments.

Therefore, in addition to African laws being widely diversified, even within a single state, the continent has also not participated in the international instruments aimed at harmonisation. While the ratification of certain Conventions (such as the Vienna Convention on Contracts for the International Sale of Goods) would have provided possible investors with reassurance and legal certainty as well as a system with which they are familiar with, this has not happened.

3.4 Current efforts towards harmonisation

3.4.1 Economic integration

Africa is currently pursuing economic integration through the creation of an African Economic Community (AEC). The AEC is to be established in six stages, by using the Regional Economic Communities (RECs) as building blocks.[188] The objectives of the AEC are to be achieved through the liberalisation of trade by abolishing non-tariff barriers in order to establish a free-trade area; the relaxation and eventual abolition of qualitative and administrative restrictions; the gradual evolution of a common trade policy; and the gradual removal of obstacles to the free movement of persons, goods and services.[189] The final stage will entail the integration of all sectors namely economic, political, social and cultural; and the

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[185] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]. Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=17 [Accessed 2 July 2010].

[186] Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters [20] http://www.hcch.net/index_en.php?act=conventions.status&cid=82 [Accessed 2 July 2010].

[187] Hague Convention of 30 June 2005 on Choice of Court Agreements. Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=98 [Accessed 2 July 2010].

[188] AEC Treaty (note 74) Art 6.

[189] M Ndulo 'Harmonisation of trade laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101 at 102.

establishment of a single African Monetary Union, the establishment of a single domestic market and a Pan-African Economic and Monetary Union.[190]

The implementation of these provisions will require the development of normative rules to give effect to the decisions, and these rules will have to be assimilated into the laws of Member States. This will require a great effort in the harmonisation of the trade laws of all member states, and the modernisation of trade laws that obstruct trade.[191]

Although some of the REC Treaties contain provisions in this regard, the AEC Treaty is not explicit on the importance of states harmonising their laws.[192] AU Member States undertake to coordinate and harmonise the integration activities of RECs of which they are members with the activities of the AEC. In order to achieve this, the AEC is entrusted with the coordination, harmonisation and evaluation of the activities of existing and future RECs.[193]

At the Banjul Summit in Gambia in 2006, the AU decided to suspend, until further notice, the recognition of new RECs, with the exception of the following eight, each established under a separate regional treaty:[194] Economic Community of West African States (ECOWAS); Common Market of East and Southern Africa (COMESA); Economic Community of Central African States (ECCAS); Southern African Development Community (SADC); Inter-Governmental Authority for Development (IGAD); Arab Maghreb Union (AMU); Economic Community of Sahelo-Saharian States (CENSAD); and East African Community (EAC).[195]

A detailed discussion of each of these RECs is beyond the scope of this paper and only the RECs that have made a significant effort towards legal harmonisation will be discussed.

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[190] EAC Treaty (note 74) Art 6(2)(f)(ii).
[191] Ndulo (note 177) at 103.
[192] RF Oppong 'Private international law and the African Economic Community: a plea for greater attention' (2006) 55 *International Comparative Law Quarterly* 911 at 911.
[193] AEC Treaty (note 74) Art 88.
[194] See Figure 1: Regional Economic Communities of the African Economic Community (Appendix).
[195] Assembly of the African Union, Seventh Ordinary Session, 1-2 July 2006, Banjul, The Gambia '*Decision on the Moratorium on the recognition of Regional Economic Communities* (RECs) DOC.EX.CL/278)IX) Assembly/AU/Dec.112(VII).

3.4.2 SADC

The Southern African Development Community (SADC)[196] was established by Treaty in 1992.[197] Its principal objective is to foster closer economic and political ties among its member states and prepare the ground for the establishment of an economic community. The Treaty[198] requires Member States to operate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit. Member States must coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programs and projects.[199]

SADC's objectives include development and economic growth, alleviating poverty, and supporting the socially disadvantaged through regional integration.[200] To achieve its aims, SADC will have to harmonise political and socio-economic policies and plans of Member States; develop policies aimed at the progressive elimination of obstacles to free movement of capital and labour, goods and services; and promote the coordination and harmonisation of the international relations of Member States.[201] The Treaty lists a number of areas in which the signatories have agreed to cooperate, but the harmonisation of laws is not included as one of the areas.[202]

Conflict and divergences arising from the laws of different SADC states in matters relating to trade, arbitration and enforcement of judgments will rank among the major barriers to intra regional cooperation and integration that SADC countries will confront as they move towards establishing a free trade area in the region, especially since the membership of the Community represents at least three main legal systems, namely the Common law, Roman-Dutch law and Civil law, with various systems of customary law.[203]

Some progress towards Regional integration has been achieved by SADC, by entering into a tripartite agreement with COMESA and the EAC in 2008. At the Tripartite Forum held in Arusha, Tanzania, the issues that were discussed included

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[196] SADC Member States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
[197] See Figure 2: SADC Member States, Annexure.
[198] *Treaty of the Southern African Development Community*, 17 August 1992, 32 ILM 116.
[199] SADC Treaty (note 198) Art 21.
[200] SADC Treaty (note 198) Art 5(1).
[201] SADC Treaty (note 198) Art 5(2).
[202] Ndulo (note 177) at 196.
[203] *Ibid.*

priority areas for harmonisation.[204] This Agreement will advance the ongoing harmonisation and coordination initiatives to achieve a convergence of the programs and activities of the three RECs, and in this way will greatly contribute to the continental integration process.[205]

At the 2008 summit, leaders from the three RECs resolved to immediately start working towards merging their FTA's into a single FTA with the ultimate objective of fast-tracking the attainment of continental integration as envisaged by the AU. The creation of the FTA will facilitate the smooth movement of goods and services across member states, boosting intra-regional trade.[206]

3.4.3 ECOWAS

ECOWAS is a regional group of fifteen countries, founded in 1975.[207] The ECOWAS Revised Treaty[208] was signed in Cotonou, Republic of Benin, on 24 July 1993.[209] ECOWAS' aims and objectives include the harmonisation and coordination of national policies and the promotion of integration programmes, projects and activities in a number of areas including trade, money and finance, taxation, economic reform policies and legal matters.[210] The harmonisation of business regulations in ECOWAS States will contribute to economic integration in the region, and promote investments.[211]

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[204] TRALAC 'Towards a tripartite COMESA-EAC-SADC Free Trade Area: The Process, Issues and Priorities" (17-18 June 2010, Arusha, Tanzania). Available at http://www.tralac.org/cgi-bin/giqa.cgi?cat_id=1034&cause_id=1694&cmd=cause_dir_news_item&news_id=88828 [Accessed 30 September 2010].

[205] COMESA Programmes 'The COMESA-EAC-SADC Tripartite Free Trade Area'. Available at http://programmes.comesa.int/index.php?option=com_content&view=article&id=211&Itemid=135&lang=en [Accessed 10 October 2010].

[206] 'COMESA, EAC, SADC grand free trade area on the horizon' *Zimbabwe Independent* 17 September 2010. Available at http://www.theindependent.co.zw/business/27963-comesa-eac-sadc-grand-free-trade-area-on-the-horizon.html [Accessed 10 October 2010].

[207] Benin, Burkina Faso, Capo Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

[208] *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 *African Journal of International Law* 187 [ECOWAS Treaty]

[209] See Figure 2: OHADA Member States.

[210] ECOWAS Treaty (note 160) Art 3(2).

[211] Akin Akinbote 'The OHADA and ECOWAS Treaties as tools for regional integration and regulatory reforms' presented at *Network of Reformers' Workshop*, Kampala, 19-21 January 2010. Available at http://www.OHADA.com/fichiers/newsletters/811/OHADA-and-Ecowas-treaties-as-tools-for-final.pdf [Accessed 16 September 2010].

In line with the Revised ECOWAS Treaty, Member States decided to harmonise their regulations on investment and work for the establishment of a common regional investment rule and code, to establish the common investment market. The Council of Ministers during their 60th session on 17-18 June 2008 adopted the two documents signalling the beginning of the process to harmonise the community investment rule into a code. The ECOWAS Common Investment Market (CIM) will promote freedom of movement, goods, services, capital, business enterprise and people within the existing customs union. This will in turn require the harmonisation of policies, laws and regulations.[212]

The main challenges ECOWAS currently faces in this area are the non-implementation of supranational laws and non-adherence to the ECOWAS Treaty and established protocols. This is coupled with trade barriers between Member States. [213]

3.4.4 EAC

The East African Community (EAC) is a regional intergovernmental organisation of the Republics of Kenya, Uganda, Tanzania, Rwanda and Burundi.[214] The EAC aims at widening and deepening cooperation among the Partner States for their mutual benefit. To this extent the EAC countries established a Customs Union in 2005 and are working towards the establishment of a Common Market in 2010 and subsequently a Monetary Union by 2012. The ultimate aim is a Political Federation of the East African States. [215] The EAC has made significant progress as shown by the progress of the East African Customs Union and the signing in November 2009 and ratification in 2010 of the Common Market Protocol by all the Partner States. [216]

At its meeting held on 5 September 2008, the EAC Sectoral Council on Legal and Judicial Affairs considered and approved the Terms of Reference (ToR) for a Consultancy Project on the Harmonisation of Partner States' Commercial Laws. The assignment will be carried out in two phases. The first phase will entail an overall review and identification of Partner States' commercial laws that have a direct

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[212] 'The ECOWAS's Common Investment Market to come soon' in Information Bulletin of the ACP Business Climate Facility, May 2009/N27. Available at http://acpbusinessclimate.org/pseef/Documents/E-Zine27-EN-BD.pdf [Accessed 10 October 2010].
[213] Akinbote (note 211).
[214] See Figure 5: EAC Member States.
[215] East African Community 'About EAC' http://www.eac.int/about-eac.html [Accessed 16 September 2010].
[216] *Ibid.*

bearing and impact on the EAC Common Market and Monetary Union.[217] It will also entail identifying two priority areas of commercial laws. The consultants will thereafter make recommendations as to the harmonisation of the laws in the two priority areas. [218]

The second phase will involve drafting of the EAC legislation in the identified and agreed priority areas to be enacted by the East African Legislative Assembly (EALA). This phase will be conditional upon the successful outcome of the first phase as determined and approved by ICF and EAC.[219]

3.4.5 OHADA

OHADA *(Organisation pour l'Harmonisation en Afrique du Droit des Affaires')* (Organisation for the Harmonisation of Business Law in Africa, 'OHBLA') was created by a Treaty signed by 14 African States in Port-Louis, Mauritius on 17 October 1993.[220] The OHADA Treaty was recently modified by the Treaty of Quebec, which was signed by the OHADA Heads of States and Governments on 17 October 2008. It currently has a membership of sixteen West African States,[221] with the DRC in the process of becoming a member.[222]

It is an international organisation with the aim of harmonising all African business law. This rationale is set to improve security, which in turn, would help promote trade and investment.[223] OHADA is a legal entity with its own rights and obligations, distinct from those of its Member States. The Treaty provides that it can be a party to contracts and agreements; may purchase or sell movable or immovable property and can appear before the domestic courts.[224]

The objectives of OHADA are set out in art 1 of the Treaty as 'the harmonisation of business laws in the Contracting States by the elaboration and adoption of simple

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[217] Banking laws, business transaction laws; finance and fiscal legislation; insurance and re-insurance legislation; investments; procurement and disposal of assets legislation; monetary legislation; standardisation, quality assurance and metrology legislations; and trading law. (see Oppong (note 2) at 112).

[218] EAC 'Meeting on approximation of national laws in EAC Context held in Nairobi, Kenya' *Press Release*. Available at http://www.eac.int/news/index.php?option=com_content&view=article&id=182:meeting-on-approximation-of-national-laws-nairobi&catid=48:eac-latest&Itemid=69.

[219] *Ibid.*

[220] *Treaty on the Harmonisation of Business Law In Africa* (JO OHADA N° 4), 1 November 1997available http://www.ohada.com/traite.php [OHADA Treaty] (note 153).

[221] See Figure 4: OHADA Member States (Annexure).

[222] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comores, the Republic of Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Equatorial Guinea, the Republic of Guinea, Mali, Niger, Senegal and Togo.

[223] Adejumoke Ademiluyi 'Diffusion of OHADA law under a bi-judicial point of view - OHADA with common law systems using Nigeria as a case study in perspective' (OHADA Doctrine D-07-36[1]). Available at http://www.ohada.com/doctrine/titre/130/Diffusion-of-OHADA-law-under-a-bijuridicial-point-of-view-OHADA-with-common-law-systems-using-Nigeria-as-a-case-study-in-perspective.htmlat 64.

[224] B Martor et al *Business law in Africa OHADA and the harmonisation process* (2002) Eversheds, London at 5.

modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes'. [225] OHADA aims to establish a judicial system (including uniform legal proceedings) for the interpretation and execution of Uniform Acts enacted pursuant to the OHADA Treaty; to create a legal tool for economic integration and development; to create a secure legal environment for doing business in Member States; and to attract foreign direct investment. [226]

Most commercial laws in OHADA States were colonial laws inherited from France dating back to 1867, and had remained unchanged until the OHADA Treaty came into force on 17 October 2003. [227] OHADA 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.[228] The current Uniform Acts in force in the member states are the Uniform Acts on General Commercial Law, Companies and Economic Interest Group, Securities Law, Debt Recovery and Enforcement Law, Insolvency Law, Arbitration Law, Accounting Law, and Law on Regulating Contract for the Carriage of Goods by Road.[229]

The harmonisation of business regulations in OHADA encourages both vertical and horizontal direct foreign investments and provides a secured investment climate and stimulates economic growth. Legal certainty is ensured by the simplification and unification of applicable laws and the supremacy of OHADA Uniform Acts over the national laws of Member States. It also provides an institutionalised commercial dispute resolution mechanism through the establishment of a Common Court of Justice and Arbitration (CCJA). The CCJA is responsible for the resolution of commercial disputes involving the interpretation and application of Uniform Acts and Arbitration.[230]

Harmonisation in OHADA at the sub-regional level is made easier by a number of factors, such as shared historical and cultural backgrounds, similar legal systems and a single language.[231]

Even though membership to OHADA is open to all AU Member States, membership is currently mainly limited to Francophone countries with a common

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[225] OHADA Treaty (note 153).
[226] Akinbote (note 211).
[227] *Ibid.*
[228] OHADA Treaty (note 153) Art 54(3).
[229] OHADA 'Uniform Acts'. Available at http://www.ohada.com/textes.php [Accessed 7 August 2010].
[230] Akinbote (note 211).
[231] Fagbayibo (note 1) at 312.

civil-law legal system and shared identity, which may hinder the participation of other member states who do not share this common identity.

3.4.6 Academic Institutions

The University of Johannesburg recently established an Institute for Private International Law in Africa, with the objectives to undertake and publish research in the field of private international law, particularly in an African context. Its work will include the drafting of regulations conventions, model laws and other legislative instruments in the field of private international law for use by the various organs and Member States of the AU. It also acts as an information centre for The Hague Conference, providing training and arranging conferences, seminars and workshops. The statutes of the institutes were drafted in collaboration with the legal division of the AU. Research is conducted on an ongoing basis in order to draft an African Convention on the Law Applicable to Contractual Obligations for future use by the AU. [232] An African Convention on the Law Applicable to Contractual Obligations would be a significant step towards the harmonisation of trade laws on the continent.

The efforts by academic institutions have so far been concentrated in Southern Africa and there is a need to expand these initiatives into other regions of Africa and the various law faculties have a crucial role to play. [233]

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[232] Oppong (note 2) 300.
[233] *Ibid.*

4 THE HARMONISATION OF PRIVATE INTERNATIONAL LAW RULES

4.1 Introduction

In order to reduce the conflicts and divergences in the international trade law of different states, two different techniques have been followed, namely the harmonisation of substantive rules; and the harmonisation of private international law rules.[234] This discussion will focus on the harmonisation of private international law rules, and the harmonisation of substantive rules will be discussed in the following chapter.

This part of the discussion will focus on the importance of private international laws, and the current state of affairs on the African continent. Thereafter the harmonisation of private international laws in the EU will be discussed, with reference to the main instruments adopted in this field.

4.2 The Private International Law Approach

The private international law approach to harmonisation seeks to provide uniform rules on choice-of-law, jurisdiction and the recognition and enforcement of foreign awards. It does not necessarily have to cover all these instruments in a single instrument, and it rarely does.

The harmonisation of private international law rules aim to ensure that parties transacting across national boundaries are aware of the governing law and jurisdiction for litigating disputed cases. Rules that stipulates respect for parties' choice-of-law and choice-of-forum agreements facilitates international trade. The same is true for explicitly allocating international jurisdiction and providing definite and expedited means of enforcing foreign judgments.[235]

Rules on direct jurisdiction define the circumstances in which the courts of one country are competent and should be willing to entertain proceedings in respect of disputes which have some connection with another country. Courts apply these to determine its own jurisdiction to entertain proceedings instituted before it. Rules on choice of law select from the connected countries the one whose law is to supply the substantive rules to be applied in determining the merits of the dispute. Rules on

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[234] Gülüm Bayraktaroglu 'Harmonisation of private international law at different levels: communitarization v. international harmonisation' 5 (2003) *European Law Review* 127 at 132.
[235] Oppong (note 3) at 707.

foreign judgments define the circumstances in which a judgment given by the court of one country is to be recognised or enforced in another country.[236]

In Africa the private international law approach may be easier to undertake to ensure the harmonisation of international trade laws. The harmonisation of private international law is regarded as simpler and more realistic approach than the harmonisation of substantive laws, because a whole branch of substantive law may be covered by a few choice-of-law clauses. [237] This approach also entails only a minimal disturbance in national legal systems as it only addresses matters involving foreign elements. While substantive harmonisation reduces the scope of private international law, it requires a lot of effort to achieve, and even when successful, private international law will remain of considerable importance in the resolution of cross-border disputes.[238]

4.3 Private International Law in Africa

The role of private international law is manifestly absent from the discourse on economic integration in Africa. The same can be said of the various instruments adopted for the pursuit of integration. The underdevelopment of the subject in Africa has been described as 'the Cinderella subject seldom studied [and] little understood'.[239] This under-development, along with the diversity of approaches to the questions on the subject, has been identified as one of the key obstacles to integration in Africa.[240] The underdevelopment of the subject may also be attributed to the difficulty of convincing African governments that the development of the subject of private international law should be an essential part of national and continental development. While Africa is labouring under the scourge of civil wars, famine, AIDS and excruciating poverty, private international law issues are not vote-winning issues.[241]

In Africa, the rules for the regulation of conflicting jurisdictions between African national courts are provided by the doctrines of comity, *forum non conveniens* and respect for party autonomy with regard to choice of applicable law and forum

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[236] Peter Stone *EU private international law: harmonization of laws* (2006) at 3.
[237] Bayraktaroglu (note 235) at 132.
[238] Oppong (note 239) at 70.
[239] Forsyth *Private International Law* (2003) at 43.
[240] M Ndulo 'The promotion of intra-African trade and the harmonisation of laws in the African Economic Community. Prospects and problems' in MA Ajomo and Omobolaji Adewali (eds) *African Economic Treaty, Issues, problems and prospects* Nigerian Institute of Advanced Legal Studies (Lagos) 1993 107, 111-112.
[241] RF Oppong 'The Hague Conference and the development of private international law in Africa: a plea for greater cooperation' (2006) 8 *Yearbook of Private International Law* 189 at 189.

agreements.[242] There are no regulating instruments which provide common rules for the private international law rules of its member states, unlike the case in the EU. The private international law rules which affect an international trade transaction will be determined by domestic rules which are based on legislation, or common and case law.

4.3.1 Choice of applicable law

The conflict-of-law rules of a national court will determine which legal system will govern the international contract. There is no universally applicable international law or rules to determine the applicable legal system where more than one state is involved. Differences in conflict-of-law rules may result in the municipal courts of the contracting parties appointing different governing laws to the same contract. The harmonisation of conflict-of-law rules aim to ensure that any court in Africa will come to the same conclusion regarding the law governing the contract. It will therefore provide legal certainty to international traders to which legal system will govern their contract in the absence of an explicit or implied choice.

The basic principle in private international law is that contracts are governed by the law chosen by the parties. This party autonomy is largely recognised in Africa. Parties' autonomy to choose the national law of one of the parties, for instance South African[243] or Egyptian[244] law in a contract between South African and Egyptian businesses, is also undisputed.

With regard to choosing the law of a third state, most national courts do not require a connection to that state, as parties often prefer to have a neutral law to govern the contract. In *Friendship Container Manufacturing Ltd v Mitchell Cotts Ltd*[245] the Kenyan court upheld an exclusive choice of forum agreement contained in a bill of lading which vested jurisdiction in South African courts. In *Barlows Central Finance Corporation Ltd. v Joncon Limited,*[246] which was a sales agreement that contained a South African choice-of-law and choice-of-forum clause, the Swaziland court upheld the choice of law clause, but declined to enforce the choice of forum agreement. One of the court's reasons for its refusal was that Swaziland and South African law were similar in many respects. In another decision of the Swaziland

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[242] Oppong (note 187) at 706.
[243] Such as the South African Enforcement of Foreign Civil Judgments Act 32 of 1988; common law and case law.
[244] Egyptian Civil and Commercial Procedure Law of 1986.
[245] [2001] East Af. L.R. 338.
[246] Barlows Central Finance Corporation (Pty) Ltd t/a B.R.L. Leasing v Joncon (Pty) Limited (2491/1999) [1999] SZHC 57 (28 December 1999).

court in *Afinta Financial Services (Pty) Ltd v Luke Malinga t/a Long Distance Transport*[247] the court had to interpret a lease agreement which provided that it 'shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland'. The Swaziland court applied Swaziland law as it held the agreement was entered into in Swaziland by parties domiciled, resident and carrying on business in Swaziland and the agreement was to be performed wholly in Swaziland.[248]

The freedom to choose the law of a third state is however not unlimited, as comity requires that individuals should not be allowed to evade foreign state laws merely by litigating in another state or choosing a different governing law. In this regard, the Zimbabwean court in *Herbst v Surti*[249] refused to enforce a contract which was illegal under the proper law of the contract, in this instance South African law.[250]

Different views also exists on whether a non-national legal system or sets of principles such as the *lex mercatoria,* UNIDROIT Principles, Principles of European Contract Law, or those of RECs can be chosen as the governing law. This matter is currently left to the conflict-of-law rules of African national courts. This will lead to uncertainty for the international trader on whether or not the chosen legal system will be recognised if the matter is brought before an African court.

In the absence of an express or implied choice-of-law clause, the most legal systems use the 'most closely connected test', although this will be determined by different means, with the result that the different courts may arise to different conclusions. African case law provides no clear answer as to which legal system should apply in the absence of a choice-of-law clause. The law of the place of destination of the consigned goods (Nigeria); the performance of the law of the contract (Kenya); the law of the place where the transaction occurred and the cause of action arose (Somalia); and the most substantial connection test (Lesotho and Ghana) have all been applied.[251]

It is therefore crucial that the private international law rules of African States be harmonised in this respect in order to promote international trade.

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[247] Afinta Financial Services (Pty) Limited v. Luke Malinga t/a Long Distance Transport (123/2001) [2001] SZSC 10; [2001] SZCA 10 (28 May 2001).
[248] Oppong (note 2) at 280.
[249] Herbst v Surti 1991 (2) SA 75 (Z).
[250] Oppong (note 187) at 679.
[251] Oppong (note 187) at 683.

4.3.2 Recognition and Enforcement of Judgments

The different legal systems on the continent are reflected in the differences that exist between jurisdiction of courts as basis for their competence in international transactions, and the rules for the recognition and enforcement of foreign judgments. These rules include the power of the courts to go into the merits of the case on which the foreign judgment was founded, the types of foreign judgments that can be enforced and the grounds for non-recognition of foreign judgments.[252]

Most African states do not provide for the automatic enforcement of judgments and it is possible for the registration or enforcement of a foreign judgment to be refused on vague and nationalist grounds.[253]

In *Barclays Bank of Swaziland v Koch*[254] the Botswana court recognised that comity requires foreign judgments to be recognised and enforced in each other's countries as far as possible, but in the same case decided that a Swaziland judgment could not be enforced under Botswana's Judgments (International Enforcement) Act. In *Minister of Water Affairs and Forestry v Swissborough Diamond Mines (Pty) Ltd*[255] for example, a South African court refused to enforce subpoenas issued out of the High Court of Lesotho for the applicants to give evidence in the application before the Lesotho Court and in *Heyns v Demetriou*[256] a South African judgment could not be registered under Malawi's British and Commonwealth Judgments Act. [257]

In many cases the non-recognition of judgments is due to the fact that there are no reciprocal agreements in place for the recognition and enforcement of judgments. The doctrine of reciprocity lies at the heart of many statutory schemes for the enforcement of foreign judgments in Africa.[258]

In Tanzania, the Reciprocal Enforcement of Foreign Judgments Act of 1935 applies to judgments given in named foreign countries on the basis of reciprocity.

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[252] Oppong (note 193) at 915.
[253] RF Oppong 'Private international law and the African Economic Community: a plea for greater attention' *International and Comparative Law Quarterly* at 922.
[254] 1997 B.L.R. 1294 at 1297.
[255] 1999 (2) SA 345 (T).
[256] [2001] Malawi High Court.
[257] Richard Frimpong Opong 'A decade of private international law in African courts: 1997-2007' (2008) 10 *Yearbook of Private International Law* 367 at 392.
[258] RF Oppong 'Private international law and the African Economic Community: a plea for greater attention' *International and Comparative Law Quarterly* at 918.

The President designates these countries after he is satisfied that judgments of the Tanzanian courts will be accorded similar treatment in that country.[259]

In the *Paulos Papassinous case*[260] the Ethiopian Supreme Court rejected the application of the judgment-creditor for execution of the Greek judgment since there was no treaty that enables Ethiopian Courts to execute judgments rendered in Greece. The Ethiopian Civil Procedure Code[261] provides that permission to execute a foreign judgment shall not be granted unless the execution of Ethiopian judgment is allowed in the country in which the judgment was given. On appeal, the judgment-creditor argued that Art 458(a) merely requires proof of the fact that judgments rendered in Ethiopia are executed in Greece, and does not require that there should be a treaty between the states in order to reciprocally execute judgments. However, the Supreme Court held that Ethiopian judgments can be executed in a foreign state if there is a treaty of judicial assistance between Ethiopia and that state, and as no such treaty existed between Ethiopia and Greece, the judgment could not be executed.[262] If the current mode of application of reciprocity by the Supreme Court of Ethiopia persists, foreign traders may avoid entering into transactions with Ethiopian business or they will simply increase the transactions costs of doing business in Ethiopia by for instance demanding advance payment or guarantees. [263]

These divergences that exist in the AU are in stark contrast to the approach adopted in the Brussels I Regulation, which provides for the quasi-automatic enforcement with little procedural obstacles and narrowly defined grounds for non-recognition within the EU.[264] The above examples illustrate how divergence in legal systems may pose as an obstacle to trade and how the harmonisation of these laws will promote international trade on the continent by reducing the legal risk involved in international transactions.

Diversity of rules poses a challenge for international trade in Africa. A major problem international traders face is the complexity of the rules of private international law. Even where the choice of parties, as regards the applicable law

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[259] The Reciprocal Enforcement of Foreign Judgments Order lists the courts of the following countries in its schedule: Lesotho, Botswana, Mauritius, New South Wales, Zambia, Seychelles, Somalia, Zimbabwe, Kingdom of Swaziland and the United Kingdkom.

[260] *In re matters of Paulos Papassinous* (Federal High Court, Ethiopia, 1987, Civil Case no. 1623/80) (unpublished).

[261] Civil Procedure Code of the Empire of Ethiopia, 1965 Art 458(a).

[262] Samuel Teshale 'Reciprocity with respect to enforcement of foreign judgments in Ethiopia: a critique of the Supreme Court's decision in the *Paulos Papassinous Case*' (2000) 12 *Journal of International and Comparative Law* 569 at 570.

[263] Samuel Teshale (note 271) at 574.

[264] RF Oppong 'Private international law and the African Economic Community: a plea for greater attention' *International and Comparative Law Quarterly* at 922.

and forum for litigation are respected in principle, individual countries impose limitations.[265] Uncertainty about where, and under which law, potential disputes will be decided, acts as a deterrent to traders contemplating international transactions. Certainty and predictability are essential for the promotion of commercial activity.[266]

4.4 Importance of harmonised Private International Law Rules

The proper functioning of the internal market creates a need for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country in which an action is brought. This is necessary in order to improve the predictability of the outcome of litigation, to provide legal certainty as to the applicable law and to ensure the free movement of judgments. [267]

If the enforcement of private legal claims is unduly complicated, time-consuming and expensive, it will hamper closer economic relations and the development of a stable economic union. The same is true for jurisdiction and choice-of-law rules. Complex and diverse private international law rules bring about uncertainty, increase transaction cost, and may drive away investors. For international traders, certainty, predictability, security of transactions, effective remedies and cost are important considerations in investment decision-making.[268] Diverse private international law rules can impose unnecessary transaction costs on traders and encourage forum shopping. [269]

There is a need for the harmonisation of laws in the African states to sustain the AEC and facilitate trade.[270] A well-developed and harmonised private international law regime is indispensable for any economic community.[271] Within the European Community, article 220 of the Treaty of Rome charged Member States to enter into negotiations with each other with a view to securing 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and arbitration awards'.[272]

Private international law can become a direct source of investment, foreign exchange and employment in Africa, through what Oppong terms 'jurisdictional

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[265] Oppong (note 264) at 922.
[266] *Ibid.*
[267] Regulation EC No 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations L177/6 [Rome I Regulation] Recital 6.
[268] Oppong (note 193) at 915.
[269] Oppong (note 187) at 707.
[270] Oppong (note 2) at 70; Ndulo (note 177) at 107.
[271] Oppong (note 193) at 912.
[272] *Ibid.*

tourism'. Contracting parties with no association to England, for example, are attracted to litigate there because of its accommodating jurisdiction rules, respect for choice of law and forum agreements, and effective foreign enforcement regime. African countries should also explore the potential of developing into jurisdictional tourist sites for the resolution of intra-African commercial disputes, including those involving non-African parties. These jurisdictional tourist sites should provide a natural, easily accessible and potentially less costly forum for resolving intra-African disputes. They will also be a source of investment, employment and foreign exchange for the countries involved, thereby promoting international trade.[273]

4.5 Harmonisation of private international laws in the EU

4.5.1 Legal Order of the EU

The European Union (EU) has its own legal order which is separate from international law and forms an integral part of the legal system of Member States. The legal order of the EU is founded on various sources of law, and the different nature of these sources has imposed a hierarchy among them.[274] At the top of the hierarchy is the primary law, represented by the Treaties and general legal principles, followed by international treaties concluded by the EU, and secondary law founded on the Treaties. The legal acts adopted by the European institutions to exercise the Union's competences are regulations, directives, decisions, recommendations and opinions. Following the entry into force of the Treaty of Lisbon, the simplification of the system will mean fewer legal acts. Since the Treaty of Lisbon abolished the 'pillar structure',[275] the Community method applies to all European policy, except for common foreign and security policy.[276]

Chapter 3 TFEU provides for the adoption of measures which have as their object the establishment and functioning of the internal market.[277] The TFEU requires the implementation of four fundamental freedoms, namely the abolition

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[273] Oppong (note 187) at 710-711.
[274] Gabriël Moens and John Trone *Commercial Laws of the European Union* (2010) at 2.
[275] The 'three pillars structure' functioned on the basis of different decision-making procedures: the Community procedure for the first pillar, and the intergovernmental procedure for the other two. In the case of the first pillar, only the Commission could submit proposals to the Council and Parliament, and a qualified majority was sufficient for a Council act to be adopted. In the case of the second and third pillars, this right of initiative was shared between the Commission and the Member States, and unanimity in the Council was generally necessary. The Treaty of Amsterdam transferred some of the fields covered by the third pillar to the first pillar (free movement of persons). 'Pillars of the European Union'. Available at http://europa.eu/scadplus/glossary/eu_pillars_en.htm [Accessed 30 July 2010].
[276] Moens and Trone (note 274) at 2.
[277] *Ibid.*

between Member States of obstacles to the freedom of movement of goods, persons, services and capital.[278]

The European Parliament and the Council of the European Union must, in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. These provisions do not apply to fiscal rules/regulations, to those relating to the free movement of persons or to those relating to the rights and interests of employed persons.[279]

The entry into force of the EU Treaty of Amsterdam on 1 May 1999 changed the sphere of harmonising private international law rules, as legislation on matters of private international law no longer had to be in the form of intergovernmental Conventions that had to be ratified and implemented by states, but could become directly applicable through Regulations.[280] Based on Articles 61 and 65 of the Treaty of Amsterdam (now art 81 TFEU), regulations have been accepted as the most important means for harmonisation of private international law rules in the EC after 1999.

The approach before 1999 posed a number of disadvantages. The ratification procedures were generally slow, and each time a new member joined the group, an accession treaty to each convention had to be negotiated and ratified. The ECJ' jurisdiction to assure the uniform interpretation of the conventions was also limited.[281] There is now no longer the risk that Members will fail to meet their obligations and that measures would not come into force, as was the case with the Insolvency Convention.[282] Through the use of Community Law, once agreements are concluded, they can take direct effect into Member States. The European Commission has underlined the importance of regulations, stating that the change of form is warranted by the need to apply strictly defined and harmonised rules to jurisdiction and the recognition and the enforcement of judgments, and by the advantages of regulations, which contain unconditional provisions that are directly

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[278] TFEU (note 93) Arts 21(1), 28, 45, 56, and 63.
[279] TFEU (note 93) Art 114.
[280] Katharina Boele-Woelki 'Unification and Harmonization of Private International Law in Europe' in J Basedow et al (eds) *Private Law in the international arena* – Liber Amicorum Kurt Sier (2000) 61 at 62.
[281] Bayraktaroglu (note 235) at 134.
[282] J Basedow "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam" (2000) 37 *Common Market Law Review* 687 at 688.

and uniformly applicable in a mandatory way, and by their very nature, require no action by the Member States to transpose them into a national law.[283]

Denmark, the United Kingdom and Ireland however enjoy a special regime as regards to Title IV of the EC Treaty, which constitute the legal basis for judicial cooperation in civil matters. Legal instruments adopted under Title IV of the EC Treaty are not binding or applicable in Denmark, while Ireland and the United Kingdom are bound by them if they notify the Council to that effect.[284]

The authority to adopt binding and directly applicable legislation in the field of private international law has further been developed by the Treaty of Nice and the Treaty of Lisbon. The Treaty of Lisbon divides competences into three separate groups: exclusive competence, shared competence and supporting competence. Articles 3, 4 and 6 TFEU lists the areas that falls under each type of competence. The areas in which the Union has exclusive competence include the customs union, the establishing of the competition rules necessary for the functioning of the internal market and a common commercial policy. [285] The Union also has exclusive competence for the conclusion of an international agreement of which the conclusion is provided for in a legislative act of the Union, or which is necessary to enable the Union to exercise its internal competence.[286] Principle areas in which the Union and the Member States share competence include the internal market, economic, social and territorial cohesion, consumer protection and transport.[287]

Art 81 TFEU (ex art 65 TEC) provides for the development of judicial cooperation in civil matters having cross-border implications. This is based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. This may include the adoption of measures for the approximation of the laws and regulations of the Member States.[288] In order to achieve such cooperation, the EU Parliament and Council must adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member State concerning conflict of laws and of jurisdiction; (d)

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[283] Bayraktaroglu (note 235) at 145.
[284] European Union 'Judicial Cooperation in Civil Matters'. Available at 'http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16016_en.htm [Accessed 30 July 2010].
[285] TFEU (note 93) Art 3(1).
[286] TFEU (note 93) Art 3(2).
[287] TFEU (note 94) Art 4.
[288] TFEU (note 93) Art 81(1).

cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; and (h) support for the training of the judiciary and judicial staff.[289]

The measures of European harmonisation of private international law adopted or proposed may be classified under five headings, namely civil jurisdiction and judgments, the law applicable to civil obligations; family matters; insolvency; and procedural cooperation. [290] The focus of this paper will be on the first two categories.

4.5.2 Civil Jurisdiction and Judgments

The most important EU instrument in the sphere of private international law is the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I Regulation'). [291]

The Regulation supersedes the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('Brussels Convention'), which was based on art 293 (ex art 220 EC). The Brussels Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to art 299 of the TEC.[292]

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[289] TFEU (note 93) Art 81(2).
[290] Stone (note 236) at 5.
[291] Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1.
[292] European Union 'Judicial cooperation in civil matters'. Available at 'http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm [Accessed 30 July 2010].

a) Rules of jurisdiction

The basic principle is that persons domiciled in a Member State must be sued in the courts of that Member State, regardless of their nationality.[293] If the defendant is not domiciled in a Member State the jurisdiction of the courts of each Member State must be determined by the laws of that Member State.[294] In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business, and in the case of trusts, domicile is defined by the court that is considering the case by applying its own rules of private international law.[295]

In certain circumstances a defendant may be sued in the courts of another EU country. The areas of jurisdiction where this is the case, are special or exclusive jurisdiction, and jurisdiction on matters relating to insurance, consumer contracts and individual contracts of employment.[296] A defendant may also be sued in the courts of another EU state if allowed by forum agreement or by voluntary appearance of the defendant. Special jurisdiction exists for matters relating to a contract; maintenance; tort, delict or quasi-delict; a civil claim for damages or restitution; a dispute arising out of the operation of a branch, agency or other establishment; a trust; and a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight.[297]

b) Recognition and Enforcement

A judgment given in an EU country is recognised in the other EU countries without any special procedure being required. A judgment is defined as given by a court or tribunal in an EU country, including a decree, order, decision or writ of execution.[298]

A judgment will not be recognised if such recognition is manifestly contrary to public policy of the Member State in which recognition is sought; where it was given in default of appearance; if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or if it

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[293] Brussels I (note 291) Art 2(1).
[294] Brussels I (note 291) Art 4(1).
[295] Brussels I (note 291) Art 60.
[296] Brussels I (note 291) Sections 3-5.
[297] Brussels I (note 291) Art 5.
[298] Brussels I (note 291) Art 33(1).

is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and between the same parties.[299]

A judgment is enforceable in another Member State if it is enforceable in the State were the judgment was given, and it has been declared enforceable in the other member state after an application has been made by any interested party. The parties may appeal against a decision on an application for a declaration of enforceability. [300]

c) New Lugano Convention

On 15 October 2007 a convention was signed on jurisdiction and the recognition and enforcement of judgments ('New Lugano Convention'), with the objective of achieving the same level of circulation of judgments between the EU Member States and Switzerland, Norway and Iceland. On entering into force, it will replace the Lugano Convention of 1988 on jurisdiction and enforcement of judgments in civil and commercial matters.[301]

Once it has come into force, the convention will also be open to future European Free Trade Area (EFTA) Members; Member States of the EC acting on behalf of certain non-European territories that are part of their territory or for whose external relations they are responsible; or any other state, subject to the unanimous agreement of all the contracting parties.[302] It is therefore evident that harmonisation of laws on the European continent has not only taken place within the ambit of the EU, but also outside it, driven by international organisations. (This is also true of initiatives undertaken by the Lando Commission, discussed below.)

The convention follows the present legal framework of the Brussels I regulation, and the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will therefore be similar in the EU and Switzerland, Norway and Iceland.[303] This promotes international harmonisation, and should also be aspired to on the African continent.

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[299] Brussels I (note 291) Art 43.
[300] Brussels I (note 291) Art 38.
[301] European Union 'Judicial cooperation in civil matters'. Available at http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm [Accessed 30 July 2010].
[302] *Ibid.* http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm
[303] *Ibid.*

4.5.3 Law applicable to civil obligations

The Regulation on the Law Applicable to Contractual Obligations [304]('Rome I Regulation') provide uniform rules for the determination of law governing civil and commercial law contracts within the EU, while the Rome II Regulation provides rules for non-contractual obligations. The Rome I Regulation entered into force on 17 December 2009 between Member States of the EU, except Denmark, which is not bound by it.[305] The Regulation replaces the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations ('Rome Convention').[306]

a) Choice by parties

Rome I acknowledge that the parties' autonomy to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations. [307] This choice must be made 'expressly or clearly demonstrated by the terms of the contract or the circumstances of the case'. Parties can select the law applicable to the whole or only part of their contract.[308] The Regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international Convention, such as the CISG.[309]

b) Applicable Law in absence of choice

Art 4 provides the rules that must be used to determine the applicable law in the absence of an express or implied choice of law. According to these rules, a contract for the sale of goods will be governed by the law where the seller has its habitual residence; a contract for services, where the service provider has its habitual residence; a right *in rem* in immovable property, the country where the property is situated; a franchise contract, where the franchisee has its habitual residence; a distribution contract, where the distributor has its habitual residence; and sale of goods by auction will be governed by the law of the state where the auction takes place.[310]

If the contract is not covered by one of the above rules, or where it falls into more than one category, it will be governed by the law of the country where the party

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[304] Rome I (note 268).
[305] Rome I (note 268) Recital 46.
[306] [1998] OJ C27/34.
[307] Rome I (note 268) Recital 11.
[308] Rome I (note 268) Art 3(1).
[309] Rome I (note 268) Recital 13.
[310] Rome I (note 268) Art 4(1)(a-g).

required to effect the characteristic performance has its habitual residence.[311] However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply, and where the applicable law cannot be determined by the above rules, the contract shall be governed by law of the country with which it is most closely connected.[312]

c) Exceptions to party autonomy

Parties' freedom to choose the applicable legal system is not absolute. Considerations of public interest gives courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.[313] Rome I define mandatory rules as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'[314]

The chosen legal system must be legal, not contrary to public policy of the forum state, *bona fide* and not chosen only to evade the part of the law of a particular country. This provision may serve as reassurance to Member States, as they are assured that their courts are not forced by this Regulation to apply illegal rules or rules that are contrary to their public policy. Rome I therefore provide clear, predictable rules in certain circumstances where there no governing law has been chosen.

4.6 Africa: the way ahead

There is a clear need for the harmonisation of private international law in Africa. While the creation of a single instrument applicable in all African states is the ultimate goal, this might be too ambitious at the outset. The adoption of harmonisation instruments by the RECs, as building blocks of regional integration with the aim to ultimately merge to form the African Economic Community, may be a simpler starting point. Each of the eight recognised RECs should draft and adopt instruments to regulate each of the areas of private international law (applicable law, jurisdiction and enforcement of foreign judgments), or a combination of these

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[311] Rome I (note 268) Art 4(2).
[312] Rome I (note 268) Art 4(3) and Art 4(4).
[313] Rome I (note 268) Recital 37.
[314] Rome I (note 268) Art 9(1).

aspects in a single instrument. If the specific REC experiences difficulty in this regard, the Hague Conference on Private International law may be approached to assist the REC in the development of regional conventions, in the same way that UNIDROIT is currently assisting OHADA to develop a uniform law of contract. The purpose of the HCCH is to work for the progressive unification of the rules of private international law in the participating countries. [315] Cooperation with the HCCH could start with the ratification by African countries of some of the Hague conventions already in force. [316] The EU Brussels I and Rome I Regulations may also be used as examples when drafting similar regulations for the African context.

Cooperation with the HCCH could also take the form of sending official delegations to participate in the Conference's proceedings as a prelude to membership.[317] There are currently only three African countries[318] that are members of the Conference. The EU recently became a member of the HCCH, although all members of the EU are members of the HCCH. The HCCH's membership policy was extended to allow regional economic communities to become members. The AU and each of the RECs should therefore consider becoming members of the HCCH. In order to affect this it might be necessary for some REC's member states to amend their founding treaties to afford to the relevant REC with the necessary legislative authority and capacity. A strong relationship with the Conference should be a key aspect of any strategy within the RECs to develop their private international law regimes. [319]

In order to remedy the problem of easily enforceable judgments, it is recommended that each African state should designate more African states as beneficiaries of its statutory regime for the registration of foreign judgments.[320] This should only provide an interim solution, as the actual aim would be the conclusion of an African foreign judgment enforcement instrument, discussed above.

Despite the advantages and incentive that harmonised private international law rules provides to international traders little effort has been made towards a

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[315] Oppong (note 2) at 305.
[316] Oppong (note 2) at 305.
[317] *Ibid.*
[318] Egypt, Morocco and South Africa.
[319] Oppong (note 2) at 306.
[320] For example, South Africa's regime designates only Namibia. Namibia's regime designates only South Africa. Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya and Tanzania. Ghana's regime only designates Senegal; Tanzania's regime designates Lesotho, Botswana, Mauritius, Zambia, Seychelles, Somalia, Zimbabwe and the Kingdom of Swaziland. Kenya's regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda. *See* Oppong (note 2) at 278.

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[315] Oppong (note 2) at 305.
[316] Oppong (note 2) at 305.
[317] *Ibid.*
[318] Egypt, Morocco and South Africa.
[319] Oppong (note 2) at 306.
[320] For example, South Africa's regime designates only Namibia. Namibia's regime designates only South Africa. Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya and Tanzania. Ghana's regime only designates Senegal; Tanzania's regime designates Lesotho, Botswana, Mauritius, Zambia, Seychelles, Somalia, Zimbabwe and the Kingdom of Swaziland. Kenya's regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda. *See* Oppong (note 2) at 278.

harmonised private international law regime. This should be addressed as a matter of urgency at a national, regional and continental level.

5 HARMONISATION OF SUBSTANTIVE LAW RULES

5.1 Introduction

An alternative approach to private international law rules is the harmonisation of substantive law rules of national states.

The harmonisation of substantive law rules entails achieving a degree of similarity in the substantive laws of the countries concerned. Within the field of international trade, several areas are in need of harmonisation. These include the law of sale of goods, laws relating to bills of exchange, banker's commercial letters of credits and guarantees, insolvency and the law of commercial arbitration. All these areas play an important facilitating role, and if these laws are not harmonised, will impede international trade.[321]

By considering the successes of other international organisations and institutions, Africa may gain valuable insights into the working methods adopted, the areas chosen for harmonisation and the failures and successes of various types of instruments. Although Africa has a unique political, cultural and historical background that will shape its harmonisation process, these organisations may nevertheless provide a starting point on which the African efforts could be based.

The institutions which will be discussed are the EU which provides the most advanced model of regional integration; global organisations such as UNCITRAL and UNIDROIT which concerns itself with international harmonisation of trade laws and private law respectively; and OHADA which provides the only significant example of harmonisation in Africa.

5.2 European Union

The necessary mandate for the harmonisation ('approximation') of laws in the EU is the TFEU, which provides that the European Parliament and the Council must adopt measures for the approximation of the provisions laid down by law, which have as their object the establishment and functioning of the internal market.[322]

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[321] Ndulo (note 177) at 109.
[322] TFEU (note 93) Art 114(1).

Various directives have been issued relating to insurance, commercial agency, consumer credit, consumer safety, doorstep sales and unfair terms in consumer contracts, to name but a few, and the list is steadily growing.[323]

5.3 Harmonisation of European Contract Law

The history of the harmonisation of European contract law precedes the EU. If a starting point for the process must be pinpointed, it may be the work of Professor Ernst Rabel, who began working on the creation of an international sales law in the late 1920's.[324] It was largely at his suggestion that UNIDROIT adopted the project and commenced the task of preparing a draft international sales law. The result of the project was two Hague Conventions, namely the Uniform Law on the International Sale of Goods, and the Uniform Law on the Formation of Contracts for the International Sale of Goods. The texts for both instruments were agreed in 1964, but neither instrument came into force until 1972 when they obtained the necessary ratifications. These Conventions are generally not regarded as a resounding success, as only nine states ratified them.[325] Despite their limited ratification, these instruments provided a significant starting point for the drafting of the Vienna Convention on the International Sale of Goods (CISG).[326]

The next major stage in the development of a harmonised European contract law can be said to be the work done on the Principles of European Contract Law.[327]

5.3.1 Principles on European Contract Law

The Principles of European Contract Law (PECL) have been drawn up by the Commission on European Contract Law, which is an independent body of lawyers from each Member State of the EU under the chairmanship of Professor Ole Lando (therefore often termed 'the Lando Commission'). The Principles are a response to a need for a union-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contracts.[328]

The Principles attempt to clarify basic rules of contract law which most legal systems of the Member States of the EC hold in common. The principles are stated in the form of articles with a detailed commentary explaining the purpose and

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[323] O Lando and H Beale (eds) *Principles of European Contract Law Parts I and II* (2000) at xxii.
[324] E McKendrick 'Harmonisation of European Contract Law: the state we are in' in Stefan Vogenauer and Stephen Weatherhill (eds) *The harmonisation of European Contract Law* (2006) at 6.
[325] UK, Belgium, West Germany, Italy, Luxembourg, Netherlands, San Marino, Israel and Gambia.
[326] McKendrick (note 324) at 6.
[327] *Ibid.*
[328] Lando and Beale (not e 324) at xxi.

operation of each article. The PECL was published in three phases: Part I was published in 1995, Parts I and II in 1999 and Part II in 2003. [329]

The PECL is a different type of instrument than the CISG, although it has been influenced by it. Whereas the CISG forms part of 'hard law', the Principles were not indented as a legally binding set of rules.[330]

The purposes of the Principles are set out in the introduction to Parts I and II. [331] Firstly, the Principles may form a foundation for European legislation, including a possible step in the preparation of a European Code of Contracts. Secondly, the Principles are suitable for adoption by parties who want their contractual relations to be governed by a neutral set of rules not based on a national legal system. Thirdly, the Principles are a 'modern formulation of the *lex mercatoria'*, and can therefore be applied by arbitrators when the contract is stated to be governed by 'general principles of law' or the *'lex mercatoria'*. Fourthly, they are a model for judicial and legislative development of the law of contract, and finally, they may form the basis for the harmonisation of contract law among the Member States of the EU. [332]

Although European Community law had an impact on national contract law, its intervention has been rather episodic or selective to date, but its role is steadily increasing. The principal contributions of community law to the development of a harmonised contract are in the form of directives. These directives cover subjects such as doorstep selling, self-employed commercial agents, unfair terms in consumer contracts, timeshare, sale of consumer goods and associated guarantees, and late payment in commercial transactions.[333]

A more expansive role for the EU has been signalled in recent years, which led to the European Commission passing a resolution in November 2001.[334] This underlined the 'need to pursue a targeted harmonisation of contract law where the mutual recognition of national rules cannot be applied and where divergence of

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[329] The Commission on European Contract Law 'Introduction to the Principles of European Contract Law'. Available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm [Accessed 11 August 2010].
[330] McKendrick (note 324) at 8.
[331] Lando and Beale (note 324) at xxiii-xxiv.
[332] *Ibid.*
[333] McKendrick (note 324) at 10.
[334] McKendrick (note 324) at 11.

these rules leads to obstacles to the functioning of the internal market as defined by the Court of Justice.'[335]

The *Principles of European Contract Law Parts I and II* identifies the following as benefits to be derived from a formulation of principles of contract law within Europe.

a) Facilitation of cross-border trade

There is a growing recognition of the need for measures of harmonisation to eliminate the differences in national laws which are detrimental to the efficient conduct of cross-border trade. Harmonisation allows contracting parties to contract with reference to a neutral set of rules which apply uniformly over the territories of the various States. The rules are available in various languages of which at least one is likely to be known to the parties. Over time the rules are expected to become much more familiar to international traders than the individual national laws of the various foreign countries in which they transact business.[336]

b) Strengthening of the Single Market

The harmonisation of principles of contract law is important for the proper functioning of the Singe Market. A harmonised legal system overcomes the obstacles to trade which differences in the national laws of Member States cause. These differences will affect trade within the Market, and the harmonisation of laws will strengthen the Single Market.[337]

c) Creation of an Infrastructure for Community Laws governing contracts

Disparities between national laws include matters such as formation, formal and essential validity, substantive effects, remedies for non-performance and the conditions under which performance is excused. The PECL was designed to reduce the adverse effects of difference in national laws, but also to provide a foundation of contract law within the Community upon which more specific harmonisation measures can be constructed.[338]

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[335] Resolution on the Approximation of the Civil and Commercial law of the Member States, COM (2001) 398 final, C5-0471/2001-2001/2187 (COS), OJ C 140E, 13.6.2001 538 in Patnaik & Lala (note 45) at 14.
[336] Lando & Beale (note 324) at xxi.
[337] *Ibid.*
[338] Lando & Beale (note 324) at xxi.

d) Provision of guidelines for national courts and legislatures

The PECL are intended to reflect the common core of solutions to problems of contract law. On many issues covered by national law they may offer a more satisfactory answer than that which is reached by traditional legal thinking. The Principles are therefore available for the assistance of European courts and legislators concerned to ensure the fruitful development of contract law on a union-wide basis. Beyond the borders of the EU, the Principles may serve as an inspiration for African legislators who are in the course of reforming their laws of contract to meet the needs of a market economy.[339]

e) Construction of a bridge between the civil law and the common law

One of the major obstacles of European legal integration is the reconciliation of the civil and the common law families.[340] This will certainly also be the case in African legal integration, which will further be complicated by the influence of mixed and religious legal systems. The major differences pertain to legal structure and reasoning, terminology, fundamental concepts and legal policy. These differences are detrimental to the efficient functioning of the Single Market. One of the major benefits offered by an instrument such as the PECL is that it provides a bridge between the civil law and the common law by providing rules designed to reconcile the differing legal philosophies.[341]

5.3.2 Draft Common Frame of Reference

In 2003 the Commission produced a further Communication in the form of an Action Plan, suggesting a mix of non-regulatory and regulatory measures. The target was to create a common frame of reference, establishing common principles and terminology in the area of European Contract Law.[342] In answer to this plan, the Draft Common Frame of Reference for the Principles, Definitions and Model Rules of European Private Law (DCFR) was completed in 2009.

The DCFR was prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (*Acquis* Group). The DCFR are based in part on a revised version of the PECL. Its completion in 2009 fulfilled an obligation to the European Commission undertaken in 2005.

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[339] *Ibid.*
[340] *Ibid.*
[341] Lando & Beale (note 324) at xxiii.
[342] Patnaik & Lala (note 45) at 15.

One of the purposes of the text is to serve as a draft for drawing up a 'political' Common Frame of Reference (CFR), which was first called for by the European Commission's 2003 Action Plan on a More Coherent Europe Contract Law.[343] In addition to a possible model for a political CFR, the DCFR is also to be used for legal science, research and education and as 'a possible source of inspiration'.[344] The DCFR originated from an initiative of European legal scholars and as such is an academic and not politically authorised text. Its rules, definitions and principles has not been approved or mandated by a politically legitimated political body at European or national level, but the DCFR may be carried over at least in part into a Common Frame of Reference.[345]

The PECL received the attention of many higher courts in Europe and numerous official bodies charged with preparing the modernisation of the relevant national law of contracts. In the same way it is believed that this development will continue in the context of the DCFR and that it will have repercussions for reform projects within the EU, at both national and Community law levels, as well as beyond the EU. If the content of the DCFR is convincing, it may contribute to a harmonious and informal Europeanisation of private law.[346] It is suggested that the DCFR could be taken into account by national legislators when EU directives in the area of contract law are transposed into national legislation and be used in arbitration to find neutral and balanced solutions to resolve conflicts arising between contractual parties. It could also be developed into a body of standard contract terms to be made available to legal practitioners and lastly inspire the ECJ when interpreting the *acquis* on contract law.[347]

The PECL and DCFR therefore provide examples of how the harmonisation of substantive private law rules of the African continent may be approached.

5.4 Intergovernmental and private international organisations

Several forms of legislation have been rendered possible and harmonised through the activity of intergovernmental institutions, which formulated uniform laws

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[343] Study Group on a European Civil Code and Research Group on European Private Law (Acquis Group) *Principles, Definitions and Model Laws of European Private Law Draft Common Frame of Reference* Outline Edition (2009) [DCFR] at 2. Available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf [Accessed 30 July 2010].
[344] DCFR (note 343) at 4.
[345] DCFR (note 343) at 4.
[346] DCFR (note 343) 8-10.
[347] McKendrick (note 324) at 12.

and international conventions. Examples are UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law. [348]

As more international conventions are accepted and ratified by countries of different legal traditions their significance for the harmonisation of laws will be increased. [349] It is therefore imperative that Africa increases its participation in this sphere, which would promote both continental and international harmonisation.

5.4.1 UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established in1966 by the UN General Assembly. UNCITRAL plays an important role the development of an improved legal framework for the facilitation of international trade and investment. Its mandate is to further the progressive harmonisation and modernisation of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in certain fields of commercial law.[350]

UNCITRAL fulfils its mandate by coordinating and promoting cooperation among the organisations active in this field; by promoting wider participation and acceptance of existing international conventions and model and uniform laws, and preparing and promoting the adoption of new ones; promoting the codification and wider acceptance of international trade terms, provisions, customs and practices; and promoting means of ensuring a uniform interpretation and application of international trade conventions and uniform laws.[351]

UNCITRAL has prepared a number of important conventions, including on Carriage of Goods by Sea (1978); Contracts for the International Sale of Goods (1980); International Bills of Exchange and International Promissory Notes (1988); Independent Guarantees and Stand-by Letters of Credit (1995); and the Convention on the Use of Electronic Communications in International Contracts (2005).[352]

Various model laws with guide to enactments have also been drafted, including on the subjects of international commercial arbitration, international credit transfers (1992); procurement of goods, construction and services (1994); electronic

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[348] Fazio (note 11) at 14.
[349] Fazio (note 11) at 14.
[350] UNCITRAL 'Basic facts about the United Nations Commission on International Trade Law' at 2. Available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf [Accessed 10 September 2010].
[351] UNCITRAL General Assembly resolution 2205 (XXI), sect. II, para. 8 in UNCITRAL (note 350) at 2.
[352] UNCITRAL (note 350) at 11.

commerce (1996); cross-border insolvency (1997); electronic signatures (2001); and international commercial conciliation (2002).[353]

With 76 parties, the Vienna Convention on Contracts for the International Sale of Goods (CISG) is generally regarded as one of the most successful harmonisation instruments. At a general level, the CISG facilitates international trade by providing modern, uniform rules of clear application. It establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.[354] Despite its international success, only ten African States[355] are parties to the Convention.[356]

5.4.2 UNIDROIT

The International Organisation for Unification of Private Law (*Institut International pour l'Unification du Droit*) (UNIDROIT) is an international organisation that was founded in 1926 under the auspices of the League of Nations, but is now an independent international organisation. The organisation studies needs and methods for modernising, harmonising and co-ordinating private and particular commercial laws between States and groups of States. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules and will only include uniform conflict of law rules incidentally.[357]

Different from UNCITRAL, whose membership is rotated between UN Member States, UNIDROIT membership is restricted to accession to its Statute. There are currently 63 members, of which Egypt, Nigeria, South Africa and Tunisia are the only African states. These members are from a variety of different legal, economic and political systems as well as different cultural backgrounds.[358]

UNIDROIT has also adopted a number of Conventions and Protocols. These include the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964) (ULIS) and Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964)

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[353] UNCITRAL (note 350) at 39.
[354] UNCITRAL '1980 United Nations Convention on Contracts for the International Sale of Goods'. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [Accessed 8 August 2010].
[355] Burundi, Egypt, Gabon, Ghana (still to be ratified), Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia.
[356] UNCITRAL (note 354).
[357] UNIDROIT 'UNIDROIT: An overview'. Available at http://www.unidroit.org/dynasite.cfm?dsmid=103284 [Accessed 8 August 2010].
[358] UNIDROIT 'Membership'. Available at http://www.unidroit.org/english/members/main.htm [Accessed 8 August 2010].

(ULIF). These two instruments were rendered largely redundant since the adoption of the CISG. Other Conventions include the Convention on Agency in the International Sale of Goods (Geneva, 1983); Convention on International Financial Leasing (Ottawa, 1988); Convention on International Factoring (Ottawa, 1988); Convention on International Interests in Mobile Equipment (Cape Town, 2001); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001).[359]

5.4.3 CMI & OTIF

The *Comité Maritime International* (CMI) is a non-governmental international organisation that was formed in 1897, when it aimed to create an international convention governing carriage contracts. CMI's objective is the unification of maritime law in all its aspects.[360] As the bulk of the international trade in goods are carried by sea, this organisation has an important role to play in the harmonisation of laws of international trade.

In 1922 the CMI took over a draft that had emerged out of the Maritime Law Committee of the International Law Association. This document, after the CMI had revised it, became the basis for the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), which a diplomatic conference approved in 1924. Almost all the major sea power today recognise these rules, either as in their original form, or the amended Hague-Visby rules, which are the Hague Rules as amended by the Brussels Protocol 1968, in Visby (Sweden).[361]

The Committee also prepared a basic draft of the new Rotterdam Rules, which are the result of inter-governmental negotiations that took within UNCITRAL after the basic draft had been prepared by the CMI. The rules were adopted by the General Assembly of the UN on 11 December 2008. The Rotterdam Rules are the first rules governing the carriage of goods by sea and connecting or previous transport by land in a single instrument.[362]

The entry into force of the 1980 Convention concerning International Carriage by Rail (COTIF) in 1985 marked the birth of the Intergovernmental Organisation for

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[359] UNIDROIT 'Conventions'. Available at http://www.unidroit.org/english/conventions/c-main.htm [Accessed 10 August 2010].
[360] CMI 'History'. Available at http://www.comitemaritime.org/ [Accessed 13 August 2010].
[361] Paul B Stephan 'The futility of unification and harmonisation in international commercial law' (1999) 39 *Virginia Journal of International Law* 743 at 763.
[362] Rotterdam Rules 'New Rotterdam Rules open for Signature' http://www.rotterdamrules2009.com/cms/index.php [Accessed 11 August 2010].

International Carriage by Rail, known today as OTIF (*Organisation Intergouvernementale Pour Les Transports Internationaux Ferroviaires).* The aim is to establish a system of uniform law applicable to the carriage of passengers, baggage and freight in direct international traffic between Member States. The Protocol of 3 June 1999 for the modification of COTIF (Vilnius Protocol) has been in force since 1 July 2006.[363]

45 European, Middle Eastern and North African States are currently members of OTIF with Jordan being an associate member. Only three African states, namely Algeria, Morocco and Tunisia, are member of OTIF.[364]

5.4.4 ICC

The International Chamber of Commerce (ICC) is a non-governmental institution that was founded in 1919 with its seat in Paris. ICC operates a global network of national committees and groups in more than 90 countries. The ICC safeguards private contracts, provides information, undertake arbitrations and propose uniform economic laws. One of its most important publications are the Incoterms (international commercial terms), an internationally recognised standard that are used worldwide in international and domestic contracts for the sale of goods. Incoterms rules provide internationally accepted definitions and rules of interpretation for most common commercial terms, such as FOB (free on board) and CIF (cost-insurance-freight). The rules were first published in 1936 and the latest revision was launched in mid-September 2010 and will take effect from 1 January 2011.[365] The ICC has also formulated many other important commercial rules, such as the Rules for Conciliation and Arbitration of 1998,[366] the Uniform Customs and Practice for Documentary Credits,[367] the current version being the UCP600 which has been in effect since 1 July 2007, and the Uniform Rules of Conduct for Interchange of Trade Data by Tele-transmission[368] of 1988.[369]

The ICC membership is open to national and local organisations not conducted purely for political reasons, as well as corporations, companies, firms, other legal

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[363] OTIF 'Conventions'. Available at http://www.otif.org/en/about-otif/conventions-cotif.html [Accessed 11 August 2010].
[364] OTIF 'Member States'. Available at http://www.otif.org/en/about-otif/addresses-and-useful-links/member-states.html [Accessed 11 October 2010].
[365] ICC 'The new Incoterms 2010 Rules'. Available at http://www.iccwbo.org/incoterms/ [Accessed 12 August 2010].
[366] ICC Rules for Conciliation and Arbitration of 1998, ICC Pub. No. 808 (1997).
[367] Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce (Pub. No. 400, June, 1983).
[368] International Chamber of Commerce, Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission ('UNCID'), ICC Pub. No. 452 (1988).
[369] Fazio (note 11) at 13.

entities and individuals involved in international business activities, provided they belong to a National Committee or Group.[370]

5.5 OHADA

OHADA consist of a Council of Ministers and a Common Court of Justice and Arbitration (CCJA) who are responsible for the realisation of the tasks planned in the OHADA Treaty. The Council of Ministers is assisted by a Permanent Secretary Office, to which is attached a Regional High Judiciary School (ERUSMA).[371]

Legal harmonisation is effected through the issuing of Uniform Acts. The adoption of the Uniform Acts requires unanimous approval of the representatives of the Contracting States who are present and who have exercised their right to vote. For the adoption of the Uniform Acts to be valid, at least two-thirds of the Contracting States must be represented. Abstention does not delay adoption of the Uniform Acts.[372]

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.[373] According to the Advisory Opinion of the CCJA,[374] the effect of this article is to abrogate and \prohibit any future national legislative or regulatory provisions which has the same purpose as the Uniform Acts, and which conflict with these. In cases where not all the provisions of a national law conflict with those of a Uniform Act, the non-conflicting provisions remain applicable.[375]Uniform Acts enter into force 90 days after their adoption. Uniform Acts may be relied upon against any party 30 days after publication in the OHADA official journal.[376]

The OHADA Treaty awards the interpretive function to the CCJA. This is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national systems. The CCJA offers a forum for international arbitration, and also serves as the court of laws for judgments rendered and

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[370] Constitution of the International Chamber of Commerce, June 2009. Available at http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC_Constitution_EN_8_June_2009.pdf [Accessed 13 August 2010] Art 2(a).
[371] OHADA Treaty (note 153) Art 3.
[372] OHADA Treaty (note 153) Art 8.
[373] OHADA Treaty (note 153) Art 10.
[374] Advisory Opinion No. 001/2001/EP in Martor (note 224) at 21.
[375] Martor (note 224) at 21.
[376] OHADA Treaty (note 153) Art 9.

arbitrations instituted within member states.[377] Because the CCJA preserves the uniformity of the OHADA laws through its final say on matters concerning the application thereof, it represents a transfer of national sovereignty to a supranational authority.[378] OHADA therefore represents an example of the willingness of African governments to relinquish sovereignty to promote economic development, as member states have given up some degree of national sovereignty in order to establish a single regime of uniform business laws.[379]

OHADA's scope includes any regulations concerning company law, definition and classification of legal persons engaged in trade, proceeding in respect credits and recovery of debts, means of enforcement, insolvency, receiverships and arbitration. It further includes employment law, accounting law, transportation and sales laws.[380]

The analysis of the draft OHADA Act on Contract law against the CISG provides a practical example of how universal and regional uniform trade law texts may complement each other.[381] The draft OHADA Act on Contract Law was inspired by the UNIDROIT Principles of International Contracts, which was in turned influenced by the CISG. If consistency between the two texts is maintained will ensure uniformity at the different legislative levels and will facilitate the use of the case law and academics available on the CISG and UNIDROIT Principles in the interpretation of the OHADA Act.[382]

The future of OHADA in the harmonisation of laws on the continent, as well as other measures which can be implemented to achieve the harmonisation of trade laws on the continent, will be discussed in the following concluding chapter.

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[377] Dickerson (note 24) at 56.
[378] Dickerson (note 24) at 56.
[379] Dickerson (note 24) at 56.
[380] OHADA Treaty (note 153) Art 2.
[381] Luca 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) *Uniform Law Review* 115 at 119.
[382] *Ibid.*

6 TOWARDS HARMONISATION

6.1 Introduction

For Africa to achieve a significant degree of harmonisation, an integrated effort at al levels on the continent will be required. This implies involvement and cooperation from the AU on continental level, the eight RECs on regional level and all Member States on a national level. It will also require the involvement of academic institutions, trade organisations and individuals.

6.2 African Union

It is essential that the importance of a harmonised legal system be emphasised within the AU to ensure that the topic receives more attention as part of the AU's agenda. The AU Assembly should play a leading role in this regard as it has the necessary legislative capacity to adopt regulations or directives to harmonise international trade laws. It will also be able to take decisions on reports from the organs of the AU and ensure that these policies are in fact adopted in the member states. The AU Executive Council also has an important role to play and the matters on which it may decide includes foreign trade.

As part of its work, the Specialised Technical Committees, who must perform the work of the Council, should undertake a study to determine how the laws affecting foreign trade can be harmonised, and submit a policy to the Assembly for possible adoption. The STC' will then also be responsible for overseeing and monitoring the proper adoption of these policies.

The AU and AEC has been criticised that it does not have among its Technical Committees one specifically designated to deal with legal issues and in particular the harmonisation of trade laws and commercial practices in the Community.[383] It has been suggested that a new Committee on legal issues in integration, which would include harmonisation, be established by using the mechanism provided for in the AEC Treaty[384] and AU Act,[385] which provides that the Assembly may, whenever it deems appropriate, establish other Committees'.[386] It is suggested that the newly created AU Commission on International Law (AUCIL) fulfil this role, but as its Commissioners have not been appointed, it has not yet started in this regard.

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[383] Ndulo (note 177) at 115-116.
[384] AEC Treaty (note 74) Art 25(2).
[385] AU Act (note 75) Art 14(2).
[386] Ndulo (note 177) at 117; Oppong (note 2) at 71-72.

6 TOWARDS HARMONISATION

6.1 Introduction

For Africa to achieve a significant degree of harmonisation, an integrated effort at al levels on the continent will be required. This implies involvement and cooperation from the AU on continental level, the eight RECs on regional level and all Member States on a national level. It will also require the involvement of academic institutions, trade organisations and individuals.

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[383] Ndulo (note 177) at 115-116.
[384] AEC Treaty (note 74) Art 25(2).
[385] AU Act (note 75) Art 14(2).
[386] Ndulo (note 177) at 117; Oppong (note 2) at 71-72.

The AUCIL is an advisory organ of the AU.[387] Its objectives are to undertake activities relating to codification and progressive development of international law in the African continent; to propose draft framework agreements, model regulations, formulations and analyses of emerging trends in States' practice; to assist in the revision of existing treaties and the identification of areas in which new treaties are required and prepare drafts thereof; to conduct studies on legal matters of interest to the Union and its Member States; and to encourage the teaching, study, publication and dissemination of literature on international law.[388]

The Commission must identify and prepare draft instruments and studies in areas which have not yet been regulated or sufficiently developed in the practice of African States.[389] The private international law rules regulating judicial cooperation in the choice of the applicable law in contractual obligations, and the jurisdiction of courts, as well as the enforcement of foreign judgments should receive immediate attention. The same is true for the substantive law rules which provide the framework for international commercial transactions.

The AUCIL is entitled to propose the revision of OAU/AU treaties with a view to, amongst others, harmony between AU treaties and current legal developments and promoting the harmonisation of international obligations.[390] An important revision that should be considered is the need for regulations to be implemented in Member States, and the fact that they are not directly applicable in Member States. In order to achieve the desired level or harmonisation, it is crucial that these instruments are directly applicable, and are not dependent on member states to implement them in domestic legislation.

One of the objectives of the AU Commission on International Law (AUCIL) is the codification of international law 'by way of a systematic and precise formulation of rules of international law in fields where there has already been extensive State practice, precedent and doctrine in the African continent'.[391] It has however been suggested that codification and harmonisation do not easily match, as illustrated by the Dutch experience.[392] The reason for this is that national codification and European harmonisation of private law each have distinct characteristics, most of

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[387] AUCIL Treaty (note 162).
[388] AUCIL Treaty (note 162) Art 4.
[389] AUCIL Treaty (note 162) Art 5(1).
[390] AUCIL Treaty (note 162) Art 8(1)(a).
[391] AUCIL Treaty (note 162) Art 6(1).
[392] MW Hesselink 'Codification and Europeanisation in the Netherlands' in *The harmonisation of European private law* (2006) at 48.

which are radically opposed, and the same is to be expected to be the case in Africa.[393]

The following table illustrates the distinct and often opposing characteristics of codification and harmonisation:[394]

TABLE 2: CODIFICATION AND HARMONISATION

Codification	Harmonisation
Comprehensive	Partial
• All private law in one code	• Legal basis
• Code answers all questions	• Subsidiary
Systematic	Unsystematic
• General Rules	• Sector-specific
• Several Levels of abstraction	• No abstraction
• Coherent	• Incoherent
One level of governance	Two levels of governance
• National	• National and [African]
• One legislator	• No Kompetenz-Kompetenz (Competence-Competence)[395]
• One court system	• Harmonious interpretation
Static	Dynamic
• Non-instrumental (at most: justice)	• Instrumental (Internal Market)
• (Can be changed)	• Aims at change

It is therefore suggested that instead of being responsible for the *codification* of international law, the AUCIL should rather focus on the *harmonisation* of private law in Africa, in the light of the importance of the subject for the promotion of international trade on the continent.

6.3 Regional Economic Communities

At a regional level, each REC should place greater emphasis on the harmonisation of the laws of their Member States. RECs should encourage harmonisation efforts and appoint a committee or commission with the responsibility of drafting framework agreements and preparing model laws, principles and guidelines aimed at harmonising identified areas of laws. In the light of the paper, it

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[393] Hesselink (note 388) at 49-52.
[394] Hesselink (note 388) at 49.
[395] The doctrine of competence-competence, which holds that an arbitral tribunal may determine questions as to its own jurisdiction.

is recommended that the private international laws affecting international commercial transactions be afforded priority.

RECs where Member States share a legal system may experience fewer difficulties in harmonising their laws, but even in RECs with diverse legal systems this should be possible, as illustrated by the EU model, with legal systems stemming from the common and civil law legal families.

In the light of the importance of the RECs towards regional integration, it is important that the harmonisation the laws of member states, specifically those relating to international trade, be added to the agenda of the RECs concerned with the creation of the AEC. According to the 2010 UNECA Report, 'a number of the RECs are harmonising their business laws and pursuing vigorously their implementation with the aim of promoting trans-boundary business and investments in Africa'.[396] The addition of the harmonisation of international trade laws will therefore not be a foreign concept to the RECs, and should be encouraged.

In addition to an increased participation in international instruments and organisations at a national level, some international conventions have made provision for organisations concerned with regional economic integration and which are endowed with legislative competence to enact required legislation to fulfil those goals.[397] UN Conventions are normally open for signature, ratification approval or accession by State members of the United Nations, specialised agencies or parties to the statute of the International Court of Justice.[398]

Member states of RECs' should endow the economic community with legal personality and the necessary capacity to allow them to become independent members of international organisations, as the EU which is a member of HCCH, and the necessary legislative competence to ratify and accede to international legislation.

It will also be necessary for the RECs to ensure that their harmonisation efforts are co-ordinated, and unnecessary duplication avoided. This can be done by the AU under the ambit of the Protocol on the Relations between the African Union and the

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[396] Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing intra-African trade* (2010) UNECA (ARIA IV). Available at http://www.uneca.org/aria4/ at xix.

[397] J Coetzee J and M da Gama 'Harmonisation of Sales Law: An International and Regional Perspective' (2006) 1 *Vindobona Journal of International Commercial Law and Arbitration* 15 at 25.

[398] Coetzee & da Gama (note 397) at 26

Regional Economic Communities[399] that will replace the 1998 Protocol on the same subject once it comes into effect. The AU Assembly at the Ninth Ordinary Council at Accra, Ghana in July 2007 adopted the Protocol and authorised the Chairperson of the Commission to sign it on behalf of the AU.[400]

The Tripartite Agreement between COMESA, EAC and SADC entered into in 2008 and discussed above, can be regarded as a step in this direction that may have an extremely important role to play towards the harmonisation of international trade laws on the continent.

6.4 Individual States

At the national level, states should increase their participation in international instruments on the subject and partake in new developments in the field. This should include becoming members of international organisations aimed at harmonisation and unification, such as The Hague Conference and UNIDROIT. This should be done even if the RECs become members, as in the EU, for example, both EU member states and the EU are members of the HCCH.

The adoption of universal uniform texts may provide an immediate step towards harmonisation, which should be complemented by continuous efforts on a continental level. While the creation of African instruments to harmonise law is strived for, this may take some time, and the wider adoption of international instruments provide a speedy interim solution.

With the exception of Egypt, Nigeria, Tunisia and South Africa, African states show very little participation in the adoption and ratification of international instruments aimed at the harmonisation of certain substantive law elements. If the two trade law treaties with the broadest participation, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('New York Convention') and the CISG are considered, only 31 African States are parties to the New York Convention, with Rwanda acceding on 31 October 2008 and coming into effect on 29 January 2009, and only ten African States are parties to the GISG.

As an immediate step therefore, states should adopt international harmonisation instruments. Preference should be given to those regulating international trade, for

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[399] Protocol on Relations between the African Union and the Regional Economic Communities, July 2007. Available at http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf.

[400] Decision on the Protocol on relations between the African Union and the Regional Economic Communities (RECs) Doc.Ex.CL/348 (XI) Assembly/AU/Dec.166 (IX).

example, the CISG, NY Convention, Hague Choice of Court Convention, as well as the various instruments regulating international transport.

National efforts to enhance the institutional development of the subject should be given greater support. The Institute for Private International Law in South Africa, which is part of the University of Johannesburg, is already doing some work in the harmonisation of private international laws in Southern Africa. The work of this institute should be encouraged, and possibly adopted by SADC and made a regional initiative.[401]

The cooperation and participation of African merchants, business groups, trade associations and other business interest should be obtained in order to ensure the practical workability of any proposal for regional harmonisation of trade laws. This must be done to ensure that the concerns and views of these groups are aired and reflected in any proposals. African trade organisations should participation and effectively contribute to the development of commercial practices and customs in Africa, as illustrated by the major role trade organisations had to play in Europe.[402]

6.5 OHADA

OHADA has made some significant progress in the harmonisation of business laws. Collaborations should be entered and agreed to between OHADA and AUCIL to determine the future role of OHADA in the harmonisation process in Africa. OHADA may also provide a guideline to RECs on how the laws of its member states may be harmonised, and therefore collaborations should be entered into between OHADA and RECs to facilitate this.

In the light of OHADA's success it should become a continent wide initiative. A first step in this regard would be for other civil law countries to join OHADA. As the majority of Africa's legal systems are civil law systems (see Figure 7: Legal systems on the African continent), this would represent a significant degree of harmonisation on the continent. As these countries have a common legal system, this should be done without too much difficulty. The Democratic Republic of Congo (DRC), a civil law country and former colony of Belgium, is in the process of acceding to the OHADA Treaty and will become the 17th OHADA Member State.[403]

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[401] Oppong (note 2) 304.
[402] Bamodu (note174) at 137.
[403] OHADA 'Summary of the interview given by Boris Martor in "Les Afriques" on the entry of DRC into OHADA'. Available at http://www.ohada.com/imprimable.php?type=news&article=02102009-726 [Accessed 25 September 2010].

For OHADA to be a truly continent-wide initiative, it must be prepared to become fully bi-juridical. This would entail the successful integration of common law (and mixed) jurisdictions to create a new African business law with no judicial division.[404] This would be ultimately be more complex than simply harmonising the laws of neighbouring civil law countries, but the membership of Cameroon, a mixed common and civil law system, and the initiative in Nigeria, a common law system, are examples of how this initiative is already embraced in bi-juridical and common law countries.

To be expanded beyond West-Africa and civil law countries, and to engage all of Africa in its activities, it must be willing to make some sacrifices. The aim or the organisation is harmonisation (as opposed to unification), although the current adoption of uniform texts ultimately results in unification, but it is therefore not necessary that the laws in all the member states be identical. As a starting point, it is suggested that those areas where harmonisation can be achieved without major difficulties, these areas should be focused on and areas in which difficulties are experienced, be addressed at a later point as the harmonisation process develops, so as not to create a impasse right from the outset.

From a regional perspective, Ghana, Sierra Leone and Liberia are common law states, geographically surrounded by OHADA members, and also members of ECOWAS. These states should therefore be encouraged to consider membership of OHADA. The same can be said for other ECOWAS member states. As membership of OHADA expands, and as states are often a member of more than one REC, other RECs would also be encouraged to become OHADA members. ECCAS has 11 members, of which seven are already OHADA members. Therefore the non-OHADA members of ECCAS, Angola, Burundi, Rwanda, Sao Tome and Principe should be encouraged to join OHADA.

For there to be a possible cohesion between OHADA and common law countries so as to have a bi-juridical system, there have to be changes to the current OHADA set up. The French procedures which currently dominate OHADA would be disadvantageous to common law countries and would need to be altered.[405] The Organisation, if it wishes to create a single business law regime for the entire continent, should expand its official languages to become more representative of

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[404] Ademiluyi (note 223) at 64.
[405] Ademiluyi (note 223) at 68.

the continent.[406] It should initially at least include English, to represent the common law legal systems, and thereafter the other working languages of the AU, namely Arabic, Spanish, Portuguese and Swahili. This may pose a challenge to OHADA, but not necessarily an unfathomable one, as illustrated by other international organisations, such as UNCITRAL.

OHADA has two main advantages which should be sufficient motivation for prospective member states, namely the creation of a stable environment by the adoption of modern law; and the improvement of the reliability of dispute resolution system by (i) modernising the recourse to arbitration and (ii) creating a common Supreme court which is has exclusive jurisdiction over disputes relating to Uniforms Acts, to the exclusion of all national courts.[407]

For the adoption of OHADA laws into common law legal systems, OHADA Nigeria, the first common law country to engage in OHADA laws, have suggested a framework that can be fully developed into acceptable strategies for the harmonisation of business law in Africa. Stakeholders' conference workshops and conferences should be convened and should include all countries and languages in Africa, as well as Multilateral Organisations/Institutions and the RECs. The best way to introduce OHADA laws in non-OHADA States should be established and accompanied by a programme of awareness of the OHADA Laws in non-civil law countries. The obstacles to harmonisation should be examined, and solutions proposed for how to overcome them. A Department of Harmonisation of Laws or of OHADA Laws should also be established in some Faculties of law in Anglophone countries.[408]

6.6 Courts

The actual behaviour of the national courts will be decisive in furthering harmonisation after harmonised laws have been adopted. If African integration by legal harmonisation is to be furthered, national courts will have to rethink their

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[406] *Ibid.*

[407] Barthélemy Cousin & Aude-Marie Cartron 'OHADA : A common legal system providing a reliable and judicial environment in Africa for international investors'. Available at http://www.cerclehorizon.com/nosarticles/judicial-environment-in-africa.pdf [Accessed 30 September 2010].

[408] Akin Akinbote 'Strategies for adopting OHADA laws in Anglophone African countries' opening at OHADA Conference held in Accra, 24 February 2008. Available at http://www.OHADA.com/fichiers/newsletters/332/opening-address-OHADA-conference-accra.pdf [Accessed 21 August 2010] at 4-5.

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interpretation of the application of Community-level directives, and Community institutions must propose ways to facilitate this.[409]

The implementation of harmonised trade law and commercial practices will require high-level expertise in every field concerned. The availability of trained personnel and resources are of the utmost importance as the harmonisation of trade laws and commercial practices will require expenditure, research, implementation and high-quality elaboration of instruments to bring about the desired results.[410]

An example that may be used by other institutions is OHADA's Regional Training for Legal Officers (ERUSMA). The main role of ERUSMA is to improve the legal environment in the Member States, in particular by training judges and other legal officers such as lawyers, notaries, court experts, registrars and bailiffs, in OHADA law. Academics and businesspersons may also receive training. ERUSMA may also cooperate with any establishment or institution whose aim it is to train legal officers or teach law.[411]

7 CONCLUSION

The harmonisation of international trade laws will promote international trade on the continent by providing a secure legal framework and reducing legal risks, but despite the benefits that harmonisation will have, the subject has not received the required attention as part of the continent's integration agenda.

The paper compared the AU, which provides the framework in which the harmonisation of laws on the continent will take place, with the EU, which provides the most advanced model of regional integration. While the EU may serve as an example, these two institutions are shaped by their unique historic development and problems facing each continent. Africa will therefore have to adopt a solution specifically suited to its specific needs.

Two alternative approaches to achieve harmonisation, namely the harmonisation of private international law, and the harmonisation of the substantive laws, as well as the contribution of various international and intergovernmental organisations have been considered in Parts 4 and 5, and it has been concluded that while the

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[409] Ndulo (note 177) at 118.
[410] *Ibid.*
[411] Martor (note 224) at 17.

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[409] Ndulo (note 177) at 118.
[410] *Ibid.*
[411] Martor (note 224) at 17.

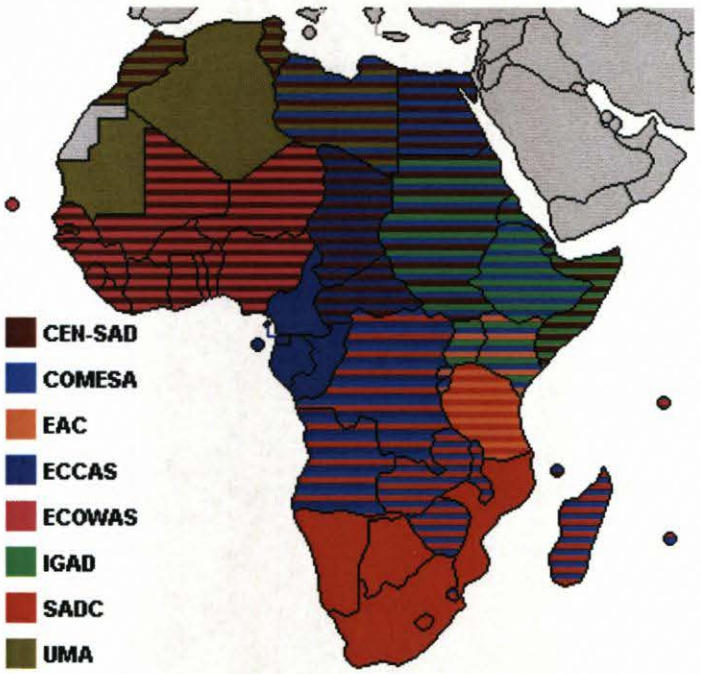
harmonisation of substantive laws reduces the scope for private international law problems, it requires great effort to achieve. Even when successful, private international law will remain of considerable importance in resolving cross-border disputes.

The final part of the paper argued that for Africa to achieve a significant degree of harmonisation, an integrated effort all levels at all spheres will be required: the AU, all RECs, all Member States on national level, as well as academic institutions, trade organisations and individuals.

It can therefore be concluded that in the light of the important role the harmonisation of trade laws will play in the promotion of trade and economic development on the continent, it should assume an important role on the AU and RECs' agenda and immediate steps should be taken to harmonise the international trade laws of African states.

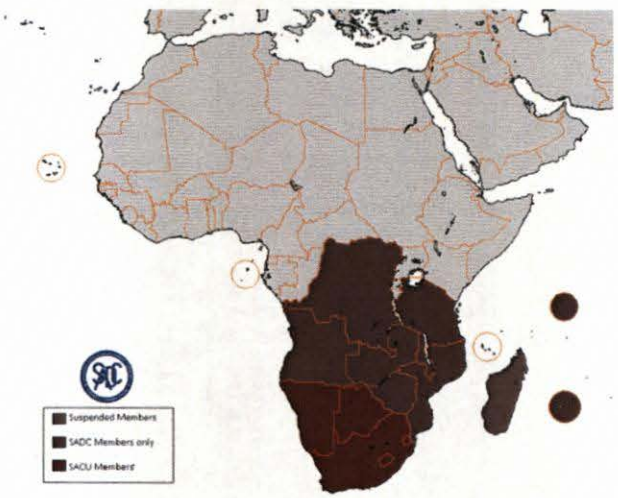
ANNEXURE

FIGURE 1: REGIONAL ECONOMIC COMMUNITIES RECOGNISED BY THE AU



Source: Wikipedia[412]

FIGURE 2: SADC MEMBER STATES



Source: Wikipedia[413]

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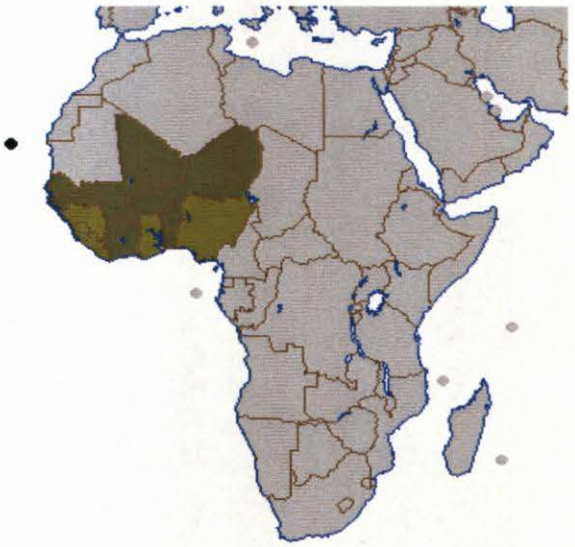
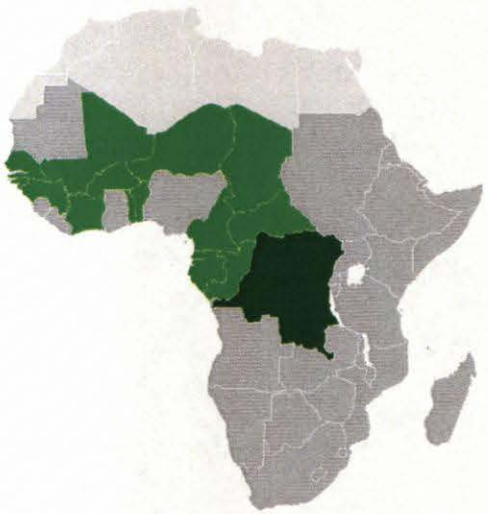
[412] Available at http://en.wikipedia.org/wiki/File:RECs_of_the_AEC.png [Accessed 27 July 2010].

FIGURE 3: ECOWAS MEMBER STATES



Source: Wikipedia[414]

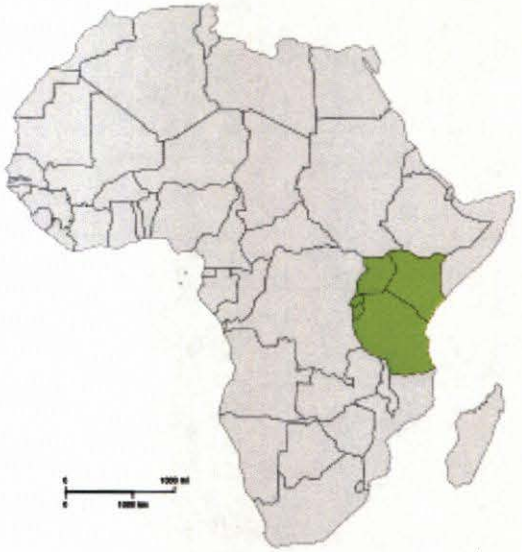
FIGURE 4: OHADA MEMBER STATES



Source: Wikipedia[415]

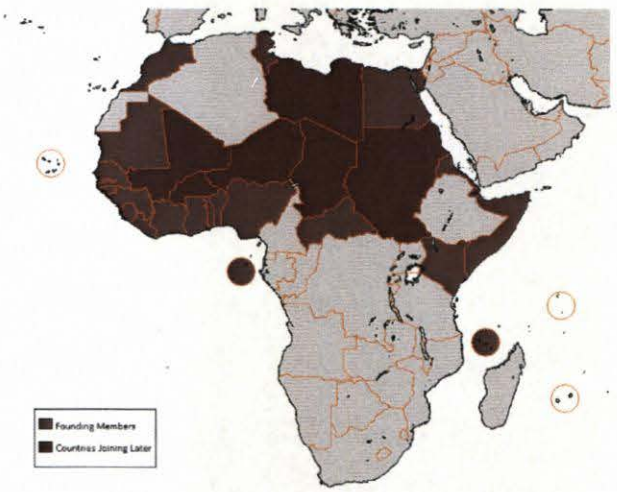
[413] Available at http://en.wikipedia.org/wiki/File:SADC_and_SACU.PNG [Accessed 27 July 2010].
[414] Available at http://en.wikipedia.org/wiki/File:UEMOA_and_Eco_in_ECOWAS.PNG [Accessed 27 July 2010].
[415] Available at http://en.wikipedia.org/wiki/File:SubSaharanAfrica-OHADA.svg [Accessed 27 July 2010].

FIGURE 5: EAC MEMBER STATES



Source: Wikipedia[416]

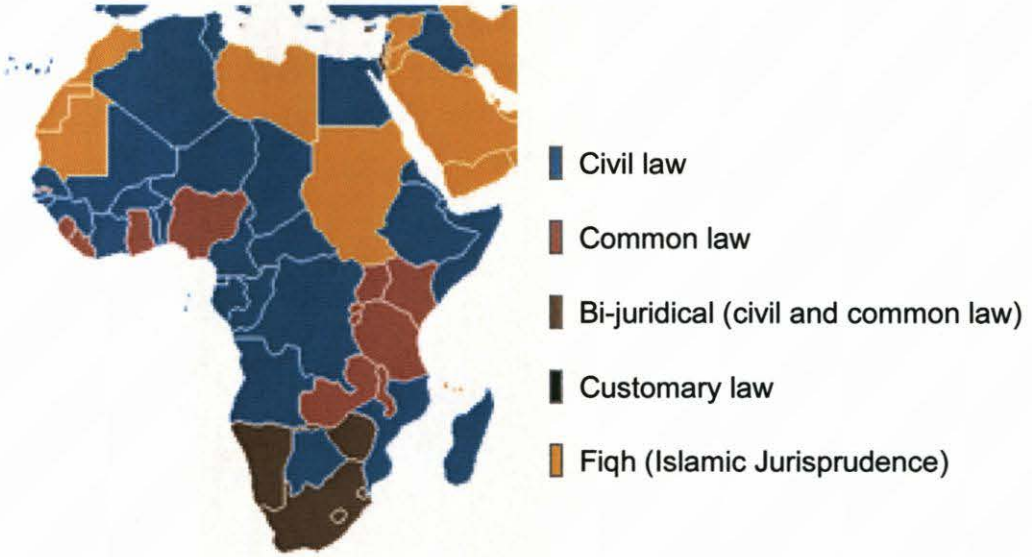
FIGURE 6: CEN-SAD MEMBERS



Source: Wikipedia[417]

[416] Available at http://en.wikipedia.org/wiki/File:Africa-countries-EAC.svg [Accessed 27 July 2010].
[417] Available at http://en.wikipedia.org/wiki/File:Community_of_Sahel-Saharan_States-map.PNG [Accessed 27 July 2010].

FIGURE 7: LEGAL SYSTEMS ON THE AFRICAN CONTINENT



Source: Wikipedia[418]

[418] Available at http://en.wikipedia.org/wiki/File:RECs_of_the_AEC.png [Accessed 27 July 2010].

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