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## Author

Jan L Neels

## Affiliation

University of Johannesburg,  
South Africa

## Email

jlniels@uj.ac.za

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## Abstract

This article provides an overview of the history of international commercial law in Africa with reference to instruments of the three sister organisations of private international law (in a wide sense): UNCITRAL (the United Nations Commission on International Trade Law), UNIDROIT (the International Institute for the Unification of Private Law) and the HCCH (the Hague Conference on Private International Law). The adoption of UNIDROIT's *Cape Town Convention on International Interests in Mobile Equipment* of 2001 is identified as a possible watershed moment in respect of the future development of international commercial law in Africa. Following the creation of an African Continental Free Trade Area by member countries of the African Union, it is suggested that participating states reconsider joining the *United Nations Convention on the International Sale of Goods* (1980) (CISG) and incorporating the *UNCITRAL Model Law on International Commercial Arbitration* (1985/2006), which are in a certain sense the two founding documents of the modern *lex mercatoria*. Another priority, the author suggests, is that Africa needs a supporting instrument on the private international law of contract. The first draft of the African Principles on the Law Applicable to International Commercial Contracts is then discussed with an emphasis on the role of substantive law instruments, in particular the CISG.

## Keywords

International commercial law; private international law; international commercial contracts; African Principles of Commercial Private International Law; African Principles on the Law Applicable to International Commercial Contracts.

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## 1 Introductory remarks

My colleague Charl Hugo is an expert in banking law, especially the law in respect of documentary letters of credit and independent guarantees, both of which play an important role in international commerce. He is also known as a family man, mentor and linguistic *connoisseur*, an athlete and amateur ornithologist and, in general, a lover of the abundance of nature on our continent. Charl will therefore appreciate the references to hilly landscapes in my small interpretive history of international commercial law in Africa, which is dedicated to his academic and personal legacy.

## 2 International commercial law in Africa during the 20th century

Our story commences in the forgotten kingdom. Africa knows three kingdoms that are also sovereign states, one in North West Africa (Morocco) and two in Southern Africa – Eswatini (also written eSwatini or e-Swatini, previously known as Swaziland)<sup>1</sup> and Lesotho.<sup>2</sup> In an art movie released in 2013 that showcased the immense natural beauty of the country, Lesotho was baptised "the forgotten kingdom".<sup>3</sup> But in the chronicles of the *United Nations Convention on the International Sale of Goods* of 1980 (widely

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\* Jan L Neels. B Com LLB LLM (RAU) Dr Jur (Leiden). Professor of Private International Law and director of the Research Centre for Private International Law in Emerging Countries, University of Johannesburg, South Africa; honorary member of the UNIDROIT Governing Council; member of the Academy of Science of South Africa. Email: jlneels@uj.ac.za. ORCID ID: 0000-0001-8407-9155. The text draws on (a) my opening address at the UNIDROIT (International Institute for the Unification of Private Law) briefing for member states of the Southern African Development Community (SADC) on the legal and economic benefits of the Rail Protocol and the MAC (Mining, Agricultural and Construction Equipment) Protocol to the *Cape Town Convention on International Interests in Mobile Equipment* (2001) for Southern Africa, Department of International Relations and Cooperation, OR Tambo Building, Rietondale, Pretoria on 5 September 2019 and (b) my paper delivered at the conference celebrating the 40<sup>th</sup> anniversary of the *United Nations Convention on the International Sale of Goods* (1980) (CISG@40), held online on 3 December 2021 by the University of Pretoria and endorsed by the United Nations Commission on International Trade Law (UNCITRAL).

<sup>1</sup> Legal Notice No 80 in *Eswatini Government Gazette* of 11 May 2018. See Motau 2018 <http://www.times.co.sz/news/118373-kingdom-of-eswatini-change-now-official.html>; Msimang 2018 <https://www.lexology.com/library/detail.aspx?g=278eafa1-d6c5-4be5-9524-10f1900fbe0c>. The name change was effective as from 19 April 2018.

<sup>2</sup> See Wikipedia 2022 [https://en.wikipedia.org/wiki/Monarchies\\_in\\_Africa](https://en.wikipedia.org/wiki/Monarchies_in_Africa).

<sup>3</sup> The American-South African-Lesotho production *The Forgotten Kingdom* won three awards at the 2014 African Movie Academy Awards, including best cinematography by Carlos Carvalho. The film was directed by Andrew Mudge and the main actor was Zenzo Ngqobe as Atang Mokoonya. See *Forgotten Kingdom* 2013 <http://www.forgottenkingdomthemovie.com/>.

known by its abbreviation CISG, and also referred to as the *Vienna Sales Convention*, after the place of its conclusion),<sup>4</sup> the mountainous kingdom has not been forgotten.

Perhaps the most important event in the annals of modern international commercial law was the conclusion of the *Vienna Sales Convention* on 11 April 1980. Lesotho made history by becoming the first country in the world to ratify the CISG on 18 June 1981.<sup>5</sup> Hungary was the first country to sign the Convention<sup>6</sup> but ratified it only in 1983.<sup>7</sup> The Convention entered into force on 1 January 1988.<sup>8</sup> For this reason, the name of Lesotho will live on wherever the CISG is studied.<sup>9</sup>

Among the first eleven contracting states to the CISG were three African countries – Egypt, Lesotho and Zambia.<sup>10</sup> If one ignores Yugoslavia in this regard,<sup>11</sup> as it no longer exists,<sup>12</sup> this comes down to a high 30% of African participation. If Yugoslavia is considered, the percentage of participating African states would still be more than 27%.

The situation today is less comforting. This may partly be due to the strong common-law traditions in countries such as Ghana, Kenya and Nigeria,<sup>13</sup> following the lead of the United Kingdom (and perhaps also India and South Africa) in not joining the CISG.<sup>14</sup> Less than 14% of the current contracting

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<sup>4</sup> Schwenger *Schlechtriem and Schwenger Commentary* is the leading commentary on the Convention.

<sup>5</sup> The Convention was signed by Lesotho on the same day as the ratification took place. See the status table to the CISG at UNCITRAL date unknown [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status) (hereafter the CISG status table).

<sup>6</sup> On 11 April 1980, the day of its conclusion.

<sup>7</sup> 16 June 1983. See the CISG status table.

<sup>8</sup> See the CISG status table.

<sup>9</sup> Dr Luca Castellani of the United Nations Commission of International Trade Law (UNCITRAL) indeed had the following tag on his PowerPoint slides at the local 40<sup>th</sup> anniversary celebration of the conclusion of the CISG (see introductory note): "Remember Lesotho".

<sup>10</sup> See the CISG status table. Egypt acceded on 6 December 1982 and Zambia on 6 June 1986.

<sup>11</sup> Yugoslavia was one of the original eleven contracting states to the CISG: see UNCITRAL Secretariat *Explanatory Note* (included in the 1989 printed version of the Convention) 34.

<sup>12</sup> The following countries succeeded Yugoslavia as contracting states to the CISG: Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia, and Slovenia. See the CISG status table.

<sup>13</sup> See, in general, Okoli and Oppong *Private International Law in Nigeria*; Oppong *Private International Law in Ghana*; Oppong *Private International Law in Commonwealth Africa*; Oppong and Agyebeng *Conflict of Laws in Ghana*.

<sup>14</sup> See the CISG status table.

states are from Africa,<sup>15</sup> while the number of countries in Africa constitute almost 28% of the countries in the world.<sup>16</sup> Among the thirteen contracting states,<sup>17</sup> there are only three from the region of the Southern African Development Community or SADC: besides Lesotho and Zambia, already mentioned, only one country, Madagascar, has joined since these early days.<sup>18</sup>

Many years earlier, the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*, informally known as the 1955 *Hague Sales Convention*, attracted only one African country. Niger became (and remains) a contracting state, together with (now) seven European countries.<sup>19</sup> Three African countries joined the original *Convention on the Limitation Period in the International Sale of Goods* of 1974<sup>20</sup> and six are contracting states to the Convention as amended by the 1980 Protocol.<sup>21</sup> UNCITRAL has recorded that its *Model Law on*

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<sup>15</sup> That is, 13 out of 94 – 13,82%. See the CISG status table.

<sup>16</sup> There are 54 countries in Africa and approximately 193 in the world. See Wikipedia 2022 [https://en.wikipedia.org/wiki/List\\_of\\_sovereign\\_states\\_and\\_dependent\\_territories\\_by\\_continent](https://en.wikipedia.org/wiki/List_of_sovereign_states_and_dependent_territories_by_continent) accessed 17 June 2022.

<sup>17</sup> Benin, Burundi, Cameroon, Congo (also known as Congo-Brazzaville; to be distinguished from the Democratic Republic of the Congo), Egypt, Gabon, Guinea (to be distinguished from Equatorial Guinea and Guinea-Bissau), Lesotho, Liberia, Madagascar, Mauritania, Uganda, and Zambia. Ghana signed the Convention on 11 April 1980, the day of its conclusion, but never ratified it. See the CISG status table.

<sup>18</sup> Madagascar acceded to the Convention on 24 September 2014. The Convention entered into force for Madagascar on 1 October 2015. See the CISG status table.

<sup>19</sup> Some of these countries are European Union states (Denmark, Finland, France, Italy, and Sweden) and others are not (Norway, and Switzerland). Belgium denounced the Convention on 19 February 1999; it is therefore no longer applicable in that country. See the status table at HCCH 2022 <https://www.hcch.net/en/instruments/status-charts> (hereafter the HCCH status table). For a discussion of the Convention, see Fawcett, Harris and Bridge *International Sale of Goods* 843-872. The 1986 Hague Sales Convention (the *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods*) never entered into force. See the HCCH status table. For an evaluation of the Hague and other models of private international law of contract, see Girsberger, Kadner Graziano and Neels "Global Perspectives on the Hague Principles" 120-127.

<sup>20</sup> Benin, Burundi, and Ghana. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/salegoods/conventions/limitation\\_period\\_international\\_sale\\_of\\_goods/status](https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods/status) (hereafter the *Limitation Convention* status table).

<sup>21</sup> Côte d'Ivoire, Egypt, Guinea, Liberia, Uganda, and Zambia. See the *Limitation Convention* status table. The total of nine out of 53 countries almost equals 17%.

*International Commercial Arbitration* of 1985<sup>22</sup> was used in the domestic legislation of only eleven African countries.<sup>23</sup>

However, already midway through the 20<sup>th</sup> century there was another hopeful sign, apart from the initial enthusiastic participation in the CISG: almost 78% of African countries became contracting states to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958.<sup>24</sup>

### 3 International commercial law in Africa: the dawn of a new century

Just before and after the turn of the century the status of international commercial law in Africa undeniably started to improve. The *UNCITRAL Model Law on Electronic Commerce* of 1996<sup>25</sup> has been successful in Africa, as eighteen states on the continent (partially) based their national legislation on this template.<sup>26</sup> The African participation is therefore at almost 23% of the total of 79 states which utilised the Model Law.<sup>27</sup> During this era, much development took place in the seventeen OHADA countries in West and Central Africa. The Organization for the Harmonization of Business Law in Africa (OHADA)<sup>28</sup> is a supranational organisation which has the authority

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<sup>22</sup> Revised in 2006.

<sup>23</sup> Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia, and Zimbabwe. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status).

<sup>24</sup> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Comoros, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Sierra Leone, Senegal, Seychelles, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. Forty-two out of 54 African states constitute almost 78% and 42 out of approximately 169 states almost 25%. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

<sup>25</sup> Amended in 1998.

<sup>26</sup> Botswana, Cabo Verde, Gambia, Ghana, Liberia, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda, and Zambia. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_commerce/status](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce/status) (hereafter the *Model Law on E-Commerce* status table).

<sup>27</sup> See the *Model Law on E-Commerce* status table. However, the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) attracted only three African states: Benin, Cameroon, and Congo. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/ecommerce/conventions/electronic\\_communications/status](https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status).

<sup>28</sup> See OHADA date unknown <https://www.ohada.org/en>.

to enact uniform laws that are directly applicable in all member states.<sup>29</sup> The current uniform acts are dated between 1998 and 2017 and deal *inter alia* with companies, secured transactions, insolvency, arbitration and the carriage of goods by road.<sup>30</sup> There are even plans to revive the project on the codification of the law of obligations for the OHADA region, including its private international law aspects;<sup>31</sup> it was on the agenda for the meeting of the Council of Ministers in December 2021.

International commercial law in Africa, in general, followed an upward trajectory in the first two decades of the 21<sup>st</sup> century. Important in this context is the adoption in 2001 of UNIDROIT's *Cape Town Convention on International Interests in Mobile Equipment*.<sup>32</sup> The *Cape Town Convention* has been a successful instrument, with 83 contracting states already,<sup>33</sup> including 25 African countries.<sup>34</sup> This is a high percentage (more than 30%) of the total number of contracting states. Africa is indeed setting the trend here. All the 25 African countries are also contracting states to the Convention's *Aircraft Protocol*.<sup>35</sup>

The *Hague Principles on Choice of Law in International Commercial Contracts* were adopted on 19 March 2015 by consensus between all member states of the Hague Conference on Private International Law.<sup>36</sup> At the time, these included seven African states (Burkina Faso, Egypt,

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<sup>29</sup> See Monsenepwo "Organization for the Harmonization of Business Law in Africa and the Hague Principles" 248-250; Neels 2018a *THRHR* 466-467.

<sup>30</sup> See Monsenepwo "Organization for the Harmonization of Business Law in Africa and the Hague Principles" 249 n 9 for a list of the ten Uniform Acts.

<sup>31</sup> See Monsenepwo 2021 *Unif L Rev* 345. Also see Monsenepwo "Organization for the Harmonization of Business Law in Africa and the Hague Principles" 248-250; Neels 2018a *THRHR* 466-467.

<sup>32</sup> See, in general, Goode *Official Commentary on the Convention on International Interests in Mobile Equipment*.

<sup>33</sup> See the status table at UNIDROIT date unknown <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/> (hereafter the *Cape Town Convention* status table).

<sup>34</sup> Angola, Burkina Faso, Cameroon, Cape Verde, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Eswatini, Ethiopia, Gabon, Ghana, Kenya, Madagascar, Malawi, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Togo, and Zambia. See the *Cape Town Convention* status table.

<sup>35</sup> There are 80 contracting states to the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*. See the status table at UNIDROIT date unknown <https://www.unidroit.org/instruments/security-interests/aircraft-protocol/states-parties/>. Also see Goode *Official Commentary on the Convention on International Interests in Mobile Equipment*.

<sup>36</sup> *Hague Principles on Choice of Law in International Commercial Contracts* (2015) (hereafter the *Hague Principles*). See HCCH 2022 <https://www.hcch.net/en/home>.

Mauritius, Morocco, South Africa, Tunisia and Zambia).<sup>37</sup> Namibia joined in January 2021.<sup>38</sup> But, in a recent publication, authors writing on the private international law of contract of 35 African countries<sup>39</sup> are unanimously of the opinion that the *Hague Principles* would be useful in the development of the respective national conflicts systems.

UNCITRAL has recorded that its *Model Law on International Commercial Mediation* of 2002 has been used in domestic legislation in seventeen African states,<sup>40</sup> that is almost 37% of the participating 46 countries.<sup>41</sup> The Model Law has been amended and is currently known as the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* of 2018. There are no African contracting states to the *Singapore Convention on Mediation*<sup>42</sup> yet, but it is a hopeful sign that the signatories include thirteen African states.<sup>43</sup>

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<sup>37</sup> See the list of member countries at HCCH 2022 <https://www.hcch.net/en/states/hcch-members>.

<sup>38</sup> HCCH 2022 <https://www.hcch.net/en/states/hcch-members>.

<sup>39</sup> See the national and regional reports in Girsberger, Kadner Graziano and Neels *Choice of Law* 237-396 (in alphabetical order according to country): Neels and Fredericks "African Principles of Commercial Private International Law and the Hague Principles" 239; Monsenepwo "Organization for the Harmonization of Business Law in Africa and the Hague Principles" 248 (on 17 OHADA countries); Dias and Nordmeier "Angolan and Mozambican Perspectives on the Hague Principles" 265; Oppong "Common Law African Perspectives on the Hague Principles" 274 (on private international law of contract in nine common law systems); Monsenepwo "Congolese Perspectives on the Hague Principles" 281 (on the private international law of contract in the Democratic Republic of the Congo); Ibrahim Badr "Egyptian Perspectives on the Hague Principles" 292; Gebremeskel "Ethiopian Perspectives on the Hague Principles" 308; Cupido "Mauritian Perspectives on the Hague Principles" 320; Zaher "Moroccan Perspectives on the Hague Principles" 336; Neels "South African Perspectives on the Hague Principles" 350; Elbalti "Tunisian Perspectives on the Hague Principles" 374.

<sup>40</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_conciliation/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status) (hereafter the *Model Law on International Commercial Mediation* status table).

<sup>41</sup> See the *Model Law on International Commercial Mediation* status table.

<sup>42</sup> *United Nations Convention on International Settlement Agreements Resulting from Mediation* (2018). See Zhao 2022 *J Priv Int L*.

<sup>43</sup> Benin, Chad, Congo, Democratic Republic of the Congo, Eswatini, Gabon, Ghana, Guinea-Bissau, Mauritius, Nigeria, Rwanda, Sierra Leone, and Uganda. There are nine contracting states. See the status table at UNCITRAL date unknown [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status).

## 4 The Kigali Agreement

On 21 March 2018 an agreement was concluded in Kigali, Rwanda, to establish the African Continental Free Trade Area or AfCFTA.<sup>44</sup> The agreement, which entered into force on 30 May 2019, features in the field of international economic law, the public law arm of international commercial law. Today it has been signed by all member states of the African Union,<sup>45</sup> except Eritrea, and has been ratified by 38 countries. The operational phase of the free trade area was launched in Niger on 7 July 2019. Trading under the agreement was approved to commence on 1 January 2021, but the full implementation of the agreement will take several years.<sup>46</sup> The main aim is the creation of a single market for goods and services, in order to deepen the economic integration of the African continent; create a liberalised market for goods and services; facilitate investments; promote sustainable and inclusive socio-economic development; and enhance the competitiveness of the economies of state parties in the continent and the global market.<sup>47</sup>

Participating states now need to reconsider joining the CISG<sup>48</sup> and incorporating the *UNCITRAL Model Law on International Commercial Arbitration*, the two founding documents of modern international commercial law. A third priority, the current author would suggest, is that Africa needs a supporting instrument on the private international law of contract.

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<sup>44</sup> *Agreement Establishing the African Continental Free Trade Area* (2018) (hereafter the *Kigali Agreement*).

<sup>45</sup> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. See AU 2022 <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>. The Western Sahara is disputed and Réunion is French territory.

<sup>46</sup> See Monsenepwo 2021 *Unif L Rev* 371-373; various documents available at TRALAC 2022 <https://www.tralac.org>; TRALAC *African Continental Free Trade Area*. See, in general, Oppong *Legal Aspects of Economic Integration*.

<sup>47</sup> Articles 3-4 of the *Kigali Agreement*.

<sup>48</sup> Also see Tsorme 2021 *Journal of Law, Policy and Globalization* 1.



## 5 The African Principles of Commercial Private International Law

### 5.1 Provenance of the project

The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg has commenced a project to formulate the provisionally called African Principles of Commercial Private International Law. The most important one of these sets of principles will be the African Principles on the Law Applicable to International Commercial Contracts.

The research centre has requested the support of the South African Minister of International Relations and Cooperation to facilitate the process of endorsement of the project by the African Union (AU). According to the department, she did indeed discuss the issue with the AU, but no communication from the AU has been received since 2019. More recently, we communicated with officials of the Pan African Parliament. The proposal will be referred to the appropriate commission as soon as possible.

The preliminary design for the African Principles on the Law Applicable to International Commercial Contracts was introduced at a symposium entitled Building a Global Framework to Facilitate Trade and Investment, arranged by the research centre in cooperation with the Hague Conference on Private International Law, the Permanent Court of Arbitration and the International Court of Justice on 9 September 2014 at the University of Johannesburg; it also featured at the Pan-African Conference on Party Autonomy in Private International Law, held at the University of Johannesburg on 4 October 2017, and was introduced to the broader academic community at the end of 2018 with an article in the *Stellenbosch Law Review*.<sup>49</sup> A first draft of the African Principles on the Law Applicable to International Commercial Contracts was published in the 2020 *Uniform Law Review/Revue de droit uniforme*.<sup>50</sup> A French and Portuguese translation will appear in the *Festschrift* for Professor Christopher Forsyth, to be published at the end of 2022, DV.<sup>51</sup> We invited the public to send us comments on the draft<sup>52</sup> and extend that invitation to all current readers, and in particular Prof Charl Hugo – perhaps he could indicate his opinion on the references to the *Uniform*

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<sup>49</sup> Neels and Fredericks 2018 *Stell LR* 347. Also see Neels and Fredericks "African Principles of Commercial Private International Law and the Hague Principles" 239.

<sup>50</sup> Neels 2020 *Unif L Rev* 426.

<sup>51</sup> Neels and Fredericks *Commercial Private International Law*.

<sup>52</sup> See Neels 2020 *Unif L Rev* 426.

*Customs and Practice for Documentary Credits* of the International Chamber of Commerce in article 4(1)(c) and article 4(3)(c) and, in general, on articles 4 and 7 (including, specifically, article 4(2) in relation to article 4(1)(c)).

## **5.2 Relation to the African Union's Agenda 2063 and the United Nations Sustainable Development Goals**

The existence of a reliable transnational legal infrastructure in respect of international commercial law, including commercial private international law, is a prerequisite for investor confidence, inclusive economic growth, sustainable development and, ultimately, the alleviation of poverty on the African continent. The proposed African Principles may contribute to sustainable economic growth on a long-term basis. They are essential in the development of the African free-trade area and common market called AfCFTA, combined with increasing legislative powers for the African Union,<sup>53</sup> as envisaged in the strategic plan of the African Union Commission called Agenda 2063.<sup>54</sup>

Aspiration 1 of Agenda 2063 strives towards prosperity for Africa by inclusive growth and sustainable development. For inclusive economic growth a stable legal infrastructure is needed, as this attracts traders and investors and leads to job creation. Increased living standards and the eradication of poverty will eventually be the result. The required stable legal infrastructure includes legal certainty in commercial private international law. The African Principles may provide this certainty and, in this way, contribute to inclusive economic growth. Aspiration 1 is linked to United Nations Sustainable Development Goal number 8 ("[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all") and, ultimately, goals number 1 and 2 (the eradication of poverty and hunger).<sup>55</sup>

Aspiration 2 of Agenda 2063 deals with legal integration in Africa (frameworks for a united Africa) and the ideals of Pan-Africanism and the African *renaissance*. The development of African private international law in general stagnated in the 1970s.<sup>56</sup> The African Principles may therefore form

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<sup>53</sup> AU date unknown <https://au.int/en>.

<sup>54</sup> AU Commission *Agenda 2063 (Framework Document)*. Also see AU Commission *Agenda 2063 (Implementation Plan)*.

<sup>55</sup> *Transforming our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A/RES/70/1 (2015).

<sup>56</sup> See Oppong *Private International Law in Commonwealth Africa* lix-ix; cf Oppong 2007 *Am J Comp L* 677.

part of the phenomenon of the African *renaissance*. The Principles will be pan-African in nature, as they will be intended for use in all African countries, and will be based on African conceptions of private international law, taking into account global best practices (including those in other emerging regions of the world). The legal integration of the continent is envisaged to take place in the executive, legislative and judicial sphere. The African Principles may indeed be used by courts and arbitral tribunals and as a model law for national, regional or supranational legislation.

Aspiration 3 of Agenda 2063 deals with good governance and the rule of law, which should undoubtedly also pertain to commercial private international law. The African Principles are part of the enabling legal environment referred to in the Agenda.

### **5.3 *The nature, objective and purposes of the African Principles on the Law Applicable to International Commercial Contracts***

To indicate the nature, objective and purposes of the envisaged African Principles on the Law Applicable to International Commercial Contracts, the present author quotes from the proposed preamble:

- 1 This instrument sets forth general principles for determining the law applicable to international commercial contracts.<sup>57</sup>
- 2 They may be used as a model for national, regional and supranational legislative instruments in Africa.<sup>58</sup>
- 3 They may be used by African courts in the interpretation, supplementation and development of the rules of private international law of contract.<sup>59</sup>
- 4 They may be used by arbitral tribunals in the interpretation, supplementation and development of the rules of private international law, wherever appropriate, and whether the tribunal is seated in Africa or elsewhere.<sup>60</sup>

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<sup>57</sup> Compare *Hague Principles* preamble para 1; *UNIDROIT Principles of International Commercial Contracts* (2016) (hereafter the UPICC) preamble para 1.

<sup>58</sup> Compare *Hague Principles* preamble para 2.

<sup>59</sup> Compare *Hague Principles* preamble paras 3 and 4; UPICC preamble paras 5 and 6.

<sup>60</sup> Compare *Hague Principles* preamble paras 3 and 4.

#### **5.4 The role of substantive law instruments in the African Principles on the Law Applicable to International Commercial Contracts**

The draft African Principles on the Law Applicable to International Commercial Contracts<sup>61</sup> have a particular and close relationship to the CISG and other substantive law instruments, influenced by Prof Fritz Juenger's teleological substantive law approach to private international law, most comprehensively expounded in the monograph *Choice of Law and Multistate Justice*.<sup>62</sup> Juenger encourages courts to choose from (a) the *lex fori* and (b) any other laws with a sufficient link to the specific case, the particular legal system with the best arrangement for the given situation.<sup>63</sup> The reader gains the impression that both the quality of the rules and principles of the potentially applicable legal systems *per se* and the result of their application in the particular circumstances should be taken into consideration. Preferable above all, it seems, are international up-to-date and readily available codifications as the CISG and, especially, the *UNIDROIT Principles of International Commercial Contracts*.<sup>64</sup>

The *Inter-American Convention on the Law Applicable to International Contracts* of 1994, better known as the *Mexico City Convention* (or even the *Mexico Convention*), was strongly influenced by Juenger's approach.<sup>65</sup> Prof Juenger was indeed an advisor to the American delegation at the Fifth Specialised Conference on Private International Law or CIDIP-V.<sup>66</sup> According to the author, the first sentence of article 7 ("The contract shall be governed by the law chosen by the parties") includes a choice of instruments such as the CISG or the UPICC.<sup>67</sup> Article 9 commences with the standard common law approach to determining the law applicable in the absence of a choice by the parties: "If the parties have not selected the

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<sup>61</sup> Hereafter the (proposed/draft) African Principles.

<sup>62</sup> Juenger *Choice of Law and Multistate Justice*. For direct influence of Juenger's views, see Borchers and Zekoll *International Conflict of Laws*; Hardjowahono *Unification of Private International Law*; Pears *Foundation of Choice of Law*.

<sup>63</sup> Juenger's methodology is therefore classified as one of the better law approaches to private international law in the United States of America. Application of the better law was originally one of the choice-influencing considerations listed by Leflar: predictability of result; maintenance of interstate and international order; advancement of the forum's governmental interests; and application of the better rule of law. See Leflar, McDougal and Felix *American Conflicts Law* 357-372.

<sup>64</sup> Abbreviated as the UPICC. See Juenger "The Problem with Private International Law" 289. For commentaries on the UPICC, see Bogdan *Transnational Commercial Contract Law*; Bonell *International Restatement of Contract Law*; Vogenauer *Commentary on the UNIDROIT PICC*.

<sup>65</sup> See Girsberger, Kadner Graziano and Neels "Global Perspectives on the Hague Principles" 124-125.

<sup>66</sup> See Juenger 1994 *Am J Comp L* 381.

<sup>67</sup> Juenger 1994 *Am J Comp L* 392.

applicable law, ... the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties." However, the next sentence testifies to an international substantive law approach to private international law: "It shall also take into account the general principles of international commercial law recognized by international organizations."<sup>68</sup> According to Juenger, the drafters here intended to refer to the UPICC.<sup>69</sup> He also refers to the CISG in this regard.<sup>70</sup> Article 9 blends the proper law methodology with a substantive law approach and seems to reflect "an unbridled eclecticism that vacillates between geography and teleology", but, so Juenger adds, "[w]hile CIDIP-V can be faulted for mixing together the oil of supranationality and the water of positive laws, one can expect, in the natural course of things, the oil to rise and the water to sink".<sup>71</sup>

The *Mexico City Convention* is applicable in Mexico and Venezuela but also influenced the law in various other Latin American countries, including the Dominican Republic and Paraguay.<sup>72</sup> Moreover, the Convention "remains a point of reference in contemporary conflicts discourse, perhaps especially due to the inclusion of the first examples in black-letter rules of the integration of substantive considerations in the relevant objective conflicts analysis".<sup>73</sup> A decision of the Court of Appeal of Rio Grande do Sul in 2017 can indeed be explained only against the background of a substantive law approach to private international law of contract. The court applied "the new *lex mercatoria*" in the form of the UPICC and the CISG to an international sales contract without a choice of law clause, ignoring the traditional *lex loci contractus* approach in the Brazilian conflict of laws.<sup>74</sup>

The proposed African Principles display influences from an international substantive law approach to private international law but take a less

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<sup>68</sup> Also see art 10 of the *Mexico City Convention*: "In addition to the provisions in the foregoing article, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."

<sup>69</sup> Juenger 1994 *Am J Comp L* 391.

<sup>70</sup> Juenger 1994 *Am J Comp L* 390.

<sup>71</sup> Juenger 1994 *Am J Comp L* 391.

<sup>72</sup> See the discussion in Girsberger, Kadner Graziano and Neels "Global Perspectives on the Hague Principles" 124-125.

<sup>73</sup> Neels 2018b *THRHR* 662.

<sup>74</sup> *Noridane Foods SA v Anexo Comercial Importação e Distribuição Ltda* (Court of Appeal of Rio Grande do Sul) case number 70072362940 of 14 February 2017, referred to by Gama, Tiburcio and Albuquerque "Brazilian Perspectives on the Hague Principles" 998. See also the discussion by Girsberger, Kadner Graziano and Neels "Global Perspectives on the Hague Principles" 125.

adventurous approach than the *Mexico City Convention* and the decision of the Court of Appeal of Rio Grande do Sul. References to international substantive law are strictly contained within a Savignian framework,<sup>75</sup> as will become clear from the discussion below. Another point of difference with the position under the *Mexico City Convention* is the fact that the African Principles expressly mention important international substantive law instruments such as the UPICC, the CISG and the *Uniform Customs and Practice for Documentary Credits*.<sup>76</sup>

Due to its inherent uncertainty, article 4 of the draft African Principles opts against an unlimited choice of non-state law on the same level as state law; however, it intends to make this possible in cases where the choice of non-state law clearly has merit. The *Hague Principles* also provide parameters within which a choice of non-state law should be recognised: "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."<sup>77</sup> Article 4(1) of the proposed African Principles provides even more certainty by supplying an exhaustive list of the instruments and types of instruments that may be chosen:

A choice of one or more of the following instruments is recognised on the same level as the choice of the law of a country:

- a. the UNIDROIT Principles of International Commercial Contracts;<sup>78</sup>
- b. a treaty, as defined in the United Nations Convention on the Law of Treaties;<sup>79</sup>
- c. the Uniform Customs and Practice for Documentary Credits;
- d. any instrument issued under the auspices of a regional economic integration organisation or an international, supranational or regional intergovernmental organisation.

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<sup>75</sup> The primary conflicts methodology in most private international law systems today. See the discussion in Forsyth *Private International Law* 47-50. The methodology originated with volume 8 of von Savigny's *System des heutigen römischen Rechts*. Also see Neels "Experiment in the Systematization of South African Conflicts Rules" 529.

<sup>76</sup> Hereafter the UCP. The latest edition (the UCP600) is from 2007.

<sup>77</sup> Article 3 of the *Hague Principles*, under the title "Rules of law". The last phrase ("unless the law of the forum provides otherwise") does not make much sense in a non-binding instrument but was added on the insistence of the European Union.

<sup>78</sup> See para 2 of the preamble to the UPICC: "[The UPICC] shall be applied when the parties have agreed that their contract be governed by them."

<sup>79</sup> *Vienna Convention on the Law of Treaties* (1969).

Choosing the CISG as the governing law on the same level as a national legal system, when it would not otherwise be applicable, is therefore legitimised by article 4(1)(b). If the parties choose any one of the instruments listed, so determines article 4(2), the UPICC may be used in its interpretation and supplementation. This subarticle is inspired by paragraph 5 of the preamble to the UPICC: "[The UPICC] may be used to interpret or supplement international uniform law instruments."

Article 4(3) echoes paragraph 3 of the preamble to the UPICC,<sup>80</sup> but refers to a broader palette of potentially applicable instruments: "If the parties choose the general principles of law, the *lex mercatoria*, international commercial law or the like to govern their contract, the following instruments may be applied, where relevant ..." – followed by a list of instruments including the UPICC, the CISG "as interpreted and supplemented by the [UPICC]" and, finally, the UCP.

Article 7 of the draft African Principles is inspired by paragraphs 5 and 6 of the preamble to the UPICC,<sup>81</sup> but refers to the same, more extensive inventory of potentially applicable instruments: "The law applicable to a contract by virtue of this instrument may be interpreted, supplemented and developed along the lines of the instruments listed in Article 4(3)", namely the UPICC, CISG (read with the UPICC) and the UCP.

## 6 Concluding remarks

Having started in the forgotten kingdom, our story now concludes in another mountainous country, this time in the north-eastern corner of Africa – not a kingdom but for long an empire. In front of the African Union building in Addis Ababa you indeed find a statute of Emperor Haile Selassie of Ethiopia, one of only two countries in Africa (namely, with Liberia) that have never been colonised – that is, if one ignores the Italian occupation of Ethiopia during WWII.<sup>82</sup>

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<sup>80</sup> "[The UPICC] may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."

<sup>81</sup> The UPICC may be used to interpret or supplement "international uniform law instruments" (para 5) and "domestic law" (para 6).

<sup>82</sup> See Boddy-Evans 2020 <https://www.thoughtco.com/countries-in-africa-considered-never-colonized-43742>. Unfortunately, at the time of writing, Ethiopia is amid a devastating civil war. See Green 2021 <https://www.reuters.com/article/ethiopia-conflict-fractured-giant-idAFL8N2T62AY>.

In his address to African leaders in May 1963 the Emperor stated the following:<sup>83</sup>

Africa is today at mid-course, in transition from the Africa of Yesterday to the Africa of Tomorrow. Even as we stand here, we move from the past into the future. The task on which we have embarked, the making of Africa, will not wait. We must act, to shape and mould the future and leave our imprint on events as they slip past into history.

Hopefully it is not too optimistic to speak of a new dawn for international commercial law in Africa. Again, this is a critical time, waiting for our re-invention of the future of the continent and all its people. Charl has done his share in the context of international financial law (a subdivision of international commercial law) in Africa, and he has been invited in paragraph 5.1 above to also contribute to the project on the African Principles of Commercial Private International Law, more specifically the African Principles on the Law Applicable to International Commercial Contracts.

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<sup>83</sup> Selassie "1963 Address to African Leaders" 77.



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## List of Abbreviations

AfCFTA	African Continental Free Trade Area
Am J Comp L	American Journal of Comparative Law
AU	African Union
CISG	United Nations Convention on the International Sale of Goods
HCCH	Hague Conference on Private International Law
ICC	International Chamber of Commerce

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J Priv Int L	Journal of Private International Law
OAS	Organisation of American States
OHADA	Organisation for the Harmonisation of Business Law in Africa
PICC	Principles of International Commercial Contracts
SADC	Southern African Development Community
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRALAC	Trade Law Centre
UCP	Uniform Customs and Practice for Documentary Credits
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Univ L Rev	Uniform Law Review / Revue de droit uniforme
UPICC	UNIDROIT Principles of International Commercial Contracts
WWII	World War II / the Second World War