Unification of Southern African Contract Law

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> *"Let jurists continue in their routine opposition to international unification of law; nevertheless, that unification will occur without and despite them, just as the ius gentium developed in Rome without the pontiffs, and as equity developed in England without the common-law lawyers. Today the problem is not whether international unification of law will be achieved; it is how it can be achieved."*[1]

A. Introduction

The unification or harmonisation of laws and legal systems is not a new phenomenon. Schmitthoff describes the wave of national unification of commercial laws in Europe during the nineteenth century as a method of obtaining political unity.[2] According to Faria[3] similar results were achieved on a wider scale by the dissemination of English legal traditions throughout common law jurisdictions. What he describes as the "ultimate goal",[4] however, was the unification of private law, the benefits of which had been extolled by Lord Justice Kennedy as early as 1909:

> "Conceive the security and peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country."[5]

Increased regional trade, shared history and legal background motivated the Nordic countries (Sweden, Norway, Denmark, Finland and Finland) to embark on an extensive legal unification programme, resulting in the implementation of a series of unified Acts dealing with various aspects of commercial law during the latter stages of the nineteenth century. The first unified law on negotiable instru-

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1 R.J. David, 'The Methods of Unification', *16 American Journal of Comparative Law* 1968, p. 13 and 27.

2 This refers in particular to the French Code Civil (1804) and the German Bürgerliches Gesetzbuch (1896). Chia-Jui Cheng (Ed.), *Clive M. Schmitthoff's select essays on international trade law*, Dordrecht 1988, p. 118. *See also* J.A.E. Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?', *U. L. Rev.* 2009, p. 6 (cited as: '*Future Directions*').

3 *See* Faria, *Future Directions*, *supra* note 2, p. 5 *et seq.*

4 *Id.*

5 *See* L.J. Kennedy, 'The Unification of Law', 10 *Journal of the Society of Comparative Legislation* 1909, p. 212.

ments was enacted in 1880, with unified acts on maritime law, the sale of moveable goods and contract law enacted by 1922.[6]

The spirit of legal unification and harmonisation, particularly in the area of private law, appeared firmly entrenched with the establishment of the International Institute for the Unification of Private Law (UNIDROIT) in 1926. Harmonisation of various aspects of commercial law continued during the latter half of the twentieth century on an international basis through the efforts of organisations such as UNIDROIT, the United Nations Commission on International Trade Law (UNCITRAL), The United nations Conference on Trade and Development (UNCTAD) and business organizations such as the International Chamber of Commerce (ICC).

This continued drive towards harmonisation of commercial laws is still motivated by the specific need to facilitate increased international trade, as recognized by Lord Kennedy a century ago. It is widely recognised that international business and trade flourish in an environment of predictability and dwindle in the face of uncertainty and the un-familiar. One of the biggest uncertainties international business has to content with is the uncertainty of dealing with or operating in foreign legal systems of contracting parties and host nations.[7]

UNCITRAL was created with the specific mandate of modernising and harmonising rules on commercial transactions in order to increase trade opportunities worldwide, as "trade means faster growth, higher living standards, and new opportunities through commerce".[8]

B. Harmonisation/Unification of Contract Law

International, and specifically regional diversity of contract laws has been identified as a specific obstacle to international trade that may increase transaction costs due to the need to consult foreign law and lawyers, may serve as a psychological barrier to trade due to the fear of the unknown and may distort competition.[9] This sentiment is echoed by Lando who describes the existing diversity of contract laws in Europe as a non-tariff barrier to trade, hampering the free flow of goods, persons, services and capital within the Union.[10] According to him, busi-

6 *Id*.

7 In the words of Prof. I. Schwenzer: "Different laws have always been an obstacle to trade, be it on a domestic, regional or on the international level. Thus, with the increasing globalization of trade the necessity of harmonizing and unifying the relevant sets of rules governing international trade becomes more and more urgent". I. Schwenzer, 'Regional and Global Unification of Sales Law', *supra* p. 370 *et seq.* (cited as: *Regional and Global Unification*).

8 Available at <www.uncitral.org/uncitral/en/about_us.html>.

9 *See* D. Kallweit, 'Towards a European Contract Law: for a Prosperous Future of International Trade', *Victoria University of Wellington Law Review* 2004, p. 9 (cited as: *European Contract Law*).

10 *See* O. Lando, The Principles of European Contract Law and the Lex Mercatoria, in Basedow (Ed.), *Private law in the international arena: from national conflict rules towards harmonization and unification: liber amicorum Kurt Siehr*, The Hague 2000, p. 392 (cited as: *The Principles*).

ness needs safety and predictability, with rules that will allow the swift and inexpensive conclusion of contracts, but will retain a measure of flexibility.[11]

International efforts at the harmonisation of contract laws have thus been focused on commercial, and specifically sales contracts and take the form of conventions such as the UNCITRAL Convention on the International Sale of Goods (CISG), model rules / principles such as the UNIDROIT Principles of International Commercial Contracts 2004 and "codified" trade practices such as the Incoterms of the International Chamber of Commerce.

In regional context there is a move towards broadening the harmonisation of contract laws to include general contracts, and not only those between traders and professionals. The Commission on European Contract Law (Lando Commission) has been working on Principles of European Contract Law since the nineteen-seventies.[12] In terms of Article 1 of the Principles (1999 text), these principles are intended to apply as general rules of contract law in the European Union either when incorporated by contracting parties into their contract, as part of the *Lex Mercatoria* or to provide a solution where the applicable legal system fails to do so.

In the African context, the Organisation for the Harmonisation of Business Law in Africa (OHADA) approached UNIDROIT for assistance in drafting an Uniform Act on Contract Law that is intended (as per the recommendation of the drafters) to apply to all contracts, both commercial and non-commercial.[13]

C. Harmonisation/Unification of Laws in Africa

The pressures of globalisation and the need for the harmonisation of laws are as prevalent in Africa as in the developed world.[14] As far back as 1963, the Charter of the Organisation of African Unity obliged member states to co-ordinate and harmonise their general policies in a number of fields, including economic co-operation. This focus on economic integration was entrenched with the signing and resultant ratification of the Treaty establishing the African Economic Community in 1994.[15] This intention was confirmed in the Constitutive Act of the African Union (2002) where co-ordination and harmonisation of policies between regional economic communities are called for in order to fulfill the stated objec-

11 *See* Lando, *The Principles*, *supra* note 10, p. 394.

12 *See* K. Riedl, 'The work of the Lando-Commission from an Alternative Viewpoint', 8 *European Review of Private Law* 2000, Issue 1.

13 *See* M. Fontaine, 'OHADA Uniform Act on Contract Law. Explanatory Notes to the Preliminary Draft', *U. L. Rev.* 2008 (cited as: *OHADA Uniform Act*').

14 "The issue of the diversity of laws has been for a long time, an important (even if indirect) obstacle to economic development in Africa." *See* S. Mancuso, 'The new African Law: Beyond the Difference between Common Law and Civil Law', 14 *Annual Survey of International & Comparative Law* 2008, p. 40 (cited as: *New African Law*).

15 *See* R.F. Oppong, 'Private International Law and the African Economic Community: a Plea for Greater Attention', 3 *Journal of South African Law* 2006, p. 503 (cited as: *International Law*).

tive of the Union, namely to achieve greater unity and solidarity between African states.[16] Notably, despite the emphasis on closer integration, no direct mention is made of legal harmonisation or the role of law in the integration process.[17] The need for legal harmonisation can at most be inferred from the stated objectives of the Union.

OHADA, the most successful organisation responsible for the harmonisation of business laws in Africa, was created by a treaty signed in Mauritius in 1993. The objectives of OHADA are to harmonise the business laws of member countries (16 largely Francophone countries in West Africa) into a single, modern legal framework for business.[18] Legal harmonisation and unification within OHADA is achieved through the adoption of Uniform Acts by the Council of Ministers. In terms of Article 10 of the OHADA Treaty, these Acts become effective immediately after publication in the Official Gazette and are directly applicable in member states, to the exclusion of national laws.[19] To this end, eight uniform acts have been implemented on various aspects of commercial law, including a Uniform Act relating to General Commercial Law. A number of further unified Acts are being drafted, including the Uniform Act on Contract Law.

The East African Community (EAC), comprising of Uganda, Tanzania, Rwanda, Kenya and Burundi, has embarked on an intensive legal harmonisation effort in order to achieve the objectives of the Common Market. Both the original Treaty establishing the EAC (Article 126), as well as the Protocol establishing the Common Market (Article 47) require harmonisation of laws amongst member states.[20] The EAC has identified and prioritised specific areas of law in which harmonised Bills are being prepared. These include the Law of Contract. Similar to the position in OHADA, such harmonised laws will be applicable and supersede national laws in member states once enacted by the EAC Legislative Assembly and published in the Gazette.[21]

In Southern Africa, the 1992 treaty establishing the Southern African Development Community (SADC) aims to harmonise the political and socio-economic policies and plans of member states.[22] In terms of Article 21, member countries undertake to co-ordinate, rationalise and harmonise their overall macro-economic and sectoral policies, strategies and programmes in a number of areas,

16 For a general discussion, *see* M.P. Ferreira-Snyman, & G.M. Ferreira, 'The Harmonisation of Laws within the African Union and the Viability of Legal Pluralism as an Alternative', 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 2010, pp. 609-628.

17 *See* Oppong, *International Law*, *supra* note 16, p. 504.

18 See J. Penda, 'The applicability of OHADA Treaty in Cameroon: the way forward', available at <www.ohada.com> (cited as: OHADA Treaty).

19 *See* Mancuso, *New African Law*, *supra* note 14, p. 41. *See also* C.M. Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune', 44 *Colum. J. Transnat'l L.* 2005, pp. 17-73.

20 *See* S. Agaba, 'The Future of International Commercial Law in East Africa', *infra*, p. 505 *et seq.*

21 *Id.* It should be noted that there is a split between Common Law (Uganda, Tanzania and Kenya) and Civil Law (Rwanda and Burundi) backgrounds within the EAC.

22 Article. 5(2)(a) of the Declaration and Treaty Establishing the Southern African Development Community (1992).

including trade, investment and finance. The treaty does not call for the harmonisation of laws as such. Muna Ndulo has as far back as 1996 identified this as a lacuna and a critical impediment to regional integration.[23] Ndulo, like Lando and Kallweit in Europe, identifies legal diversity in SADC as one of the major barriers to intra regional integration, particularly in view of the, then, intended establishment of a Free Trade Area and calling for the harmonisation of business laws, including the law relating to sales contracts.

The SADC Free Trade Area came into force in 2000 and contains a number of fairly vague objectives to implement measures that hint at harmonisation, for example, "(to) adopt comprehensive trade development measures aimed at promoting trade within the Community"(Article 26), "(to) adopt policies and implement measures within the Community for the protection of intellectual property rights" (Article 24) and "(to) implement measures within the Community that prohibit unfair business practices and promote competition" (Article 25). The charter of Fundamental Social Rights in SADC specifically aims to "promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States".[24] Despite these stated ambitions, nothing concrete has materialised in the area of legal harmonisation.

The stated objective of the Regional Indicative Strategic Development Plan (RISDP) is to strengthen regional integration even further by establishing a SADC Customs Union by 2010. This proved to be over-ambitious and the launch of this Customs Union has been postponed, but member countries still aim to establish a Monetary Union by 2016 and a Single Currency by 2018.[25]

The ambitious integration plans of SADC, aiming towards a Customs Union and further, should result in the free flow of people, goods, services and capital through the region. As in Europe, legal diversity can be seen as an impediment in the way of the free flow of intra-regional business and a harmonised or unified legal system, particularly with reference to contract law, should assist in providing the predictability, cost reduction and familiarity required to facilitate greater intra-regional trade.

D. Harmonisation or Unification of Contract Law

Harmonisation refers to a process, often between governments, but sometimes by non-governmental organizations or the private sector, to co-ordinate different legal systems to make laws more uniform and coherent. This is often done by

23 *See* M. Ndulo, 'The need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)', 60 *Cornell Law Faculty Publications* 1996, p. 196 (cited as: 'Need for the Harmonisation').

24 Available at <www.sadc.int/index/browse/page/171>.

25 *See* W. Denner, 'Multilateral, Bilateral and National trade developments for 2010', available at <www.tralac.org>.

"eliminating major differences and creating minimum requirements or standards",[26] in so doing enhancing legal cooperation between countries.[27]

The best example of the harmonisation of commercial laws is the work of UNCITRAL. Harmonisation is effected by publishing model laws or rules such as the Model Law on Arbitration, or the UNITRAL Arbitration Rules. Although these instruments themselves have no binding effect, the more countries adopt these as national legislation, or parties choose to settle disputes using the Arbitration Rules, the less legal diversity there is in the international commercial world. The same effect can also be achieved via conventions, such as the Convention on the International Sale of Goods. The greater the number of countries that ratify and implement this convention, the greater the number of international sales transactions governed by the same legal system.

Harmonisation is unfortunately often fragmented and mostly allows for some degree of flexibility, such as countries signing the CISG (or other conventions) with reservations, excluding certain aspects of the convention, or making changes to the Model Law on Arbitration when implementing it as national legislation.

Unification[28] on the other hand is a much more comprehensive and "top-down" process during which conflicting rules of two or more legal systems are replaced with one single system.[29] This may still allow countries some measure of flexibility, but generally provides much more legal certainty. A prime example of unification is the Unified Acts implemented in OHADA member countries to regulate various aspects of business law. These Acts are based on common principles found in the respective jurisdictions, but repeal national laws.

Harmonisation is therefore often merely a step towards unification. This is also what Lando is recommending for the unification of European contract law. [30]

Unification can be achieved in a number of different ways. In the first instance, the market could be allowed to develop its own uniform solutions – a process of self-regulation,[31] or what Lando calls "creeping" harmonisation.[32] This is however not a feasible option as it lacks transparency, will be dominated by the needs of big business and may lead to the detriment of small business. The flexibility of this system is at the same time the danger of this system as business may often veer towards legal rules where the opposing contract party enjoys the least protection.

26 *See* W.J. Kamba, 'Comparative Law: a Theoretical Framework', 23 *Int'l & Comp. L. Q.* 1974, pp. 485-519.
27 *See* S. Mancuso, 'Trends on the Harmonization of Contract Law in Africa', 13 *Annual Survey of International and Comparative Law* 2007, p. 159.
28 Or 'uniformization' as it is called by Mancuso, *id*.
29 *See* Yearbook of the United Nations Commission on International Trade Law 1970, Vol. I, p. 13.
30 *See* O. Lando, 'Some Features of the law of contract in the Third Millenium', 40 *Scandinavian Studies in Law* 2000, p. 346 (cited as: *The features of the Law*).
31 *See* Kalweitt, *European Contract Law*, *supra* note 9.
32 *See* Lando, *Feautures of the Law*, *supra* note 30, p. 360.

Conventions such as the CISG have been successfully used to find a harmonised set of rules independent from national legal systems and this could lead to a form of Unification, should all countries ratify and implement the specific Convention. In this regard the CISG has not only harmonised the International Sales Law of member countries, it has also served as the basis for a number of other legal instruments, such as the OHADA Uniform Act on General Commercial Law and the UNIDROIT Principles.[33] Unfortunately ratification processes are often slow and unpredictable, for example only nine African countries are members of the CISG.

The European Commission suggested non-binding legal principles (or soft law) as a second method of unification. This is in fact also a form of harmonisation, where research is conducted to find the common core from a number of different legal systems.[34] This could lead to the drafting of a widely accepted set of principles, such as the UNIDROIT Principles of Commercial Contracts, but due to the non-binding nature of such principles and the flexibility of acceptance, it cannot provide the certainty that unification requires. Other forms of "soft law" harmonisation include standardised contract terms such as the Incoterms of the International Chamber of Commerce.[35]

The drafting of soft-law principles can successfully constitute a step towards unification, should the widely acceptable principles be used as the basis for a Unified code or Act. This is in fact the preferred form of unification according to both Lando[36] and Kallweit[37] who both suggest that the Principles of European Contract Law (PECL) should serve as a draft for a unified European Contract Law.[38]

E. Obstacles in the Way of Harmonisation/Unification of Contract Law

The diversity of legal systems and rules that harmonisation and unification seek to address, is the biggest obstacle in its way. A number of instruments have been drafted internationally to harmonise international commercial or sales contracts, such as the CISG and the UNIDROIT Principles, with only the PECL and the draft OHADA Uniform Act on Contract Law seeking to harmonise general contract law.

In all instances, drafters were tasked with finding a solution that is not one of the divergent legal systems, but that is acceptable to all. In all instances the drafters found it impossible to identify such solutions for all contractual issues. Two of the most controversial issues relating to the unification of contract laws are for-

33 *See* Schwenzer, *Regional and Global Unification, supra* note 7. See also Faria, *Future Directions*, *supra* note 3, for a general discussion of methods of unification of laws.

34 *See* Kalweitt, *European Contract Law*, *supra* note 9.

35 *See also* A. Calus, 'Modernisation and Harmonisation of Contract Law: Focus on selected issues', *U. L. Rev*. 2003, pp. 157-158.

36 *See* Lando, *Features of the Law*, *supra* note 30, p. 364.

37 *See* Kallweit, *European Contract Law, supra* note 9.

38 The difference is that Lando would use the PECL as is, whereas Kallweit would only see it as a first draft, to be refined through the CISG and the UNIDROIT Principles.

mation and validity (requirements for the creation of a valid agreement). The biggest divide would typically be between common law and civil law traditions. The lack of codification of contract law in the common law tradition poses a problem in itself and may prolong the process of establishing current law.

The drafters of the CISG found workable solutions for the different theories regarding the formation of sales contracts and these detailed rules on offer and acceptance, revocation and the moment of conclusion of the contract have largely been incorporated into the UNIDROIT principles, which in turn informed the draft OHADA Uniform Act on Contract Law.

A more problematic area is that of the validity of contracts. In this instance even the drafters of the CISG were unsuccessful in finding common ground and the CISG (in Art. 4) simply excludes any questions relating to the validity of contracts. The most important divisions amongst legal systems in relation to the validity of contracts relate to the capacity of contracting parties and illegality. The age of majority that determines contractual capacity can vary from 14 in countries like Albania to 21 in countries like Namibia,[39] with a large majority of countries requiring a contracting party to be either 18 years old, or to be an emancipated minor. Equally so, what constitutes illegal actions can vary dramatically from one jurisdiction to another.

The Article 4:101 of 1999 text of the PECL exclude invalidity arising from illegality, immorality or lack of capacity from the ambit of the rules. Article 3.1 of the UNIDROIT Principles also indicate that the Principles do not deal with invalidity arising from a lack of capacity, immorality or illegality.[40]

All three the above instruments therefore currently leave the determination of capacity and illegality to the applicable national law (in international contracts often to be determined by the rules of conflict of law). Due to the diversity in conflict of law rules, this means that an element of uncertainty and unpredictability remains regarding the validity of contracts.

The draft OHADA Uniform Act on Contract Law does include an article on illegality (Art. 311), indicating that any contract or term that contradicts public order or good moral standards or mandatory provisions of the law, is void. This essentially has the same effect as excluding illegality from the ambit of the Act as public order, good moral standards and mandatory provisions will have to be determined with reference to national law as well.

39 *See* R. Coomer and D. Hubbard, 'A major decision: Considering the age of majority in Namibia', in Oliver C. Ruppel (Ed.), *Children's Rights in Namibia*, Online publication 2009, <www.kas.de/proj/home/pub/8/2/dokument_id-18139/index.htm>.

40 A chapter on illegality has been drafted by Prof. Bonell. This in essence determines that where a contract infringes a mandatory national, international or supranational rule, the relevant rule will determine the effect/consequences of the infringement. This will be considered for inclusion in the Principles during 2011.

The less controversial requirements for validity would typically relate to consensus (agreement), possibility of performance, formalities (whether writing is required), as well as the concepts of cause and consideration found in some civil law countries. In most of these instances common ground can be found, or exceptions can be created, such as in Article 11 of the CISG which does not require a contract to be in writing, combined with Article 96 that allows countries where writing is required to declare that Article 11 will not be applicable to contracts where the contracting party has its place of business in that country.

The UNIDROIT Principles successfully did away with the doctrines of cause and consideration (as do the draft OHADA Act on Contract Law), proving that these are not essential to the regulation of contract law. [41]

A last, yet vitally important requirement for the unification of laws by way of a Uniform Act or Code, is the legal capacity to enforce such instrument, something which has been disputed in relation to the European Union.[42] This problem does not exist in OHADA where in terms of Article 10 of the Treaty, Uniform Acts are directly applicable in all member states and supersede national laws.[43]

F. The Unification of Contract Law in the Southern African Development Community: Possible Ways Forward

As discussed above, the harmonisation of contract laws is as vital to intra-regional trade in SADC as it is in the European Union, and maybe even more so, as the alternative would be the inclusion of choice of law clauses in contracts (which parties do not always do) or the determination of the applicable law by the relevant conflict of law rules. Should the conflict of law rules determine a foreign law to be applicable, it may be very difficult for contracting parties to determine the applicable rules, as access to other States' legal materials is often very difficult in the African context.[44] What may cause even further difficulty for contracting parties is the fact that very little of contract law in the region is codified.

Contract law in the region is based on three main legal systems, namely Common Law (Zambia, Tanzania and Mauritius), Civil Law (Angola and Mozambique) and Roman Dutch Law (South Africa, Lesotho, Botswana, Zimbabwe, Swaziland and Namibia.)[45] In most countries, rules relating to specific contracts may be codified, such as the law relating to Credit Agreements and the Sale of Land in South Africa, and similarly, Consumer Contracts in Zimbabwe and Botswana.

41 A full discussion of diverse contract law rules falls outside of the scope of this paper.

42 Doubts has been expressed whether the Amsterdam Treaty empowers the European Union institutions to enact a Civil Code on Contract Law for the Union. *See* Lando, *Features of the Law*, *supra* note 30, p. 366.

43 *See* Penda, *OHADA Treaty*, *supra* note 18. This excludes Anglophone Cameroon.

44 *See* Ndulo, *Need for the Harmonisation*, *supra* note 23, p. 212.

45 *See id.*, p. 196.

As discussed above, various methods could be employed to effect harmonisation of contract laws in the SADC region. An easy option to harmonise the position relating to international sales contracts could have been for all SADC member countries to ratify the CISG. Unfortunately, very few African countries and only two SADC countries, namely Zambia and Lesotho, are currently members of the convention. It therefore appears unlikely that all the other member countries would at this stage ratify the convention.

A combined "soft law" and practice approached could be used, with contracting parties being encouraged to use practice terms such as INCOTERMS and by drafting a Model Law on Contracts or SADC Principles on Contract Law. Based on the success of the UNIDROIT principles, these could be used as a basis for such Model Law or Principles, with adequate research into the specific diversity of rules within the region. Member countries would have to be encouraged to implement the Model Law or Principles as national law with as few changes as possible, or contracting parties would have to be encouraged to incorporate the Principles into their contracts. Both may be problematic, particularly the latter, as many contracting parties may be illiterate and would therefore not have easy access to the Principles.[46]

At most, this approach may lead to a superficial measure of harmonisation, without providing the certainty and predictability that is required for increased intra-regional trade.

Unification by way of a Uniform Act on Contract Law as implemented in OHADA is recommended as the best way of ensuring that the benefits of unification is achieved. In order to achieve this goal, a combined approach is recommended.

The first step would be to embark on a comprehensive research programme to establish the current diversity of contract laws in the region. Based on the results of this research SADC Principles of Contract Law can be drafted, and if acceptable to member countries, this can form the basis of a Uniform Act on Contract Law.

Based on the success of the UNIDROIT Principles, these should be used as basis of such SADC Principles. Based on the combination of Civil, Common and Roman Dutch legal systems in effect in the region, it is likely that much the same problems would be experienced as in Europe. It is equally likely that the most difficult and irreconcilable differences would still relate to validity of the contract.

Issues of formalities (writing) could be dealt with similar to Articles 11 and 96 of the CISG and the UNIDROIT Principles have proven that differences relating to cause and consideration could be solved. More problematic would still be issues of illegality and capacity.

The age of majority and resultant requirement for contractual capacity in the region is either 18 (Zambia, Zimbabwe, Angola, Mauritius, Tanzania, South

46 *See* Fontaine, *OHADA Uniform Act*, *supra* note 13, p. 10.

Africa, Mozambique, Malawi, Seychelles and the DRC), with the rest (Botswana, Namibia, Lesotho, Swaziland and Madagascar) still requiring contracting parties to be either 21 years old or emancipated minors. It is therefore likely that issues of capacity will have to be excluded from any SADC Principles or Uniform Act on Contracts.

Invalidity due to illegality could either be excluded and by default be determined by national law, or stipulations relating to effect of the infringement of mandatory (national, international or supranational) rules could be included in the Principles or Act with much the same effect, but regulating the consequences of such infringement.

It is submitted that the SADC Institutions are sufficiently empowered by the SADC Treaty to successfully complete the process of unification of Contract Laws.[47]

G. Conclusion

In conclusion it has to be stated that even should the suggested process of unification be completed and a Uniform SADC Act on Contract Law be implemented, it would still not provide business with absolute security and predictability as to the rules applicable to their contracts. As indicated above, at least the rules relating to capacity and illegality and requirements for a valid contract are likely to still be determined by national other mandatory laws.

Lando has stated that the introduction of an European Contract law will "cost sweat, tears and money" and that it is likely to face severe opposition from lawyers unwilling to familiarise themselves with new rules.[48] Snijders at least is hopeful that "very determined efforts" will be capable of succeeding in the unification of contract laws through the implementation of Uniform Acts.[49]

It is hoped that African determination and the strive towards greater intra-regional trade and prosperity will overcome the legal and political hindrances in the way of legal harmonisation.

47 *See* Ndulo, *Need for the Harmonisation*, *supra* note 23, p. 215.

48 *See* Lando, *The Principles*, *supra* note 10, p. 395.

49 *See* W. Snijders, 'Building a European Contract Law: Five Fallacies and Two Castles in Spain', *Electronic Journal Of Comparative Law*, Vol. 7.4, 2003, available at <www.ejcl.org/ejcl/74/art74-2.html>.