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# THE HARMONIZATION OF TRANSACTION AVOIDANCE RULES IN THE INSOLVENCY LAWS OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

**BY**

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## COPYRIGHT STATEMENT

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*M'masomo*![1]

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[1] In the *Mbo* dialect of the Ngoni language of Neno district of Southern Malawi the word is uttered when a young person appears before a group of elders and would like to address them on an issue or would want to merely show respect to them and acknowledge their presence.

[2] Meaning 'thanks' among the Ngonis of Southern Malawi.

## ABSTRACT

The study explores whether there is a legal case for the harmonization or approximation of transaction avoidance rules in the insolvency laws of members states of the Common Market for Eastern and Southern Africa ('COMESA'). It also inquires into whether the regional economic body is optimally constituted to undertake legal harmonization and how it can undertake the process of harmonizing the transaction avoidance rules of its member states.

The study has been prompted, firstly, by the treaty imperative in article 4(6)(b) of the COMESA Treaty mandating member states to harmonize or approximate their laws to the extent possible for the better functioning of the common market. Secondly, it has been made necessary by the economic reality that a marketplace will function better where there are common rules governing commerce.

The study has suggested improvements to aspects of the COMESA constitutive treaty to optimize it for legal harmonization. The study has observed that current avoidance rules in COMESA member states have no single common goal that they are pursuing. Using the functional approach within comparative legal methodology, the study has identified the treaty aspiration of attracting investment into the marketplace as the goal that harmonized transaction avoidance rules in COMESA must aim at achieving. Bearing this in mind, the study has proposed the enactment of a COMESA directive that will harmonize transaction avoidance rules dealing with preferences, gifts and transactions at undervalue. The proposed harmonized avoidance rules will have built-in features for the attainment of contractual finality, certainty and predictability in the market place so as to better attract investment inflows.

The study has made a threefold contribution to law. Firstly, with regards to insolvency law as it relates to and interacts with community law, the study has given emphasis on identifying the muse within the treaty founding a regional economic body that will inform and inspire the formulation of elements of harmonized transaction avoidance

rules. Secondly, with regards to private international law, the study has focused on how to strike a careful balance in the relationship or interaction between domestic transaction avoidance rules on the one hand, and the harmonized avoidance rules at COMESA level with the avoidance rules of any other regional economic body or group to which each member state may belong, on the other hand. Thirdly, with regard to community law, the study's importance and contribution to learning lies in the fact that it is the first one to undertake a comprehensive review, from a comparative angle, of COMESA's readiness to undertake legal harmonization.

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# CHAPTER 1
# INTRODUCTION

## 1.1. A Synopsis Of The Study

The study is situated at the confluence of insolvency law, private international law and community law. It investigates and finds a compelling case to harmonize or approximate the transaction avoidance rules in the insolvency laws of member states of the Common Market for Eastern and Southern Africa ('COMESA') regional economic community. Having done so, it examines if COMESA as an institution is optimally primed to undertake harmonization or approximation of laws and, finding that it needs to make a few improvements to its constitutive document to better equip it for the task, the study proceeds to make proposals on how the regional economic community can proceed to harmonize or approximate two categories of its transaction avoidance rules, to wit, preferences and transactions at undervalue and at no value.

The inquiry has been prompted primarily by article 4(6)(b) of the COMESA Treaty under which member states undertook to harmonize or approximate their laws to the extent required for the proper functioning of the common market. It has also been rendered necessary by an economic case for having common transaction avoidance rules in a single market place. Such common transaction avoidance rules would enhance legal certainty and predictability as well as minimize transaction costs. It will achieve the later purpose by averting the need for market players to know the avoidance rules of multiple jurisdictions thereby wasting time and incurring legal costs when planning cross border transactions. Common transaction avoidance rules will also prevent forum shopping by investors through locating enterprises or placing investments in the member states with the most favourable avoidance rules for creditors or investors. There is also literature, to be discussed later in the study, supporting the proposition that a market place where there is legal certainty and predictability attracts investment better than where there are multiple and sometimes conflicting legal rules.

The chapter sets out by discussing the meaning of insolvency law, focusing on its nature as a collective process for all creditors as a group. It then discusses the various aims of insolvency law before delving into a brief discussion of transaction avoidance rules, analyzing

their nature, purpose and contribution to the attainment of the various aims of insolvency law. Following this, the chapter delves into common transaction avoidance rules typologies, engaging in a brief critique of their design and observing that there is no uniformity in the composition of their elements in most mature jurisdictions as these are formulated according to the vision of insolvency law that each jurisdiction chooses to pursue, and the visions are many and are not arranged in any order of importance. The chapter then observes that there is need for uniformity of avoidance rules in every market place including the market place that is the regional economic community so as to enhance certainty and predictability. Having discussed the treaty imperative to harmonize or approximate laws of member states in COMESA, the chapter then discusses the aims of this study and its importance before proceeding, in the following order, to: the research questions; the importance of the research; the literature review; the research methodology; limitations of the study and the research ethics. The chapter ends with a narrative of the arrangement of chapters in the thesis.

## 1.2. The Context Of The Research Proposal: Its Aims, Objectives And Potential Impact

### *1.2.1. The Meaning Of Insolvency And Aims Of Insolvency Law*

Insolvency is commonly defined as an inability to pay debts as and when they fall due.[1] This situation may arise either because of a lack of cash at the material time (cash flow insolvency), or because the total liabilities of a company exceed the assets available to meet them (balance sheet insolvency).[2] Much as an insolvent debtor worries creditors individually, it is of greater concern to all the creditors as a group[3] who are interested to see to it that they are treated equally, fairly and in an orderly manner[4] and also that the estate of the debtor is not dismembered by any one or just a few of them to the disadvantage of all the others.

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[1] Anderson H, 'The Meaning of Insolvency' in Anderson, H *The Framework of Corporate Insolvency Law* (New York 2017; online edition, Oxford Academic) 11 https://doi.org/10.1093/oso/9780198805311.003.0004 accessed on 5 Feb 2024.

[2] *In re Sedalia Farmers Co-op. Packaging & Produce Co*. 268 Fed. 898 (Dist Ct W D Mo) 1919; Seng W, 'Taking Stock of the Insolvency Tests in s. 254 of the Companies Act', (2011) Singapore Journal of Legal Studies 486; Tolmie F, *Corporate & Personal Insolvency Law* (2nd edn, Cavendish Publishing 2003) 3.

[3] Fletcher I, *The Law of Insolvency* (4th edn, Sweet and Maxwell 2009) 2.

[4] Quo S, 'Insolvency Law: A Comparative Analysis of Preference Tests in the Hong Kong Special Administrative Region (HKSAR) and Australia' (July 2007) Monash U Department of Business Law and Taxation Working Paper No.10, available at SSRN:https://ssrn.com/abstract=1029885 accessed on October 20,2024.

Insolvency laws are, among other things, geared at the maximization of the value of the debtor's assets for recoveries by creditors. This is achieved through preventing the dismemberment of a debtor's estate by individual creditors seeking quick judgments; and, providing for the fair and equitable treatment of equally situated creditors.[5] The latter purpose is one of the core functions of insolvency laws − a collective creditors' remedy that furthers the goals of efficiency and distributive justice.[6]

Insolvency laws are tailor-made as a collective response by all creditors to a debtor's general default.[7] Although one creditor may move the court to commence insolvency proceedings, once a winding up order is made, all the unsecured creditors collectively seek, after secured and prioritized payments are made, to share rateably amongst themselves whatever can be recovered from the debtor's business.

### *1.2.2. Transaction Avoidance Rules And Their Role In Aiding The Collective Nature Of Insolvency Proceedings*

Because insolvency is the debtor's inability to pay debts, it follows that at the time a winding up order is made by the courts, there may be very little or nothing left in the debtor's estate to satisfy all the debts incurred by the insolvent debtor. This situation would make the facility of an insolvency action not worth the while, save for priority creditors.[8] Further, an inability to pay debts may happen gradually and not all of a sudden. It could be a state of affairs which the debtor and some of its creditors may be aware of long before the making of a winding up order, and in the intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends, pay certain creditors to the exclusion of others or encumber the assets,

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[5] The World Bank, *Principles of Effective Insolvency and Creditors/ Debtor Regimes'* (The World Bank Group , 2021), available at http://hdl.handle.net/10986/35506 accessed on October 20, 2024; UNCITRAL Legislative Guide on Insolvency Laws 2005, p10-14, accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law; Tabb C, *The Law of Bankruptcy,* (2nd edn, Thomson Reuters 2009) 3; Baird D and Jackson T, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 University of Chicago Law Review 97, 100-101.

[6] Tabb C, *The Law of Bankruptcy* (2nd edn, Thomson Reuters 2009) 4.

[7] Eidenmuller H, 'What is an Insolvency Proceeding?' ( Winter 2008) The American Bankruptcy Law Journal Vol 92(1) 53

[8] Westbrook J, 'Choice of Avoidance Law in Global Insolvencies' (1991) Vol. 17, Issue 3, Brooklyn Journal of Int'l Law 499.

thereby giving advantage to the chargees as against the rest of the creditors. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position. The result of such actions in terms of the eventual insolvency proceedings generally disadvantages ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest.[9] Such actions also impair the collective nature of insolvency proceedings, especially the need for equally situated creditors to share the debtor's estate equally.

In an ordinary, non 'collective action' scenario, individuals that are injured by the debtor's pre- insolvency actions have recourse to various kinds of actions in contract or at equity to challenge some already concluded transactions on various grounds.[10] These actions may only benefit the individual that has taken the court proceedings and hence the benefits may not flow to all the creditors, as a group. The actions may therefore end up dismembering the debtor's estate. The device that insolvency law uses to maximize, bulk up or augment the debtor's estate for distribution to the general body of creditors and to attain the fair and equitable treatment of equally situated creditors is the facility of transaction avoidance proceedings. Once the winding up order has been made and a liquidator has been appointed, the liquidator is vested by statute with powers to apply to court to invalidate, set aside or neutralize the effects of certain prescribed transactions that the law deems fraudulent or are aimed at or have the effect of defeating the goals of debtor estate augmentation or maximization and fair and equitable distribution in an insolvency.[11] If all the prescribed elements are proven, the transaction is set aside, the proceeds disgorged from the recipient and ploughed back into the insolvent estate, to be distributed firstly according to prescribed priorities, and these priorities vary from jurisdiction

[9] UNCITRAL Legislative Guide on Insolvency Laws, 2005, paragraph 148, accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

[10] In the law of contract, the main ground for unravelling already concluded transaction is that relating to unfair bargains, for example, those occasioned through duress, undue influence, illegality, those that can be set aside on the basis of a plea of *non- est factum,* and harsh and unconscionable bargains. In the law of equity these would be transactions relating to the concepts of the constructive or resulting trust: Haley M and Mc Murtry L, *Equity and Trusts* (2nd edn, Sweet and Maxwell 2009) Ch. 10; And see generally Parry R, ' Other Laws Enabling Transaction Avoidance' in Parry R, Ayliffe J, Shivji S and Oliff- Cooper G, *Transaction Avoidance in Insolvencies* (3rd edn, Oxford University Press 2018) Ch. 24

[11] Tabb C, *The Law of Bankruptcy* (2nd Edn, Thomson Reuters 2009) 465.

to jurisdiction according to national policy dictates.[12] The remainder is shared rateably among all the unsecured creditors.

Gurrea-Martinez[13] lists the following benefits of transaction avoidance powers: they prevent or reverse various types of opportunistic, value destroying behaviors usually engaged in by debtors in the zone of insolvency, for example, asset dilution (siphoning assets usually to related parties), asset substitution (for example, pursuing risky projects even if they have a negative net present value) and debt dilution (borrowing money even when the company has no chance to survive). The existence of avoidance powers may help to maximize the value of the firm; they prevent a race to the debtor's assets when insolvency threatens; they protect the interests of debtors and creditors as a whole when the debtor is facing financial trouble and some market participants want to take advantage of the situation; they can be helpful for early detection of financially distressed debtors; and, finally, third parties serve as gate − keepers to see if transactions are at an undervalue, since, if they involve themselves in such, they stand to face an avoidance action in which they may be made to pay up the real value of the transaction.[14]

Transaction avoidance rules hence support the collective action nature of insolvency proceedings. Keay[15] argues that collective action is the better solution in the insolvency of the debtor as no one unsecured creditor gets to receive full payment at the expense of the rest, who receive little or nothing. A creditor might benefit on one occasion if there was a 'free for all' rather than a collective scheme, but on other occasions he or she may receive nothing. Therefore a collective action overall, will be more fruitful for every creditor. He also notes a public interest element in collective action in the sense that there is an orderly and expeditious resolution of the company's demise and the avoidance of what he terms an 'unsavory' scramble of creditors for the assets of the insolvent, which with the involvement of many lawyers acting for many

[12] Westbrook J, 'Choice of Avoidance Law in Global Insolvencies' (1991) Vol. 17, Issue 3, Brooklyn Journal of Int'l Law 499.
[13] Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.
[14] See also Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) Vol. 2 European Company and Financial Law Review 235 available at https://doi.org/10.1515.ecfr.2011.235 accessed on 13 December, 2021.
[15] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) Vol. 18 Sydney Law Review 55.

creditor clients seeking to have a go at the debtors' assets, will involve more legal costs hence depleting the debtor's estate. He then goes on to note that if collectivism is to work, then avoidance provisions are needed to strip a creditor of any advance payment received immediately before the liquidation so as to bring a greater benefit to the bulk of the creditors. As such, so he concludes, avoidance provisions serve as a disincentive to individual action by creditors, as any gains made will likely be disgorged from them through avoidance actions, which may entail the additional burden of legal costs for the creditor involved. Avoidance provisions, therefore, ensure and support the practicability of a collective proceeding. Creditors are encouraged to participate in such collective proceedings as they cannot take the benefit of individual pre-liquidation debt collection mechanisms. Since these are impugned, the pool of the assets of the debtor is maximized for all creditors.[16] An avoidance action prevents a creditor jumping to the front of the queue of general unsecured creditors, all of whom must be paid equally.[17]

### *1.2.3. Common Transaction Avoidance Typologies And A Brief Critique Of Their Design*

Transaction avoidance provisions exist in almost every jurisdiction, albeit in diverse forms.[18] The variations may relate to the types of transactions covered, the mental element(s) to be proven on the part of the debtor or the transferee, the periods of time prior to the commencement of insolvency proceedings that the liquidator can go back to in searching for suspect transactions, as well as the range of defences available to the debtor or to the transferee.

The United Nations Commission on International Trade Law ('UNCITRAL') puts voidable transactions into four types being:[19] (a) transactions intended to defeat, delay or hinder creditors from collecting their claims, say, transferring assets to third parties with intent to put them beyond the reach of creditors; (b) transactions at an undervalue; (c) transactions with certain creditors that would be regarded as preferential and (d) transactions involving security

[16] Keay, ibid.
[17] Keay A, 'Liquidators Avoidance of Preferences: Issues of Concern and Proposals for Reform (1996) 18 Adel L R 159
[18] Schorr S, 'Avoidance Actions under Chapter 15: Was Condor Correct?' (2016) Vol 35 (1) Fordham International Law Journal 350; Parry R, et al, *Transaction Avoidance in Insolvencies* (3rd edn, Oxford University Press 2018) 500.
[19] UNCITRAL Legislative Guide on Insolvency Laws, 2005, Part Two, Page 141*ff*, accessed on 3rd November 2020 at https://uncitral.un.org/sites/uncitral.on.org/files/media-documents/uncitral/en/05-80722_ebook.pdf.

interests. Gurrea-Martinez[20] posits that at common law, there are usually two types of transaction avoidance measures; the first type seeks to avoid transactions where the debtor received a lower or even no consideration. These are transactions at no value or at an undervalue or fraudulent conveyances. The second type seeks to avoid transactions where the debtor put a creditor in a better position over its fellows, like in the case of unlawful preferences. Boraine[21] concurs in stating that core transactions that are avoided are: fraudulent conveyances, for example, transactions at no value or at an undervalue, where the debtor does not receive or gets inadequate value and preferences. He distinguishes preferences from fraudulent conveyances in that preferences deal with settling pre-existing debt but in a way where the creditor is made to ' jump the queue' and get paid more than what he would have been paid in a collective insolvency process.

The design of avoidance provisions requires a balance to be reached between competing social benefits such as, on the one hand, the need for strong powers to maximize the value of the debtor's estate for the benefit of all creditors, and, on the other, the possible undermining of contractual predictability and certainty.[22] This necessitates a balance to be reached between avoidance criteria that are easily proven and will result in a higher number of transactions being avoided, in this thesis labelled as avoidance criteria whose aim is the maximization of returns to creditors, and narrower avoidance criteria that are difficult to prove but are more restricted in the number of transactions that will be avoided successfully, in this work generally described as avoidance criteria aimed at attaining contractual certainty and predictability. To minimize the potentially negative effects of avoidance powers on contractual certainty and predictability, it is desirable that as far as possible the categories of transactions to be avoidable (irrespective of

[20] Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.

[21] Boraine A, 'Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-border Context' (2009) 21 SA Merc L J 435.

[22] UNCITRAL Legislative Guide on Insolvency Laws, 2005, paragraph 154, accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law; Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.

whether they are broadly or narrowly defined) and the exercise of avoidance powers be subject to clear criteria that will enable business and commercial risks to be ascertained.[23]

Transaction avoidance criteria are generally grouped into objective and subjective categories.[24] With objective criteria, reliance is placed on generalized non-partisan, uninvolved or impersonal criteria, for example, a prescribed 'suspect' period; whether 'appropriate value'[25] was paid or received for the transaction; whether a debt repaid was mature and the obligation to pay was due; and, the relationship of the parties to the transaction.[26] Objective criteria do reduce the time for judicial examination of avoidance claims; increase certainty of outcomes of the proceedings and avoid moral reproaches of the parties.[27] They are easier to apply but can have arbitrary results if relied upon exclusively. For example, with regard to prescribed 'suspect' periods, a high value transaction entered into a day before the earliest date in the 'suspect' period may be let off the hook, whereas a lower value transaction entered into a day after the commencement of the period may be avoided or be voidable. To ameliorate this arbitrariness, prescribed suspect periods are combined with defences, some of which may or do require proof of subjective elements. Further, transactions with related parties or insiders are given a longer suspect period than transactions with unrelated parties. Subjective criteria relate to the state of mind of the debtor or the creditor or counterparty at the time of the transaction. For example the avoidance rule may have as an element whether the counterparty knew that the debtor was insolvent or whether the creditor acted in good faith and the like. These subjective criteria may require a detailed consideration of intent and other factors, like knowledge of the debtor's financial situation.[28]

Usually, objective and subjective criteria are combined in most legislative schemes, for instance, the law may refer to a transaction that took place within a given period prior to commencement of insolvency proceedings conducted with a given mental state or intent. Heavy

[23]UNCITRAL Legislative Guide on Insolvency Laws, 2005, paragraph 154 and 163, accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.
[24] ibid, paragraph 156.
[25] And, what is ' appropriate value' can itself be a subjective issue as valuation is not an exact science.
[26] See generally, de Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) 20 (3) International Insolvency Review 219.
[27] ibid.
[28]UNCITRAL Legislative Guide on Insolvency Laws, 2005, paragraphs 157, 158 and 159, accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

reliance on subjective criteria may lead to protracted litigation and may be costly on the insolvent estate in the long run.[29] To avert costs, some jurisdictions rely exclusively on short suspect periods. This may be used to create the presumption of the necessary intent or knowledge, especially of insolvency.[30] Other jurisdictions adopt a two-tiered approach, combining short suspect periods within which all transactions are avoided and no defences are available to creditors, with a longer period in which certain additional elements have to be proven.[31] Whatever criteria are used, UNCITRAL advocates that insolvency laws should attempt to achieve a balance between the interests of individual creditors and those of the estate, which, in terms of recovery of assets through avoidance actions, coincide with the collective interests of all the creditors.[32]

The design of transaction avoidance criteria may also have defences built into them. Clearly, subjective criteria present the creditor or the counterparty with useful defences like those requiring knowledge of the debtor's insolvency, good faith, etc. UNCITRAL observes that[33] where an insolvency law provides defences for the creditor or for individual counterparties, these defences may have the potential to dilute the efficacy of the avoidance provisions. Defences that involve elements that may be subject to dispute, for example, whether the creditor or counterparty acted in good faith, or those involving the state of the creditor's or counterparty's actual or implied knowledge can create uncertainty for all parties, and will require determination by the court. That said, it need not escape one's mind that it is equally possible that when dealing with the debtor, the creditor or counterparty had no notice that he was being preferred or that the debtor was insolvent. It would therefore be a tad too harsh to create an insolvency law that had nothing to do with the creditor or counterparty's state of mind at the time of entering into the transaction. Such a law would create a lot of hardship on the creditor or counterparty in view of the fact, for example, they would not always know if , at the time of dealing with the debtor company, it had entered the zone of insolvency and yet the transaction would be amenable to avoidance.

[29] ibid, paragraph 159.
[30] Ibid, paragraph 159.
[31] Ibid, paragraph 160.
[32] Ibid, paragraph 162.
[33] Ibid, paragraph 169.

What (combination of) transaction avoidance rules a jurisdiction opts for is a matter of its national policy but one which, eventually, will affect predictability or certainty in business or indeed affect the implementability, overall, of the entire transaction avoidance scheme. Boraine[34] states that several elements apply in almost all systems, but they differ in a number of ways. A standard requirement for avoiding a transaction is the prescribed period during which a transaction must have occurred. Some systems prescribe longer periods where the debtor and recipient are related or connected persons as defined. Some avoidable transactions require a subjective intent to prefer a particular creditor while other systems only require that the transaction must have had a preferential effect. In some systems these elements previously mentioned and/ or the state of insolvency are presumed when the transaction occurred within a so-called 'suspect' time period, in which instances the recipient will have to rebut these presumptions in order to save the transaction. Some systems provide statutory defences to the recipient, or beneficiary that could also prevent the transaction from being avoided.

### *1.2.4. The Need For Certainty And Predictability In Transaction Avoidance Rules At National Level And Regional Economic Community Level*

Although not all transactions that are caught by transaction avoidance provisions would be normal outside insolvency,[35] transaction avoidance rules do target, among others, seemingly normal and valid business transactions that would have occurred before the commencement of formal insolvency proceedings. The business world, however, thrives on certainty and predictability. Lack thereof is a disincentive to business and investment, and drives up the cost of doing business.[36] Any transaction avoidance rules regime that a jurisdiction, therefore, needs to have a large measure of certainty and predictability.[37] The World Bank[38] states that investment in emerging markets is discouraged by, among others, the lack of well-defined and predictable risk allocation rules. The lack of clear and predictable transaction avoidance rules

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[34] Boraine A, 'Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-border Context' (2009) 21 SA Merc L J 435.

[35] Transactions like gifts to related parties or transactions at an undervalue can be impeached or challenged using the constructive trust concept in equity as being unconscionable.

[36] Porcelli S and Zhui Y, 'The Challenge for the Harmonization of Law' (2010) 17 Transit Stud Rev 430.

[37] The Insolvency Service, The Implementation of the UNCITRAL Model Law on Cross-border Insolvency in Great Britain' [2005] 4, available at http://www.insolvencydirect.bis.gov.uk> accessed on 17th June, 2013.

[38] The World Bank, *Principles of Effective Insolvency and Creditors/ Debtor Regimes'* (The World Bank Group , 2021), available at http://hdl.handle.net/10986/35506 accessed on October 20, 2024.

will therefore not only discourage investment inflows, but drive the cost of doing business very high. The United Nations Commission on International Trade Law (UNCITRAL)[39] has also identified, as one of the key objectives of an effective insolvency law regime the provision of certainty and predictability in the market to promote economic stability and growth.

What exists as a need (for certainty and predictability) at jurisdiction/national level manifests itself even more at regional economic block level as the block is but one large marketplace [40] in need of robust economic activity including investment attraction.[41]

### *1.2.5. COMESA Treaty And Its Harmonization Or Approximation Of Laws Imperative*

Within Africa, there are several regional economic blocks. One of them is COMESA. One of the aims and objectives of the COMESA Treaty is for member states to cooperate in the creation of an enabling environment for foreign, cross border and domestic investment.[42] Under Article 159(1)(c) of the COMESA Treaty, in order to encourage and facilitate private investment inflows into the common market, member states shall create and maintain a predictable, transparent and secure investment climate in the member states. Among the specific undertakings of member states contained under article 4(6)(b) of the COMESA Treaty is to harmonize or approximate the laws of member states to the extent required for the proper functioning of the common market. One of such laws that will need to be harmonized will be insolvency laws.[43] The aim will not only be to reduce the cost of doing business in the region but also to create legal certainty and predictability of outcomes for investors in the common market to prevent them having the incentive to transfer assets or judicial proceedings between member states with the aim of obtaining a more favourable legal position.[44] Within the field of insolvency laws,

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[39] UNCITRAL Legislative Guide on Insolvency Law, 2005, Part 1, Pages 10 to 14 accessed on 18th September 2020 at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

[40] For example, the preamble to the COMESA Treaty indicates that member states resolved to strengthen the convergence of their economies through the attainment of a full market integration.

[41] Under article 3(c) of the COMESA Treaty for example, one of the aims and objectives of the Common Market shall be 'to cooperate in the creation of an enabling environment for foreign, cross border and domestic investment…'

[42] Ibid.

[43] Following in the footsteps of the European Union with the European Insolvency Regulation or of OHADA with their Uniform Act Organizing Collective Proceedings for the Clearing of Debts.

[44] Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) Vol.66 International and Comparative Law Quarterly 79.

transaction avoidance rules, whose elements are as diverse as are the member states themselves,[45] will have to be harmonized, too.

Keay has posited[46] that harmonization of transaction avoidance rules in a regional economic community has the following advantages: it would reduce conflicts and divergences, and would bring uniformity and consistency, which, in turn, would enhance the development of the internal market; a common framework might facilitate credit because it increases the predictability of the outcomes of legal disputes; harmonized rules will foster equality among creditors; harmonized rules may overcome peculiarities of individual national systems that allow avoidance claims in limited circumstances, and finally, harmonized rules would increase procedural efficiencies in terms of time and costs. The insolvency practitioner would need to know only one set of rules to challenge any transaction regardless of the law applicable to the transaction, and this may end up removing a major incentive for forum shopping.[47]

COMESA is comprised of 21 member states.[48] These countries have different legal traditions,[49] different national policy and hence priority arrangements and obviously, different transaction avoidance rules. To compound matters, the member states of COMESA also belong to other regional economic communities.[50] Being members of the same internal market which is the regional economic block, there is bound to be a lot of cross-border investment and trading among businesses domiciled in various member states of COMESA. Multinational corporations and businesses will emerge and companies will own assets and conduct transactions in more than one jurisdiction. Where one of the companies or multinationals become insolvent, the

[45] See Chapter 4, infra. The divergences mainly relate to: (a) types of transactions covered; (b) mental elements required to be proved; (c) the time periods beyond which the liquidator may not reach to challenge the transaction, and; (d) the types of defences available to the debtor and/ or third party.

[46] Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) Vol.66 International and Comparative Law Quarterly 79.

[47] Case C-54/16 *Vinyls Italia SpA V Mediterranea di Navigazione SpA* ECLI:EU:C:2017:433.

[48] To wit, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, Zimbabwe. See https://www.comesa.int accessed on 10th October, 2021.

[49] Some, like Malawi, Zambia, Tanzania and Kenya, are from the English common law tradition. The likes of Botswana, Zimbabwe, Namibia and Eswatini follow the Roman Dutch law tradition. The Congo is in the civil law tradition and Egypt follows a combination of Sharia and the Napoleonic Code. Sudan follows British common law and Islamic law.

[50] Some like Malawi, Zambia, Zimbabwe and Tanzania belong to SADC; Kenya and Tanzania also belong to the East African Community; The Congo is a member of the Economic Community of Central African States, etc.

insolvency laws of more than one country may be invoked, and these may include transaction avoidance rules. A company may also be wound up in more than one country or litigation arising from the winding up may be pursued in more than one country.[51] In such a scenario, where transaction avoidance is at issue, there are going to arise choice of jurisdiction[52] and choice of law[53] issues to govern the proceedings.[54] There may also be issues relating to which country is entitled to the proceeds of avoidance proceedings.[55] Such issues make clear the need for a set of harmonized avoidance rules to govern choice of law issues and choice of jurisdiction issues in the regional economic block so that multinational insolvencies are dealt with in a manner that is predictable and economical and ensures fairness to creditors.[56]

Member states of COMESA therefore arguably ought to harmonize or approximate their transaction avoidance rules, including conflict of law rules on transaction avoidance, so as to create a common market with more legal certainty and predictability[57], and one where there is little or no incentive to 'jurisdiction shop' when locating investments.

### *1.2.6. The Aim Of This Study – The Harmonization Or Approximation Of Transaction Avoidance Rules Within The COMESA Regional Economic Community*

The study will explore how best such harmonization or approximation of transaction avoidance rules can be done by member states of COMESA. Recognizing the wide variations in transaction avoidance rules that target numerous transaction types, the study will focus on the two major types of transactions being (a) transactions at an undervalue, and this category

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[51] Parry R, 'Cross-Border Transaction Avoidance' in Parry R, Ayliffe J, Shivji S and Oliff-Cooper G, *Transaction Avoidance in Insolvencies* (3rd Edn, Oxford University Press 2018) 501.
[52] For example, which Member State has the right to open and conduct the transaction avoidance proceedings?
[53] For example, which country's laws will be used to determine whether the transaction is vulnerable and can be avoided? Is it home country law of the multinational or local law in the country where the avoidance proceedings have been commenced? See Westbrook, J, 'Choice of Avoidance Law in Global Insolvencies' (1991) Vol. 17, Issue 3, Brooklyn Journal of Int'l Law 499.
[54] Parry R, 'Cross-Border Transaction Avoidance' in Parry R, Ayliffe J, Shivji S and Oliff-Cooper G, *Transaction Avoidance in Insolvencies* (3rd Edn, Oxford University Press 2018) 501.
[55] ibid.
[56] ibid.
[57] Estrella Faria J, 'Future Directions of Legal Harmonization and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) Unif L Rev 1; Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) Vol. 2 European Company and Financial Law Review 235 available at https://doi.org/10.1515.ecfr.2011.235 accessed on 13 December, 2021.

includes gifts; and (b) preferences.[58] It will explore whether it will be better to approach the issue from the focal point of substantive law only, or whether it will be better to approach harmonization or approximation from both a substantive law and a private international law perspective. Further than this, the COMESA Treaty will be examined to see if it is optimally designed to make the task of harmonization of laws easy, and if not, the study will propose possible amendments to it.

### *1.2.7. The Importance Of The Study*

The study is important and impactful because under the COMESA treaty, harmonization of laws of member states to the extent required for the proper functioning of the common market is a treaty imperative and therefore the issue of harmonizing transaction avoidance rules cannot be wished away by member states, and needs to be undertaken if the common market is to operate perfectly. Further, the study will be of benefit to the goals set by the Treaty Establishing the African Economic Community.[59] Under article 4(2)(a) of the said Treaty one of the objectives of the African Economic Community is the strengthening of existing regional economic communities[60] of which COMESA is but one of them, and one way in which such strengthening can occur is through the promotion of the harmonization of laws or policies within each regional economic community, which harmonization will make easier the other goal of the African Economic Community namely the coordination and harmonization of policies among existing and future economic communities in order to foster the gradual establishment of the Community.[61] Inter-regional economic community harmonization of policies can only be embarked upon post-attainment of intra-regional economic community policy harmonization on any issue impacting on trade. Laws follow policies or are a manifestation of policy choices, hence, though there is an apparent disjunct between the COMESA imperative of harmonization of laws, and the African Economic Community aspiration of harmonization of regional

[58] Identified as the most commonly occurring types of transactions targeted for avoidance by Boraine A, 'Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-border Context' (2009) 21 SA Merc L J 435 and Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5 .

[59] Available at <https;//au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf> accessed on 7th November, 2021.

[60] See also article 28(1) of the Treaty Establishing the African Economic Community.

[61] See articles 4(1)d) and 4(2)(b) of the Treaty Establishing the African Economic Community.

economic community policies, the COMESA goal of harmonization of laws, being a step better than the harmonization of policies, will without doubt inform the harmonization of regional economic community policies on the subject under study.

To the best of the author's knowledge, no study of a prescriptive nature on the harmonization of transaction avoidance rules has been conducted in the COMESA context. Further, this far, none of the regional economic blocks in Africa, apart from OHADA,[62] has enacted any unified or harmonized transaction avoidance rules. None exist in the African Continental Free Trade Area, either.

### 1.3. The Research Questions

The study seeks to tackle the following questions:

1.3.1. Is there a legal basis for COMESA member states to harmonize their transaction avoidance rules? If there is, is COMESA as an institution optimally structured to undertake the legal harmonization process?

1.3.2. Granted that the harmonization or approximation of laws of Member States of COMESA is a treaty imperative, how best can the following two types of transaction avoidance rules in the insolvency laws of COMESA members states be harmonized: (a) transactions at no value or at an undervalue; and, (b) transactions with certain creditors that would be regarded as preferential?

### 1.4. Why The Research Questions Are Important

As indicated above, insolvency is traditionally defined as an inability to pay debts. Companies that are unable to pay debts usually have no cash resources and are unable to access credit to settle their debts. If they have assets, these may already have been encumbered so that they can no longer be used to raise cash for settlement of debts. When such companies go into formal liquidation, creditors, however ranked on the national priorities scale, will most likely

[62] OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts 1998 articles 67 to 71, available at https://www.droit-afrique.com/uploads/OHADA-Uniform-Act-1998-Collective-Proceedings-Clearing-Debts.pdf> accessed 5 Feb 2024.

have nothing or very little to share and the position of unsecured creditors is even much worse. This usually renders liquidation a futile and pointless exercise for such creditors. Transaction avoidance proceedings will look back a few years before commencement of formal insolvency proceedings and help 'claw back' into the insolvent's estate whatever sums are gained as a result of successful transaction avoidance proceedings so that the general body of creditors, including, resources permitting, unsecured creditors have something to share. Transaction avoidance may occur at individual creditor level using, among others, equitable concepts,[63] but, for creditors as a group is one of the major methods to 'bulk up' the debtor's estate. It has also been argued that the availability of such rules is a disincentive to the dismemberment of debtor's estates by either the debtor itself or its creditors as the transferees will be forced to pay back what they received. Besides the fact that proceeds of transaction avoidance proceedings will primarily be used to settle statutorily prioritized payments, in as far as there will be money left after settling the priorities, the devise of transaction avoidance also aids the implementation of the *pari passu* rule among creditors of the same (unsecured) class, which is the mainstay of collective proceedings. Hence, investors and traders in any market will have an interest to know what transaction avoidance rules are at play in the marketplace they are getting into. A wide range or huge diversity of these rules in one market place creates a lot of uncertainty and very cumbersome ones may even lead to forum or jurisdiction shopping for favourable transaction avoidance rules in the placement or location of investments.[64] Where there are lots of transaction avoidance rules at play in one market place, a lot of resources are going to be spent by investors seeking professional legal advice to know which avoidance rules are at play in which country in a regional trading block. A harmonized transaction avoidance regime, both in terms of substantive and conflict of laws content will cater for certainty and predictability and reduce transaction costs.[65]

This study is being conducted by a resident of Malawi, a member state in the COMESA regional trading block. COMESA as a regional trading block operates as a common market and one of its goals is to attract foreign as well as intra-block investment for the enhancement of

[63] Parry R, ' Other Laws Enabling Transaction Avoidance' in Parry R, Ayliffe J, Shivji S and Oliff- Cooper G, *Transaction Avoidance in Insolvencies* (3rd edn, Oxford University Press 2018) Ch 24.
[64] Case C-54/16 *Vinyls Italia SpA V Mediterranea di Navigazione SpA* ECLI:EU:C:2017:433.
[65] Hill G, 'How Does the Area of Law Predict the Prospects of Harmonization?'(2020) 41(1) Adel L Rev 267

economic development and poverty eradication. A market can only function perfectly where all the rules and applicable laws are well known and outcomes of litigation can be predicted with relative ease.[66] Unclear laws will attract a premium as investors and even lenders will price their products very high to cover the risk of the uncertainty. Internationally, there is much agreement that conflicts and divergences arising from the laws of different states in matters relating to international trade constitute an obstacle to the development of world trade.[67] As harmonization of laws is primarily aimed at removing or reducing conflicts in the laws, the study will not only motivate COMESA into enacting a harmonized transaction avoidance regulation governing transaction avoidance in cross-border insolvency cases as its treaty demands it to, but will also yield the result of improving the investment climate in the region through clear and predictable transaction avoidance rules in cross-border insolvency cases.

### 1.5. Literature Review

There is a lot of literature on the subject of harmonization of laws generally, following the efforts by the Hague Conference on Private International Law, the International Institute for the Unification of Private Law ('UNIDROIT'), the European Union ('EU') and the Organization for the Harmonization of Business Law in Africa ('OHADA'). There has been some literature on harmonization of substantive laws within Africa,[68] and a lot of it on OHADA's trailblazing legal harmonization efforts. Very little has taken place in the field of harmonization of private international law in Africa or in any of its regional economic blocks[69] so that there is great scope for work in this area of law.

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[66] Shumba T, 'Revisiting Legal Harmonization under the Southern African Development Community Treaty: The Need to Amend the Treaty' (2015) Volume 19, Law, Democracy and Development 127 available at <https//dx.doi.org/10.43/ldd.v19i1.7> accessed on 17th May, 2021.

[67] See Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20th December, 1965, United Nations Commission on International Trade Law Yearbook Volume 1:1968-70(1971) 18.

[68] For example, Bamodu G, 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa' ( 1994) 38 (2) Journal of African Law 125; Nicholson C, 'Some Preliminary Thoughts on a Comparative Law Model for Harmonization of Laws in Africa' (2008) Vol 14(2) Fundamina 50; Oppong R, *Legal Aspects of Economic Integration in Africa* (2011, Cambridge University Press) 106-111; Ade M, Rossow J and Gwatidzo T, 'The Effect of Tax Harmonization in the Southern African Development Community' (2021) Vol 55, No.1 Journal For Developing Areas 55.

[69] Oppong R, 'Globalization and Private International Law in Commonwealth Africa' (2014) 36 UALR Law Rev 153.

On the question whether there is legal case for COMESA member states to harmonize their avoidance rules and if so, whether COMESA as an institution is optimally structured to undertake the exercise, there has been quite some significant harmonization of laws under the East African Community ('EAC') , and this could be owing to its unique treaty provisions , some of which are not replicated in COMESA. For example, COMESA has no community legislature and its treaty has no provision like article 8(2) of the Treaty Establishing the EAC which mandates Member States to enact legislation to confer upon the legislation, regulations and directives of the community and its institutions the force of law in their territory. The same is the case in the Economic Community of West African States ('ECOWAS') where legal harmonization is stated as one of the aims and objectives of the Treaty in article 3 thereof[70] and there is also a Community Parliament. COMESA has no community legislature and it legislates through regulations, applicable to all member states and directives, applicable only to targeted member states. Though some legal harmonization efforts are afoot in COMESA, and there have been enacted the COMESA Competition Regulations[71] and COMESA Seed Trade Harmonization Regulations, 2014[72] among others, there has not been, within COMESA, any harmonization effort in the field of cross-border insolvency and most specifically in the area of transaction avoidance rules taken from a cross-border perspective. Hence this study will be the first of its kind in COMESA and also possibly, in Africa.

The study will draw upon lessons learnt in harmonization of laws in several regional economic blocks including the East African Community, Southern African Development Community ('SADC'), the EU and OHADA and in the specific area of insolvency law and transaction avoidance rules will take special note of and draw lessons from the EU and OHADA the former of which only has a proposed directive which is yet to become law,[73] and the latter of which has a Uniform Act on insolvency which, among others, deals with substantive transaction avoidance rules. It will assess the efforts by these regional economic bodies and

[70] Anukpe Ovrawah O, 'Harmonization of Laws within the Economic Community of West African States' (1994) 6 Afr J Int'l & Comp L 76.
[71] http://www.comesacompetition.org/resources/regulations/comesa-competition-regulations-english/ accessed on 5 Feb 2024.
[72] http://www.aatf-africa.org/wp-content/uploads/2021/02/COMESA-Seed- Trade- Harmonization-Regulations-English.pdf accessed on 28th October 2024.
[73] See Chapter 7, infra.

examine how COMESA can borrow or improve upon the approaches by these organizations to effectively harmonize its transaction avoidance rules in cross-border insolvencies.

### 1.6. Research Methodology

The research is based on the qualitative methodology and it is mostly be by way of desk research in physical libraries as well as online. It is doctrinal in orientation.

The study is situated in the field of economic law, being focused on the need to harmonize legal rules so as to improve the economic performance of a regional economic community.[74] The research is positivist in outlook and will use comparative law methodology[75] as its epistemological device, comparing black letter law of member states on the subject of transaction avoidance to see to what extent these can be harmonized. It will also compare relevant COMESA treaty provisions with the provisions of treaties of other regional economic communities that have embarked upon or succeeded in the legal harmonization initiatives to see what aspects in their treaty formulation have enabled such a process to succeed and whether the COMESA treaty has such features. Comparative law methodology is the main tool used in the harmonization of laws arena.[76] Within the comparative law field, the approach to be taken will be the functionality device. This is because this exercise is not about harmonizing rules for their own sake but with the aim of the practical result of not only attaining certainty and predictability in the law but also that of building a more efficient and effective regional market place through the adoption and universalization of only such of the rules as assist in the attainment of the overall aims of insolvency law.[77]

### 1.7. Limitations Of The Study

There is a dearth of published material on harmonization of laws, to say nothing of insolvency laws, in the COMESA regional economic block and on most economic blocks in Africa. Added to this, access to the laws of most African countries including those in the

[74] Marciano A and Batista Ramello G, 'Law, Economics and Calabresi on the Future of Law and Economics'(2019) Volume 48 European Journal of Law and Economics 65.
[75] Michaels R, 'Transnationalizing Comparative Law' (2015) 28 Maastricht Journal of European and Comparative Law 352.
[76] Xanthaki H, 'Legal Transplants in Legislation' (2008) Vol 57(3) The International and Comparative Law Quarterly 659.
[77] Siems M, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare?' (2019) 67 American Journal of Comparative Law 861.

COMESA regional economic block is very difficult as most public libraries in African countries are under-resourced and their electronic resources are limited. Note, too, that the COMESA regional economic block is multi-lingual with English, French, Arabic and Portuguese as the official languages hence the laws of some of the Member States are published in languages that the author, who is predominantly English speaking, does not understand unless these were translated. Then there is also the issue of access to online libraries and the internet generally. Data costs in Africa are not the lowest in the world and the availability of reliable internet services is not guaranteed all the time. Mention must also be made of the fact that COMESA member states are from different legal traditions[78] through the accident of their colonial history. Comparative approach to legal research works better, and harmonization of laws faster, when the countries involved are from the same legal tradition.[79] OHADA is an example as the member states are largely former colonies of France and possessing a civil law background.

### 1.8. Research Ethics

The researcher is not currently working for any COMESA member state's public sector apparatus and hence is not in any way in a conflict situation. He is motivated to tackle the subject as a mere private citizen who will stand to benefit from increased trade and investment activity that may flow from the contribution his thesis may make to the regional integration efforts of COMESA.

All intellectual property rights by authors of other works which the researcher will access will be respected and acknowledged and these will be mentioned in the work.

No interviews or field work involving participants were conducted, hence there was no prospect of harm to any persons during the formulation of the work.

### 1.9. Arrangement Of Chapters

Chapter two will introduce transaction avoidance rules in most mature insolvency law jurisdictions by discussing their content and purpose within the context of the goals of

[78] See n.49, above.

[79] Nicholson C, 'Some Preliminary Thoughts on a Comparative Law Model for Harmonization of Laws in Africa' (2008) Vol 14(2) Fundamina 50; Ade M, Rossow J and Gwatidzo T, 'The Effect of Tax Harmonization in the Southern African Development Community' (2021) Vol 55, No.1 Journal For Developing Areas 55.

insolvency law. This will be followed by a more detailed and refined discussion in chapter three of comparative legal research as the methodological approach adopted by the study, including its detailed justification. There will then follow, in chapter four, a comparative discussion of the content of rules relating to preferences, gifts and transactions at undervalue in over half of the member states of COMESA. This will be done in order to expose the variety in the content of the rules and to set the context for the harmonization proposal. In chapter five, the study will engage in a re- evaluation of the approaches to harmonization of laws before proceeding, in chapter six to discuss the readiness of COMESA as regional economic block to undertake the process of harmonization of laws. The assessment of whether, and if so, how COMESA member states can proceed to harmonize their transaction avoidance rules relating to preferences, gifts and transactions at undervalue will occur in chapter seven following which chapter eight will conclude.

# CHAPTER 2

# AN OVERVIEW OF THE LAW RELATING TO TRANSACTION AVOIDANCE RULES IN CORPORATE INSOLVENCY LAW

## 2.1. Introduction

### *2.1.1. Aims And Objectives Of The Chapter*

This chapter will give a general narrative, based on legislation and literature from mature insolvency systems, of transaction avoidance rules within the context of insolvency law. It has two major aims. The first is to introduce the subject matter of this work−transaction avoidance rules−describing their origins, rationale and their importance to the attainment of the goals of insolvency law. The second is to give a critical narrative of the substantive content of the most common avoidance rules, to wit, preferences, transactions at undervalue or at no value and fraudulent conveyances and transfers. This will be done with a view to demonstrating how each jurisdiction endeavours to balance out two conflicting policy goals being: the attainment of contractual certainty and finality as against the maximization of the debtor's estate. This balance ultimately informs the content of the components of each of the selected transaction avoidance rules under study. The objective is to show that though the broad aims of each of the selected regimes of transaction avoidance rules may be similar across the jurisdictions, there is a wide variation in the components of each of the avoidance rules in most mature insolvency jurisdictions, including, as will be demonstrated in chapter 4, in the jurisdictions under study in this thesis. This variation in content largely depends on the manner in which a jurisdiction chooses to resolve the policy conflicts stated above. Therein, therefore, lies the complexity of the task of any cross-jurisdictional harmonization of transaction avoidance rules as any such harmonization effort is targeted at rules the content of which, due to national policy choices, are not uniformly cast.

### *2.1.2. An Outline Of The Contents Of The Chapter*

The chapter begins by giving a narrative of the theoretical goal(s) of insolvency law, with specific focus on maximization of returns to creditors, the facilitation of rescue and reorganization and the orderly liquidation of ailing companies before delving into transaction avoidance rules and the mischiefs sought to be cured by the rules, explaining how the redress of

the mischiefs does assist in advancing the general aims of insolvency law. The content of each of the main transaction avoidance rules is then discussed in detail showing how the general aims of each transaction avoidance rule within the broader context of the goals of insolvency law are counterbalanced with the (oftentimes conflicting) need for certainty and predictability in commercial transactions. Attention is drawn to the variety of formulations of each rule, and how these relate to the attainment of the wider goals of an effective and efficient insolvency law regime. Finally, the chapter gives the rationale for the choice of gifts and transactions at undervalue and preferences, as opposed to fraudulent conveyances and transfers, as the subject matter of this study.

### 2.2. The Theoretical Goals Of Insolvency Law

A discussion of the theoretical goals of insolvency law is important not only because these serve as an evaluation tool or reference point for examining the effectiveness of existing insolvency regimes but also for understanding the suitability of transaction avoidance rules in the various insolvency law regimes, as such rules do not exist for their own sake; the *raison d'etre* of transaction avoidance rules ought to be linked to the attainment of the general aims and objectives of insolvency law.[1] A prior understanding of the goals of insolvency law will therefore avert the inevitable empty descriptive narrative of transaction avoidance rules that offers no possibility of making justifiable prescriptions for the improvement of their content. This is because a failure to understand the goals of insolvency law will render any attempt at the harmonization of transaction avoidance rules difficult, as any proposals for the design and content of harmonized rules will not be grounded in any overarching policy goals.[2] That said, any identified aims of insolvency law will have to be informed by the peculiar nature of the phenomenon that is insolvency. The aims of insolvency law will therefore have to reflect the law's response to the debtor's inability to pay his due debts.[3]

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[1] Garrido J, Bergthaler W, De Long, C, Johnson, J, Rashek A, Rosha A and Stetsenko N, 'The Use of Data in Assessing and Designing Insolvency Systems' (2018) IMF Working Paper WP/19/27. Retrieved from https://policycommons.net/artuse -of -data-in-assessing-and-designing-insolvency-systems/1414477/on 14 April 2024.CID:20.500.12592/6q7j7s.

[2] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 29.

[3] Wood R, *Bankruptcy and Insolvency Law* (Irwin Law Inc 2008) 2.

The leading theoretical aims of insolvency law are:[4]

### *2.2.1. Maximization Of Returns To Creditors*

Inspired by the law and economics movement,[5] this theory posits that insolvency law aims at preventing individual creditors' rush to 'grab' the assets of the insolvent estate, thereby dismembering it.[6] Insolvency proceedings being collective, should aim at maximizing the value of the insolvent estate for the benefit of all creditors and should therefore only be concerned with those who have pre-existing claims in the assets of the insolvent firm.[7] A collective insolvency proceeding 'is directed towards reducing the costs associated with diverse ownership interests and encouraging those with interests in the firm's assets to put those assets to such use as the group as a whole would favour.'[8] Hence, the prompt dismemberment of the debtor's estate is discouraged and speed and efficiency in its disposal encouraged to avert reduction of the value of the estate available for distribution to creditors. This theory views insolvency law as a 'collectivized debt collection device' and a response to the 'common pool' problem created when diverse co-owners assert rights against a common pool of assets.[9] The compulsory collective regime aimed at maximizing the assets of the debtor's estate is anchored in the hypothetical 'creditors bargain' theory, reflecting what agreement creditors would have reached *ex ante* were they free to agree the form of enforcement of their claims in the event of an insolvency as the approach would reduce strategic costs, increase the aggregate pool of assets and render the administration of the estate in an efficient manner. In this approach all policies and rules in insolvency law are designed to ensure that the return to creditors as a group is maximized.[10]

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[4] See generally, Kaphale K, 'Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi' (2013) Unpublished, LLM Thesis, University of Malawi, Chancellor College.

[5] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 32

[6] Baird D and Jackson T, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) U Chi L Rev 97, 100-101.

[7] Ibid, 103.

[8] Ibid, 103.

[9] Jackson T, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986)

[10] Oppong R, *Legal Aspects of Economic Integration in Africa*, (2011, Cambridge University Press) 106-111;Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 31.

The theory has been criticized for the fact that in reality, a hypothetical creditors' bargain is unnecessary as creditors can and do bargain in practice[11] and for ignoring the protection of non-creditor's interests like the right or aspiration of employees to continued employment, disregarding the community and the environment, the disregard of corporate rescue and reorganization goals,[12] and for de-contextualizing creditors without regards to their wealth status.[13]

### *2.2.2. Communitarian Theory*

Professor Gross advocates a multi-focused theory of insolvency law that takes care of the interests of the whole community that would be affected by an enterprise's insolvency. This would include employees, suppliers, customers, nearby property owners, tax authorities and so on.[14] Gross postulates that issues like corporate rescue and reorganization are driven not only by creditor's debt collection drives but also concerns for the community. Insolvency law should look to the survival of organizations as well as to their orderly liquidation.[15] The theory has been criticized on the ground of indeterminacy−the definition of the community is too broad and it is difficult to judge between competing community interests when deciding whether to proceed to liquidate or reorganize an ailing enterprise [16]due to the infinite number of community interests that might be at play in every single insolvency case and because their boundaries are limitless.[17] Hence it lacks the degree of focus necessary for the design of insolvency law because of the diverse breath of interests it covers.[18] How, for example, can selected interests be weighed? How might a court balance the community's interests in maintaining employment against potential environmental damage? These issues are compounded by the fact that judges may not

[11] Adler B, 'The Creditor's Bargain Revisited' (2018) Vol. 166 University of Pennsylvania Law Review 1853.
[12] Hummellen J, 'Efficient Bankruptcy Law in the United States and the Netherland: Establishing an Assessment Framework' (2014) European Journal of Comparative Law and Governance 148,161,
[13] Ibid.
[14] Gross K, 'Taking Community Interests Into Account in Bankruptcy: An Essay' (1994) 72 Wash U L Q 1031, 1032.
[15] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 41.
[16] Schermer B, 'Response to Professor Gross: Taking the Interests of the Community Into Account in Bankruptcy−A Modern-Day Tale of Belling the Cat' [1994] Wash U L Q 1049, 1051-1052.
[17] Schermer S, 'Rehabilitation, Redistribution or Dissipation: The Evidence of Choosing Among Bankruptcy Hypotheses' (1994) 72 Wash U L Q 955, 964.
[18] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 42.

be well placed to decide what should and should not be in the community's best interest and this would involve them in politically fraught decision making and encourages post-hocery.[19]

### *2.2.3. Contractarian Theory*

The advocates of this theory depict a model of bankruptcy as a system designed to mirror the agreement one would expect creditors and other stakeholders to form among themselves were they to negotiate such an agreement from an *ex ante* position.[20] This theory attempts to overcome the restrictions of the creditors' wealth maximization theory in the sense that whereas Jackson seeks to justify insolvency law with reference to the rules that contract creditors would agree to from behind the veil of ignorance, Korobkin places behind the veil not merely contract creditors but representatives of all those persons who are potentially affected by the company's decline, including employees, managers, owners, tort victims, the community, etc. and they proceed to choose insolvency law from behind a strict veil, ignorant of their legal status, position within the company or other factors that might affect them to advance personal interests. They foresee, however, the demise of the company affecting a wide array of interest groups with different capacities to affect the outcome. Korobkin argues that the choice of such groups would be governed by two principles: inclusion of all parties affected by the bankruptcy to press their demands, and rational planning, to determine whether and to what extent persons would be able to enforce their legal rights and exert leverage. Such rational planning would seek to protect the powerless, or persons in the worst-off positions to affect the outcome.[21]

### *2.2.4. Multiple Values Theory*

Elizabeth Warren 'sees bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among different actors. Bankruptcy encompasses a number of competing−and sometimes conflicting−values in this distribution…no one value dominates, so that bankruptcy policy becomes a composite of factors that near on a better answer to the question: How shall the losses be distributed?'[22] Hence in sharp contrast to the approaches

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[19] Ibid, 43.

[20] Korobkin D, 'Contractualism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541.

[21] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 32

[22] Warren E, 'Bankruptcy Policy' (1987) 54 U Chi L Rev 775,777. At page 778, Warren states that 'reorganization does not only serve the interests of creditors− older employees who could not have retrained for other jobs,

that offer a single economic rationale, for example, creditor wealth maximization, Warren's theory peddles the notion that insolvency law serves a series of values that cannot be organized into neat priorities.[23] Warren herself admits that the theory she offers is complex, elastic, interconnected and 'for which I can neither predict outcomes nor even fully articulate all the factors relevant to a policy decision.'[24] The theory offers little assistance to the decision maker on the management of tension and contradictions between different values or on the way that trade-offs between various ends should be effected. There are also questions as to which values to invoke or emphasize, nor do core principles emerge to guide decisions on such trade-offs to establish what weight to attach to what value. Hence the open-texturedness of this eclectic multiple values theory can pose significant problems.[25]

### *2.2.5. The Ethical Theory*[26]

Philip Shuchman's argument[27] is that insolvency law fails to rest on an adequate philosophical foundation in so far as the formal rules of insolvency disregard issues of the greatest moral concern. He argues that the situation of the debtor, the moral worthiness of the debt and the size, situation and intent of the creditor should be taken into account in laying the foundation of insolvency law, and when this is done, a distinction should be drawn between debts which have arisen out of contracts that personally benefit the creditor and debts for involuntary acts like torts, or loans between related parties. He would accordingly have judges or administrators base their decisions on such matters as priorities on ethically relevant considerations rather than blind acceptance of the supposition that all creditors are equal. The challenge with this theory is whether it is possible to find ethical principles that underpin all insolvency laws, or the possibility of a consensus on the substance of such principle(s). The boundaries of such principles would also be difficult to delimit.[28]

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customers who would have lost to resort to less attractive, alternative suppliers of goods and services, suppliers who would have lost current customers, nearby property owners who would have suffered declining property values, and States and Municipalities that would have faced shrinking tax bases'. She also notes on page 800 that ' bankruptcy is designed to solve difficult distributional choices, not just mere collectivism'.

[23] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 45.

[24] Warren E, 'Bankruptcy Policy' (1987) 54 U Chi L Rev 775 at 811.

[25] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 47.

[26] Ibid, 44

[27] Shuchman P, 'An Attempt at a Philosophy of Bankruptcy' (1973) 21 UCLA L Rev 403; See also Kilpi J, *The Ethics of Bankruptcy* (Routledge, 1998).

[28] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 45.

### *2.2.6. The Forum Theory*

One of the proponents of this theory is Flessner,[29] who posits that bankruptcy's essence is to establish a forum within which all interests affected by business failure, whether directly monetary or not, can be voiced. Its essence is to coordinate and civilize debt collection, and secondly, to organize and rationalize the hard decision making that is inevitably called for in any major business insolvency.

Finch[30] states that these theories can be seen as incorporating a number of important legitimating rationales for insolvency processes. However, among the theories, the most dominant one is the creditor returns maximization theory as it reflects reality more closely than the other theories[31] through the abhorrence of debtor estate dismemberment and the imposition of automatic moratoria on the presentation of bankruptcy petitions in most bankruptcy legislations, as well as through the facility of transaction avoidance, one of whose results is the bulking up of the debtor's estate for distribution to creditors. The anti-deprivation rule[32] serves the same purpose, and arguably, the *pari passu* principle acts as a catalyst or motivator for the collectivist approach. On the other hand, the availability of priority rules in statutory insolvency distribution schemes suggest that insolvency laws serve to protect interests other than those of creditors, *stricto sensu,* as employees and tax authorities interests also get to be prioritized.[33] Arguably, though, employees and tax authorities are, in reality, creditors of the insolvent debtor. Note, too, that environmental concerns and those of the local community generally do not fall into the mold of creditor related issues. These issues could as well be dealt with outside of the mainstream insolvency law theorical framework, like in job creation or retraining schemes and environmental protection drives. The facility of corporate rehabilitation as an alternative to liquidation, also tends to support the communitarian and contractarian theories as the revival of

[29] See Flessner A, 'Philosophies of Business Bankruptcy Law: An International Overview 'in Ziegel, J (ed) *Current Developments in International and Comparative Insolvency Law* (Clarendon Press, Oxford 1994).
[30] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 63.
[31] It also aligns well with the history of bankruptcy laws which originate from the debtor's acts of fleeing from his creditors or keeping house to escape from creditors: See generally. Tremain I, 'Escaping the Creditor in the Middle Ages' (1927) 43 Law Quarterly Review 230; Tremain I, ' Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law' (1938) 52 Harvard Law Review 189.
[32] See *British Eagle International Airlines Limited v Compagnie Nationale Air France* [1975] 1 WLR 758.
[33] This reasoning is problematic as all those that are placed on statutory priorities lists are, technically speaking, creditors.

a failing enterprise would benefit wider community interests and not only the goal of maximizing creditor returns. The ethical theory would seem to manifest itself in, for example, the abhorrence of dispositions to related parties in transaction avoidance rules.

In essence, the theories show that insolvency laws, using the device of collectivism, aim to avoid the dismemberment of the debtors' estate, not only with the aim of maximizing the estate for creditors, but also with the aim of setting the ideal conditions for corporate rehabilitation efforts which would serve wider community interests apart from those of creditors. As Goode summed it up:

> …The failure of a corporate enterprise potentially affects a wide range of interests. Those most immediately concerned are, of course, creditors, managers, other employees and the shareholders. But the failure may have wider implications. It may force customers and suppliers into insolvency; it may, in causing job losses, tear the heart out of the local community, in the case of a major bank or industrial company, it may even affect the national economy...the community at large may also have an interest in the continued performance of the company's obligations in public law.[34]

Beyond these theoretical aims, or what Finch[35] calls 'visions' of insolvency law there have also been other attempts, at both jurisdictional and multilateral levels, to give comprehensive formulations of the aims and objectives of modern insolvency law, with the most important being the jurisdictional attempt that is the report of the Cork Committee in the United Kingdom.[36] The authors of the report expressed the belief that the following were the aims of a good modern insolvency law:

> (a) To recognize that the world in which we live and the creation of wealth depend on a system founded on credit and that such a system required, as a correlative, an insolvency procedure to cope with its casualties;
>
> (b) To diagnose and treat an imminent insolvency at an early rather than a late stage;

[34] Goode R, *Principles of Corporate Insolvency Law* (4th edn, Sweet and Maxwell 2011) para 2-14.
[35] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 32.
[36] United Kingdom Insolvency Law Review Committee, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982).

(c) To relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands, whilst taking into consideration the rights which the insolvent (and where an individual, his family) should legitimately continue to enjoy; at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency;

(d) To prevent conflict between individual creditors;

(e) To realize the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum delay and expense;

(f) To distribute the proceeds of the realizations among creditors fairly and equitably, returning the surplus to the debtor;

(g) To ensure that the processes of realization and distribution are administered honestly and competently;

(h) To ascertain the causes of the insolvent's failure, and if conduct merits criticism, or punishment, decide what measures are to be taken; to establish an investigative process sufficiently full and competent to discourage undesirable conduct by creditors and debtors; to encourage settlement of debts; to uphold business standards and commercial morality, and to sustain confidence in insolvency law by effectively uncovering assets concealed from creditors, ascertaining the validity of creditors' claims and exposing the circumstances attending failure;

(i) To recognize and safeguard the interests, not merely of insolvents and their creditors and other groups in society who are affected by the insolvency, for example, not only the interest of directors, shareholders and employees but also those of suppliers, those whose livelihoods depends on the enterprise, and the community;

(j) To preserve viable commercial enterprises capable of contributing usefully to national economic life;

(k) To offer a framework for insolvency law commanding respect and observance, and yet flexible to cope with change and which is also seen to produce practical solutions to commercial and financial problems, simple and

> easy to understand, free of anomalies and inconsistencies and capable of being administered efficiently and economically….

Though they are not arranged in any manner reflecting importance,[37] an analysis of the above cited aims shows that each of the 'visions' or theoretical aims of insolvency law , ranging from creditor returns maximization, communitarianism, the ethical theory, contractarianism, the multiple values theory and even the forum theory are reflected within the Cork Report's narrative of the goals of insolvency law: the creditor returns maximization vision is reflected, somehow, in the goal of realizing the assets of the insolvent estate; the communitarian , multiple values, contractarian, and arguably, the forum visions in the goal of recognizing and safeguarding the interests, not merely of insolvents and their creditors and other groups in society who are affected by the insolvency, for example, not only the interest of directors, shareholders and employees but also those of suppliers, those whose livelihoods depends on the enterprise, and the community; the ethical vision in the goal of upholding business standards and commercial morality.

The Cork Report, however, has the problem of having no identified core or fundamental goals of insolvency law and this would render it difficult for legislators to decide which aspect(s) to give priority to and which one(s) to compromise when formulating legislation. Observably, the stated aims do cover both liquidation and rescue and reorganization goals or scenarios. Most importantly, quite apart from being goal or vision oriented in relation to what persons, activities or outcomes are to be targeted or must benefit from the laws, the stated narrative of aims also covers aspects to do with the character or attributes of insolvency laws, such as the avoidance of delay and expense, promotion of fairness and equity, capability to be administered efficiently and economically, freedom from anomalies and inconsistencies, simplicity and the ability to command respect and observance.[38]

At a multilateral level, the UNCITRAL Legislative Guide on Insolvency Law,[39] whilst recognizing the need to accommodate a range of interests in the legal mechanism of insolvency law, for example, debtors, owners and management of the debtor, creditors (including tax

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[37] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 30.
[38] ibid.
[39] Available at https://uncitral.un.org>texts>insolvency_law accessed on May 26,2022.

authorities), employees, guarantors of debt and suppliers of goods and services, and to strike a balance between the different interests[40] lists the following as the key objectives of insolvency law:

1. Provision of certainty in the market and to promote stability and growth;
2. Maximization of the value of assets;
3. Striking a balance between liquidation and reorganization;
4. Ensuring equitable treatment of similarly situated creditors;
5. Provision of timely, efficient and impartial resolution of insolvency;
6. Preservation of the insolvency estate to allow equitable distribution to creditors;
7. Ensuring a transparent and predictable insolvency law.[41]

The UNCITRAL Legislative Guide's narrative of the goals of insolvency law is obviously more succinct and focused than the Cork Report's and UNCITRAL being a multilateral forum, represents the views that multiple jurisdictions that are members of UNCITRAL hold on the subject. However, it appears the Legislative Guide does cover the same ground as the Cork Report though in a bolder manner in the sense that while the Cork Report avoided mention of maximization of the value of assets as an explicit goal, the UNCITRAL Legislative Guide is bold enough to mention the same.

The World Bank's Principles for Effective Insolvency and Creditor/ Debtor Regimes, developed in liaison with, among others, UNCITRAL state that insolvency law systems should aspire to, among others: (a) maximize the value of a firm's assets and recoveries by creditors; (b) provide for efficient liquidation of both non-viable businesses and businesses whose liquidation is likely to produce a greater return to creditors and reorganization of viable businesses; (c) strike a careful balance between liquidation and reorganization; (d) provide for equitable treatment of similarly situated creditors, both domestic and foreign; (e) provide for timely, efficient and impartial resolution of insolvencies; (f) prevent improper use of insolvency

[40] Paragraph 1 of the UNCITRAL Legislative Guide on Insolvency Law, ibid.
[41] Ibid, 9-14.

systems; (g) prevent the premature dismemberment of debtors' assets by individual creditors seeking quick judgments;(h) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and (i) establish a framework for cross-border insolvencies, with recognition of foreign proceedings.[42]

In essence, in keeping with the reality that insolvency is an inability to pay debts owed to creditors, the core aim of insolvency law must relate to maximizing the recovery of money to settle debts owed by the insolvent debtor. This explains why insolvency proceedings are a creditor driven process, and the concerns of the other constituents or stakeholders in the multiple values or communitarian scenarios can only play second fiddle. Small wonder, then, that creditor returns maximization appears to be the dominant and most frequently recurring theme when it comes to the goals of insolvency law. That said, other attributes of insolvency law like certainty, predictability, transparency, speed, efficiency, fairness and impartiality need to be borne in mind,[43] whatever constituency is given primacy under the aims of insolvency law.

Focusing on the efficiency attribute of insolvency laws, it is worth noting that the exact meaning of the term 'efficiency' is not clearly stated leaving policy makers to imply it from the context in which it is used. The Cork Report states that one of the aims of insolvency law is 'to offer a framework for insolvency law commanding respect and observance, and yet flexible to cope with change and which is also seen to produce practical solutions to commercial and financial problems, simple and easy to understand, free of anomalies and inconsistencies and capable of being administered *efficiently* and economically….'. The placement of the word 'efficiently' next to 'economically' alludes to the cost saving meaning of the term. The 1999 report of the International Monetary Fund titled 'Orderly and Effective Insolvency Procedures: Key Issues'[44] defines efficiency in terms of the speed of the process of insolvency administration, where the faster the process of insolvency, the lower the cost and the higher the efficiency. The authors posit that delayed decision making can threaten the level of asset

[42] The World Bank , *Principles for Effective Insolvency and Creditor Debtor Regimes* (The World Bank Group 2021) 7.
[43] Westbrook J, (ed) *A Global View of Business Insolvency Systems* (The World Bank and Brill 2010) 1; Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 58.
[44] Legal Department of the International Monetary Fund, *Orderly and Effective Insolvency Procedures: Key Issues* (1999) available at <http://www.imf.org/external/pubs/ft/orderly/.

recovery and hasten asset deterioration.[45] Under the UNCITRAL Legislative Guide on Insolvency Law, Objective 5 states that:

> Insolvency should be addressed and resolved in an orderly, quick and efficient manner, with a view to avoiding undue disruption to the business activities of the debtor and minimizing the cost of the proceedings. Achieving timely and efficient administration will support the objective of maximizing asset value, while impartiality supports the goal of equitable treatment. The entire process needs to be carefully considered to ensure maximum efficiency without sacrificing flexibility. At the same time, it should be focused on the goal of liquidating non-viable businesses and the survival of efficient, potential viable businesses...

In the above rendition, efficiency is linked to both speed and minimization of costs. The meaning of efficiency also occurs in the World Bank's Principles and Guidelines of Effective Insolvency and Creditor/ Debtor Regimes[46] where in relation to liquidation, it connotes 'a greater return for creditors' and the word has also been used to connote timeliness and swiftness.[47] These meanings may become useful in an examination of the substantive content of transaction avoidance rules to determine whether they meet the efficiency goal of insolvency laws.

In sum, the aims of insolvency law are multifarious. With the aims sometimes in tension with each other,[48] insolvency law serves to see to it that the goals of an orderly liquidation or reorganization are facilitated, and that the interests of all stakeholders are properly taken care of in a fair and balanced manner. How each jurisdiction chooses which aims or interests to prioritize or how to balance the multiple aims and interests is ultimately a policy issue and, as will be shown in chapter 4, different countries take different approaches. That notwithstanding, there seems to be some consensus that insolvency laws, whatever the aims are, need to have the

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[45] Lee R, 'Efficiency Determined in the Insolvency Context? Clarifying the Meaning of Efficiency with the Conjunction of Insolvency Jurisprudence and Economic Methodology' (2015) Unpublished, Ph.D Thesis, University of Queensland, Australia.

[46] World Bank, *Principles for Effective Insolvency and Creditor Debtor Regimes* (The World Bank Group 2021) 7

[47] Lee R, 'Efficiency Determined in the Insolvency Context? Clarifying the Meaning of Efficiency with the Conjunction of Insolvency Jurisprudence and Economic Methodology' (2015) Unpublished, Ph.D Thesis, University of Queensland, Australia .

[48] Ibid, 2.

attributes of transparency (or accountability), predictability, and efficiency.[49] When analyzing or critiquing any aspect of insolvency law, the primary concern will therefore be to determine whether, and to what extent, it possesses these attributes of insolvency law, and serves the goals of insolvency law, and if it does not, how the same can be improved. Such an approach will inform the discussion of transaction avoidance rules going forwards.

### 2.3. Collectivism And Pari Passu Principles As Pillars Of Insolvency Law (And How Transaction Avoidance Supports These Principles)

Insolvency law is premised on two fundamental concepts: collectivism and *pari passu* distribution.

In an insolvency scenario, the debtor surrenders his assets for distribution to its creditors. These assets are obviously limited, and not enough to settle all the debtor's liabilities, hence the inability to pay debts when due. In a situation like that, if every creditor was to individually commence proceedings to recover what they are owed, there will be an uneconomical rush for the debtor's assets as, through the engagement of lawyers to commence action to recover moneys owed to him, every creditor would incur solicitor and own client costs of enforcement of his claim, which ultimately would be charged on the debtor through a party and party costs recovery order, thereby further depleting the amount of money or assets available for distribution. Combine this with the fact that the debtor will have a whole host of creditors who will each want to have their debts settled from the dwindling pool of assets. To avert wasteful conduct and estate depletion, insolvency law's response is to opt for a collective process where each creditor forfeits the individual right to take action to enforce the debt owed to him and, instead, he submits himself to a collective insolvency proceeding whose primary beneficiary is the general group of creditors each of whom is affected by the winding up.[50] The collective pursuit of the group's debt is compulsory in insolvencies not only because it maximizes the debtor's estate for distribution to creditors through prevention of dismemberment, but also because it ensures an orderly process of in-gathering of the debt, something that a first-come-first-served scramble would not deliver, and it ensures that no one or two creditors receive their

[49] ibid, 2; Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 58; Wood R, *Bankruptcy and Insolvency Law* (Irwin Law Inc 2008) 5.

[50] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.

full payment of debt at the expense of the rest of the creditors who await to be served from the same common pool, and this brings us to the *pari passu* or fairness concept in insolvency law.

One of the fundamental principles of insolvency law is that assets of the debtor must be distributed fairly and rateably among the debtor's creditors.[51] It is regarded as one of the cornerstones of the bankruptcy structure that all persons similarly situated are entitled to equality of treatment in the distribution of the assets of the bankrupt estate.[52] If it was otherwise, there would have been no incentive for creditors in the *ex-ante* Jacksonian creditor returns maximization construct to agree to a collective process as a solution to the common pool problem. A collective procedure is hence necessary before there can be equal distribution among similarly situated creditors. It serves to ensure that some creditors are not prejudiced by other unsecured creditors acting unilaterally.[53]

The *pari passu* principle can be traced back to the English Act of 1570[54] which stated in section 2 that…' for the satisfaction and payment of the said creditors: That is to say, to every of the said creditors, a Portion, Rate and Rate alike, according to the quantity of their debts,' and a clearer statement of the principle appeared in the *Case of the Bankrupts*[55]in which Coke CJ said:

> So that the intent of the makers of the said Act [ Act of 1570], expressed in plain words, was to relieve the debtors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods among the creditors, having regard to the quantity of their debts…But if after the debtor becomes a bankrupt, he may prefer one… and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in the law.

Hence, the justification at the core of the rule is the promotion of fairness and equality among similarly situated creditors and the prevention of fraud on creditors.

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[51] Keay, ibid.
[52] Seligson C, 'Preferences Under the Bankruptcy Act' (1961) 15 Vanderbilt L R 115
[53] Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.
[54] 13 Eliz C 7.
[55] (1592) 2 Co Rep 25; 76 E R 441

Keay[56] posits that it is impossible to achieve this collectivism or equality in the sharing of the money or assets of the debtor if the law disregards what happened immediately prior to the lodging of the insolvency proceedings in as much as some creditor(s) would already have taken a dip into the common pool and taken much more than he or they would be entitled to under a *pari passu* distribution. That is where the concept of transaction avoidance comes into play. It must be stated at the outset though, that *pari passu* as a principle only guarantees equality among equally situated unsecured creditors. Secured creditors, in keeping with the principle that recognizes already accrued pre-insolvency creditor rights, are not affected or (dis)advantaged in any way as they look to the security they hold to satisfy their debts, and can only queue up with the rest under the *pari passu* principle for the balance unpaid after the security is realized. The same with sums payable under statutory priorities which, in essence, reflect every jurisdiction's policy choices as an exception to the *pari passu* rule.[57]

## 2.4. Transaction Avoidance Rules

### *2.4.1. The Problems That Transaction Avoidance Rules Seek To Address*

Companies are, in practice, under the management of directors, whether executive or non-executive, or both, assisted by an executive management team. When a company is sliding towards insolvency, before the commencement of formal insolvency proceedings, it will still be under the management of its directors, and yet, the inability to settle debts will affect the company's creditors whether actual or anticipatory. These could be trade creditors who have provided goods or services to the company or those who anticipate to provide either goods or services to it and to get something in return, like employees and executive managers, or those, like tax authorities, who are interested in the company's continued existence so they can collect past or future taxes. In the scenario described above, the company directors and managers, aware of the company's inclement financial situation may lack the incentive to use the company's resources for the benefit of the company's creditors who are in effect the company's residual owners, but, anticipating that the company may go under, may either undertake excessively

[56] Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.
[57] Wood P, 'The Bankruptcy Ladder of Priorities' (2013) Vol.14 Issue 3 Business Law International 209; Armor J and Bennet H (eds) Vulnerable Transactions in Corporate Insolvency (Hart Publishing 2003) 1-5.

risky projects or expenditure hoping to turn the company's fortunes around, or may strip the company of its resources with the aim of enriching themselves, the shareholders or their related parties.[58] On the same note, creditors of the troubled company may, aware of its financial position, rush to enforce their claims[59] before the company finally slips into formal insolvency proceedings and the rest of the creditors are made, through a collective insolvency action, to share whatever is available in the common pool. Stronger creditors may even force the company to pay them first. Insiders, like directors or shareholders that lent money to the company may also be tempted to pay themselves first in the wake of an impending insolvency or they may want to pay those close to them. Outsiders may charge high interest rates on an ailing company or demand security for any debt when they become aware of the company's position. The problem that this creates is that not all creditors can protect themselves or enforce their claims against the near insolvent company with equal vigor.[60] The result of all the above is a dismemberment of the debtor company's assets by creditors rushing to grab whatever they can from the failing business, or, in other cases a nepotistic or even malevolent disposition of the company's assets by directors or a reckless jettisoning spree of its assets on the eve of insolvency that puts the company's assets out of reach of creditors and the rest of the stakeholders. This combined debtor and creditor conduct may, quite apart from benefitting some creditors and other persons more than the entire body of creditors also expedite the company's demise, rendering any resuscitation efforts an uphill, if not impossible task.

### *2.4.2. The Rationale For Transaction Avoidance Rules And The Impact of Transaction Avoidance on Contractual Certainty*

Van Zwieten[61] notes that anti-fraudulent conveyance law is ancient and she traces the earliest manifestations of transaction avoidance to the *Actio Pauliana* under Roman law.[62] A

[58] Mokal R, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 303.
[59] For example, order the repayment of a bank loan that they guaranteed: *Re Funtime Limited* [2000] 1 BCLC 247
[60] Mokal R, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 303.

[61] Van Zweiten K, 'Related Party Transactions in Insolvency' University of Oxford and ECGI Working Paper Number 401 of 2018, May 2018. Accessed on 9th September, 2020 at http://ssrn.com/abstract_id=3173629. Also found at https://www.cambridge.org/core/books/law-and-finance-of-related-party-transactions/A09BEBFE53147F98B5D2DBB4F1FF43E8.
[62]See also Anderson H, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency' (2014) 2NIBLeJ 2.

creditor harmed by the intentional disposition of an asset of the debtor was allowed to have recourse to the transferee, as if the asset the subject of the conveyance had not been validly transferred to them. At common law, there were statutes passed in England in 1376,[63] and later in 1571[64] to deal with the subject.[65] The 1376 statute provided that property given by debtors to friendly third parties remained available to be taken in execution by the debtor's creditors.[66] These were proceedings outside the collective action of bankruptcy.[67] The modern statutory manifestation of transaction avoidance proceedings provides several mechanisms to allow the insolvency administrator to challenge otherwise legally perfect and valid transactions entered into by a debtor prior to the commencement of bankruptcy procedures.[68]

Transaction avoidance proceedings are those proceedings where a liquidator makes an application to a judicial officer seeking to recover the assets or moneys belonging to the insolvent debtor that the debtor disposed of to third parties (counterparties) on the eve of formal insolvency proceedings or which some creditors obtained from the debtor through enforcement action during that period. The aim is to recover these assets so that the general body of creditors benefits from a larger dividend emanating from an augmented debtor's estate.[69] In some such dispositions, the debtor may aim at defrauding, delaying or defeating some creditors. In fraudulent conveyances, the debtor may part with property or money and receive nothing or

[63] 50 Edward III, Cap 6 (1376).
[64] 13 Elizabeth 1, Cap 5 (1571) The Act stated in broad terms that all '' feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds…devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts shall henceforth be utterly void, frustrate and of no effect.''
[65] Van Zwieten, 'Related Party Transactions in Insolvency' University of Oxford and ECGI Working Paper Number 401 of 2018, May 2018. Accessed on 9th September, 2020 at http://ssrn.com/abstract_id=3173629. Also found at https://www.cambridge.org/core/books/law-and-finance-of-related-party-transactions/A09BEBFE53147F98B5D2DBB4F1FF43E8 .
[66]Anderson H, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency' (2014) 2NIBLeJ 2.
[67] Van Zwieten, 'Related Party Transactions in Insolvency' University of Oxford and ECGI Working Paper Number 401 of 2018, May 2018. Accessed on 9th September, 2020 at http://ssrn.com/abstract_id=3173629. Also found at https://www.cambridge.org/core/books/law-and-finance-of-related-party-transactions/A09BEBFE53147F98B5D2DBB4F1FF43E8 .
[68] Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.
[69] *Re Yagerphone Limited* (1935) 1 Ch 392; *Rubin v Eurofinance SA* (2013) 1 AC 236 at [94], [95] per Lord Collins; Anderson H, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency Law' (2014) 2 NIBLeJ 2.

very little in return, and this action will prejudice all of the creditors of the insolvent debtor. With preferences, one or more of the creditors are benefitted as against the rest of the creditors, with the effect that the preferred creditor will have received more from the debtor than they would have received from the common pool if shared rateably with the rest of the creditors during formal insolvency proceedings. In the case of a debt secured by a guarantee issued by the debtor, the lender is repaid by the debtor in order that the guarantee will not be called in. In some cases, the insolvent debtor will have transferred money or property to a related party as the debtor approaches insolvency. And yet in other cases, the debtor will have transferred assets at an undervalue or acquired some property at a very high value. The debtor could also have donated assets to a related party at no consideration. In all the scenarios mentioned above, transaction avoidance proceedings will seek to prevent the unjust enrichment of particular counterparties at the expense of the general body of creditors.[70] Not only that, by stripping and emaciating the debtor's estate at a time of progressive inability to pay debts, it renders it very difficult to engage in corporation reorganization, as the debtor will have been very enfeebled, financially, to respond to any meaningful rescue or reorganization endeavours.

Transaction avoidance rules support the collective action nature of insolvency proceedings in as much as knowledge of the possibility that the transaction will be avoided affords a disincentive to creditors to jump the queue and strive to be paid before everyone else.[71] Again, by supporting collectivism, transaction avoidance rules ensure that smaller or weaker creditors who cannot participate in a rush for the debtor's assets are protected, as there will be something in the kitty for them despite not participating in the rush.[72] By avoiding all eve of bankruptcy transactions and gathering the sums or assets recovered into a common pool for distribution to all creditors, transaction avoidance rules do support the attainment of the *pari passu* principle. The Cork Report[73] stated that:

[70] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) Sydney Law Review 55.
[71] Ibid.
[72] Ibid.
[73] United Kingdom, Insolvency Law Review Committee, *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, paragraphs 224-7, 232.

> The Bankruptcy Code, on the other hand, is directed towards achieving a *pari passu* distribution of the bankrupt's estate among his creditors. The justification for setting aside a disposition of the bankrupt's assets made shortly before his bankruptcy is that, by depleting his estate, it unfairly prejudices his creditors; and even when disposition is in satisfaction of a debt lawfully owing by the bankrupt, by altering the distribution of his estate it made a *pari passu* distribution among all creditors impossible.

*Pari passu* distribution policy ensures that transactions which affect the distribution of assets or other property before the commencement of winding up should be reviewed and avoided if they affect the principle of equal distribution. If transactions are avoided, the assets disposed of by the debtor company may be recovered and made available to meet the claims of the creditors of the company. If a liquidator was unable to avoid pre-liquidation transactions, a company would dissipate its assets in favour of whomsoever it pleased and this would result in a failure to comply with the *pari passu* principle.[74] Beyond this, by helping bulk up the debtor's estate, transaction avoidance rules also assist in providing support to statutory priority distribution schemes that exist in every jurisdiction.[75]

Hence, transaction avoidance rules do motivate collectivism, and a collective procedure is necessary before there can be equal distribution of the debtor's estate among equally situated creditors.[76] Further, by preventing dismemberment of the debtor's estate, the rules aid company reorganization efforts.[77] The rules can promote a fair and efficient insolvency system which treats stakeholders equitably, minimizes costs inherent to bankruptcy and maximizes wealth.[78]

Because transaction avoidance rules do target transactions that were already concluded at the time when the debtor was placed under formal insolvency proceedings, they do conflict with the ever-present need for contractual certainty and finality[79] and this discord needs to be

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[74] Keay A, 'An Exposition and Assessment of Unfair Preferences' (1994) 19 Melbourne University Law Review 545.
[75] Parry R, et al *Transaction Avoidance in Insolvencies* (3rd Edn, Oxford University Press 2018) 15.
[76] Casasola O, 'The Transaction Avoidance Regime in the Recast European Insolvency Regulation: Limits and Prospects' (2019) 28 Int Insolv Rev 163.
[77] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) Sydney Law Review 55.
[78] Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' ECFR 2/2011, 235.
[79] Mokal R, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 333; Anderson H, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency' (2014) 2NIBLeJ 2.

managed as both the aims of transaction avoidance rules and contractual certainty are equally important in the commercial world.[80] This necessitates the clear definition of the ambit of insolvency law to enable the parties to any transaction to plan their affairs with the knowledge they will be allowed to retain the benefit of the transaction as long as the debtor is not in distress.[81] Insolvency law has therefore devised mechanisms aimed at preserving contractual certainty, whilst at the same time advancing the goals of insolvency law. For example, only transactions that occurred within a given period prior to the commencement of formal insolvency proceedings are targeted,[82] and in some cases, counterparties that dealt with the debtor in good faith, without knowledge that the debtor was unable to service its debts or on payment of adequate consideration are spared the wrath of the transaction avoidance rules. Contractual certainty is, in this case, protected at the expense of fairness, equality and maximization of the debtor's estate.[83]

In reality therefore, the content and composition of transaction avoidance rules in every jurisdiction will reflect the balance that each country chooses between the goals of contractual certainty and predictability, using various devises as discussed below.

### *2.4.3. The Content of Selected Transaction Avoidance Rules*

#### *2.4.3.1.Preferences*

The avoidance of preferences is arguably the most significant of the liquidator's avoiding powers, and in the United States of America it is the most litigated of all the avoidance powers affecting a wide range of pre-insolvency transactions which were perfectly lawful when made.[84] Rather than just target payments, the range of transactions that the law may target include: a conveyance or transfer of property; the creation of a charge over the debtor's property; the incurring of an obligation by the debtor; the debtor undergoing an execution process; the

[80] Westbrook J, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (2006-2007) 42 Texas International Law Journal 899; Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' ECFR 2/2011, 235.
[81] Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 333.

[82] De Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' available at http://onlinelibrary-wiley-com.ntu.idm.oclc.org/doi/pdfdirect/10.1002/iir.196 accessed on June 7, 2022.
[83] Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre- Liquidation Transactions' (1996) Sydney Law Review 55.
[84] Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 486.

debtor paying money (including to satisfy a judgment or order of the court); or anything done or omitted to be done for the purpose of entering into a transaction or giving effect to it.[85] These are included in the basket of voidable preferential transactions as they have the effect of taking away money or other property from the debtor's estate or putting the assets of the debtor out of reach of the general body of creditors in the twilight period as the company approaches insolvency.

Tabb[86] defines a preference simply as a transfer that favours one creditor over others. He gives as an example of a preference a situation where a debtor owes three creditors on the eve of bankruptcy, and just before filing for bankruptcy, pays only one of the creditors in full, ignoring the other two. The creditor that has been paid has, in effect, been preferred over the other two. This situation has to be understood against the backdrop of the cardinal principles of insolvency law: bankruptcy is a collective process seeking to promote fair and equitable treatment among similarly situated creditors.[87]

Statutory provisions that enable the insolvency administrator to apply to court for an order setting aside preferential transactions are aimed at restoring to the debtor's estate money or assets that the debtor would have paid or given to a creditor on the eve of the commencement of formal insolvency proceedings. The debtor would have done or allowed something to be done that has the effect of putting the creditor in a position that will, if the company enters into insolvency, place the creditor in a better position than it would be if he was to queue up with the rest of the creditors in a *pari passu* scheme of distribution.[88] Such preferential acts work to the detriment of the whole body of creditors in reducing the amount available for distribution and defeat the aim of collectivism in insolvency law in so far as the preferred creditor would have stepped out of the line of fellow creditors to opt to be paid his entire debt or, at the very least, a

[85] See, for example, s. 282 of the Insolvency Act 2016 of Malawi.
[86] Tabb C, *The Law of Bankruptcy (*2nd edn Thomson Reuters/ Foundation Press 2009) 486.
[87] 'Equitable treatment does not require equal treatment. On the contrary, to the extent that different creditors have struck fundamentally different commercial bargains with the debtor ( e.g. through the granting of security), differential treatment of creditors that are not similarly situated may be necessary as a matter of equity. For the benefit of all creditors, however, an insolvency law must address the problem of fraud and favouritism that often arises in the context of financial distress.': International Monetary Fund, *Orderly and Effective Insolvency Procedures,* (IMF Legal Department 1999) available at https://www.imf.org accessed on 3/08/2022.
[88] De Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' available at http://onlinelibrary-wiley-com.ntu.idm.oclc.org/doi/pdfdirect/10.1002/iir.196 accessed on June 7, 2022.

part of it that is larger compared to what his fellow creditors would eventually get. Actually, the avoidance of preferences does not only benefit unsecured creditors or weak creditors who cannot engage in a rush to grab the debtor's assets, but also works to support the entire scheme of insolvency distribution, and this includes priority creditors, through its prevention or reversal of the effects of the rush to grab the assets of the debtor in the period nearing the debtor's insolvency.[89] The knowledge that preferential payments will be set aside potentially deters debtors and their counterparty creditors from engaging in preferential conduct, and this also has the effect of creating the right conditions for corporate reorganization attempts. The avoidance of preferences additionally promotes fairness through the eventual equal treatment of creditors following the setting aside of such payments.[90] The rule against preferences therefore aims at treating creditors equitably whilst tackling favouritism.[91]

Preferences are made subject to avoidance if they took place within a specified 'suspect period'[92] prior to the commencement of formal insolvency proceedings, involved a transfer of money or other assets to a creditor or the creation of an encumbrance over the debtor's property to settle or secure an antecedent debt and, as a result of the transaction, the creditor received a larger percentage of his claim than he would if he was to be paid rateably together with the rest of the creditors.[93] The avoidance of preferences plays the function of adjusting or reversing the benefits received by creditors as the company veers towards insolvency, and forces any creditor, who was trying to steal a march against the rest of the creditors, to participate in the collective proceedings and get his share in a mandatory *pari passu* serving scheme.[94]

Some jurisdictions,[95] use the subjective approach to preferences in that the law requires that the debtor must have made the transaction with an intention to prefer that particular creditor

[89] Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 328.
[90] Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 572.
[91] Mevorach, 'Transaction Avoidance in Bankruptcy of Corporate Groups' ECFR 2/2011, 235.
[92] In the case of related parties, the suspect period is always longer than in transactions between unrelated parties.
[93] Mevorach, 'Transaction Avoidance in Bankruptcy of Corporate Groups' ECFR 2/2011, 235.
[94] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.
[95] For example, in the United Kingdom, see the Insolvency Act 1986, s.239; *In Re MC Bacon Limited [*1990] BCLC 324.

– the so-called *intentio praeferre* – but this requirement is not universal. Other jurisdictions,[96] use the objective theory of preferences–the so-called 'preferential effect'–and there is no provision requiring such an intention, the same being presumed for all transactions of a given description occurring in the twilight period, due to the difficulty of fathoming the state of mind of the debtor.[97] The requirement of an intention to prefer targets debtor favouritism as against the need to maximize the debtor's estate regardless of the motive of the debtor when he made the payment.[98] The intention to prefer introduces a subjective element into the fabric of preferences, and this has got its own advantages, in as far as preserving the transaction is concerned, promoting contractual finality due to the difficulty in proving the intention to prefer, but has the disadvantage of slowing down, or in worst case scenarios, foiling the quest to augment the debtor's estate.[99] Proof of the intention to prefer also does unduly prolong court proceedings, thereby affecting the efficiency of insolvency proceedings in terms of time and cost.[100] Where the intention to prefer is presumed, the administration of the rule against preferences is made a lot easier, though this approach has been criticized for being overbroad, arbitrary and overgeneralized as it removes the element of blameworthiness[101] and makes it risky for creditors to accept payments from a troubled company, leading to a potential chill effect on commercial activity.[102]

Depending on whether a jurisdiction's emphasis is on objective or subjective elements or on a combination of both, there may be defenses that are available to the counterparty, such

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[96] For example, in Australia and in the United States of America; See Armour J and Bennet H, (eds) *Vulnerable Transactions in Corporate Insolvency* (*Hart* Publishing 2003) 128; *Re Maxwell Communications Corporation* 93 F 3d 1036 (2d Cir 1996).

[97] Mokal R, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 307. However, where there is no requirement of an intention to prefer, the law avoiding preferences would be too widely cast as to capture almost every other payment to creditors made in the twilight period. Hence though the law may not contain the requirement of an intention to prefer, it may contain within it several defenses, such as, that the payment was made in the ordinary course of business, or that there were contemporaneous exchanges for new value, etc. In the case of the United States, see Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 519, 524.

[98] Westbrook J, (ed) *A Global View of Business Insolvency Systems* (The World Bank and Brill 2010) 111.

[99] van Dijck G, 'Comparing Empirical Results of Transaction Avoidance Rules Studies' (2008) Volume 17(2) International Insolvency Review 123 available at http://www3.interscience.wiley.com/journal/120848134/abstract> accessed on September 25, 2020.

[100] On the difficulty of proving an intention to prefer see the judgement of Bozalek J, in the South African case of *Moodliar NO and Others v Lawson Tool Distributors (Pty) Limited* 2022 (2) SA 220 (WCC) [20].

[101] Westbrook J, (ed) *A Global View of Business Insolvency Systems* (The World Bank and Brill 2010) 112.

[102] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 574.

as that he transacted in good faith, for valuable consideration, in the regular course of business and without knowledge of the insolvency of the debtor,[103] something that is in keeping with the ethical vision of insolvency law as it protects parties that acted in innocent reliance of the validity of the transaction. The negative side of the lack of knowledge defense, however, is that creditors may be disincentivized from making due inquiries about the state of the debtor before they are paid.[104] For the debtor, that he acted under genuine fear of legal process is also a defence as this negatives any intention to prefer.[105] However, this affords a *laissez-passer* to powerful creditors who can exert unbearable pressure on the debtor to get away with the fruits of their labor.[106] The law's prescription of a twilight or suspect period also serves to preserve the certainty and finality of financial transactions[107] though this provision may be abused if creditors would be paid by an insolvent debtor, and then help the debtor stay solvent until the end of the suspect period.[108] Further a low value preference taking place at the commencement of the twilight period may be caught out while a high value one that occurred a day before may escape the dragnet.

The glaring weakness in the law on the avoidance of preferences is its failure to punish those that take preferences, and instead stopping at merely reversing or setting aside the transaction and bringing back into the debtor's estate the sum involved. This is perceived as a very weak response to the problem and sophisticated creditors may, as a result, decide to take their chances and obtain a preferred payment, knowing the worst thing that could happen is for the sums involved to be merely paid back.[109]

To conclude, whilst the philosophy behind the avoidance of preferences is the same in all jurisdictions, out of policy choices, there are going to be diverse approaches to how each

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[103] Parry R, et al *Transaction Avoidance in Insolvencies* (3rd edn, Oxford University Press 2018) 14.
[104] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.

[105] Countryman V, 'The Concept of a Voidable Preference in Bankruptcy' (1985) 38 Vanderbilt Law Review 713.
[106] Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 573
[107] Walters A, 'Preferences' in Armour J and Bennett H, *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) 135.
[108] Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.
[109] Ibid.

jurisdiction defines a voidable preference, and the variations may relate to: (a) the range of transactions covered; (b) the length of the suspect period; (c) whether there is need to prove an intention to prefer or not (use of subjective or objective elements) and; (d) the range of defences available to the counterparty. These divergences may have an impact on the 'harmonizability' of voidable preference laws in a regional economic block.

#### *2.4.3.2.Transactions At An Undervalue And Gifts*

Provisions in insolvency law that give the insolvency officeholder avoidance powers over transactions at an undervalue or gifts have their antecedents in ancient provisions designed to regulate debtor misbehavior. They trace their roots in the 1571 Statute of 13 Elizabeth[110] that sought to avoid fraudulent conveyances and made void as against any person prejudiced thereby 'gifts, grants, alienations or conveyances' which had been effected with intent to 'delay, hinder or defraud creditors and others.' The statute had a defence for those that acquired the property in good faith for valuable consideration.[111] Modern manifestations of the law on avoidance of transactions at an undervalue cover gifts and transactions entered into at an undervalue within a prescribed period prior to commencement of formal insolvency proceedings, and require no intention to defraud as an element.

Transaction avoidance provisions covering transactions at an undervalue in legislations of various countries differ significantly from each other, and their scopes, too, vary widely.[112] When considering legislation covering the subject matter, therefore, one has to pay attention to how a 'transaction' is defined, as well as to the time element which does cover both temporal as well as financial status (inability to pay debt) aspects.[113] An eye must be cast, too, on whether the law throws any subjective elements into the mix. For example, in England, 'transaction' covers gifts, agreements and arrangements[114] whilst in Malawi it covers gifts[115] as well as disposals of a business, property or the provision of a guarantee or services or the issuance of

[110] 13 Elizabeth 1 c.5, ss1-11.
[111] Armour J, 'Transactions at an Undervalue' in Armour J and Bennett H, *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) 38.
[112] Bork R, 'Transactions at an Undervalue- A Comparison of English and German Law' (2014) Journal of Corporate Law Studies 14:2, 453-477.
[113] Ibid, 44.
[114] S. 436 Insolvency Act 1986.
[115] S. 289 Insolvency Act 2016.

shares, and the Malawian provision, except the one covering gifts, focuses only on transfers to related or connected counterparties[116] unlike the provision in England. In Germany, the insolvency officeholder simply needs to prove that the recipient received something from the debtor without or without sufficient consideration and this happened within four years prior to commencement of insolvency proceedings. To this, the recipient may plead the item was of a very minor value. No subjective or mental elements are required in the Germanic formulation and there is no requirement that the transaction happened when the debtor was insolvent. In England, it must be shown that the debtor received no consideration or consideration whose value is significantly less than the performance given by the debtor− all objective elements− and that the transaction occurred less than two years prior to commencement of formal insolvency proceedings at a time when the debtor was insolvent. In England there is a defence where the debtor entered into the transaction in good faith for the purposes of carrying on its business, and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company.[117] These subjective defenses do not exist under German[118] and Malawian legislation.[119] For all the differences in the substantive content of transaction avoidance rules, it is important that statutory provisions affecting third party rights be designed to enable third parties who may be dealing with a person who may become insolvent to assess the potential risk of losing his rights acquired in a relationship with the debtor[120] and also to provide protection to those third parties who may unwittingly purchase from a person that dealt with the insolvent debtor, property that was the subject of a voidable transfer.

There are also different justifications for the rule. In Germany, the recipient having provided no or insufficient consideration for the transaction is said to be undeserving of legal protection. In England, the motivation might be the need to avoid the improper reduction of the debtor's estate, in the interest of the general body of creditors, and this could also be linked to

[116] S. 293(2) Insolvency Act 2016.
[117] S. 238 of Insolvency Act 1986.
[118] Bork R, 'Transactions at an Undervalue−A Comparison of English and German Law' (2014) 14 (2) Journal of Corporate Law Studies 453.
[119] S. 293 Insolvency Act 2016. The subjective defenses in s. 292 of the Act do not apply to transactions at an undervalue.
[120] Cuming R, 'Transactions at Undervalue and Preferences Under the Bankruptcy and Insolvency Act: Rethinking Outdated Approaches' (2002) 37 Canadian Business Law Journal 5.

the principle of unjust enrichment[121] on the basis of the principle that 'equity is suspicious of gifts'[122] or, indeed, the resulting trust and the reluctance of equity to assist a volunteer.[123] The Cork Report's justification for the avoidance of gifts and, arguably, transactions at an undervalue, being to prevent the debtor's assets being placed in the hands of family or associates so they are preserved for distribution to creditors, was limited in scope. However, as noted above, unlike in Malawi, in some jurisdictions, the provisions do apply to all categories of counterparties and are not limited to family members or close associates and related parties.

Armour postulates that there could be various rationales for the avoidance of transactions at an undervalue, and these could include: (a) the avoidance of fraud and the prevention of prejudice to creditors, essentially a pursuit of corrective justice. The fraud avoidance rationale could explain the differential treatment in some rules between transactions with related parties and with unrelated counterparties; (b) the reversal of unjust enrichment; (c) support for the *pari passu* or fairness principle; and (d) the amelioration of perverse incentives experienced by debtors facing financial distress,[124] where, even though the debtor may not have any intent to defraud or disadvantage any creditor, faced with a cash squeeze, they decide to sell property at a price below its market value in order to obtain a quick sale and raise funds for the company.[125] Beyond these justifications, the quest to avoid a diminution in the quantum of the property available to creditors ranks high on the motivations for this rule[126] and unlike with preferences, this is attained through deterring debtor, and not creditor misbehavior.[127]

Whatever justifications there are for the avoidance of gifts and other transactions at an undervalue, the law needs to strike a fair balance between the attainment of the various aims for avoidance of transactions at an undervalue, and the need for certainty and finality in commercial

[121] Bork R, 'Transactions at an Undervalue−A Comparison of English and German Law' (2014) 14(2) Journal of Corporate Law Studies 453..
[122] *Stock v Dowden* [2007] UKHL 17[60].
[123] *Pennington v Waine* [2002] EWCA 227 [52].
[124]Armour J, 'Transactions at an Undervalue' in Armour J and Bennett H, *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) 44.
[125] Westbrook J, (ed) *A Global View of Business Insolvency Systems* (The World Bank and Brill 2010) 111.
[126] Cuming R, 'Transactions at Undervalue and Preferences Under the Bankruptcy and Insolvency Act: Rethinking Outdated Approaches' (2002) 37 Canadian Business Law Journal 5.
[127] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.

transactions.[128] There is nothing inherently wrong with gifts, especially in these days where there is peer pressure among corporate entities for periodic corporate social responsibility gestures which invariably involve expenditure of valuable resources. This means therefore that, with the exception of gifts aimed at bribery or corruption, or having anything to do with the laundering of dirty money, beneficiaries of corporate benevolence need to be properly guided by the law as to when they can, with relative assurance, accept kind acts from corporate players. The same reasoning applies to good bargains which are essentially transactions at undervalue. Hence, a lot of thought has to be thrown into whether: it is necessary to have subjective elements in the formulation, which, much as they cater for certainty and finality, and serve to protect the counterparty, would prolong proceedings and not serve the interests of the creditors in bulking up the debtor's estate. The length of the claw-back period needs to be considered, too, distinguishing between closely related or connected parties who will be given a longer claw back period, and unrelated parties, who deserve a shorter one. Whether the rule should apply regardless of the solvency status of the debtor at the material time or should only target transaction done during financial distress is another serious consideration. As to targeting transactions during financial distress, there is the old saying that 'a man must be just before he is generous,'[129] meaning they must not give away assets when in financial distress knowing they will be depleting the estate for the creditors. Against this, however, is the realization that even during solvency, small gifts would, cumulatively, cripple a thriving enterprise and lead to its eventual collapse, and insolvency law must also aim at avoiding the descent of corporates into insolvency. A question needs to be posed, too, whether mere mention of 'undervaluation' or 'substantial undervaluation' without more caters for certainty and predictability in the laws, and whether it should be left to the length of the judge's foot to determine the quantum of the undervaluation. Related to this is the treatment of minor price differences or the sale or gifting of low value items.

In all, like preferences, there are jurisdictional variations in the formulation of transaction avoidance rules targeting gifts and transactions at an undervalue and these relate to; (a) the length of the suspect period; (b) the solvency status at the time of the transaction; (c) the

[128] Parry R, et al *Transaction Avoidance in Insolvencies* (3rd edn, Oxford University Press 2018) 14.
[129] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.

meaning of 'transaction'; (d) the burden of proof; and (e) the range of defenses, including whether subjective defenses are included.

#### *2.4.3.3.Fraudulent Conveyances Or Fraudulent Transfers*

The *fons et origo* of laws dealing with fraudulent transfers or conveyances is said to be Elizabethan England where in 1571, such transfers were criminalized. The English statute of 13 Elizabeth, 1571 was built on the Roman law concept of fraudulent conveyances, which allowed creditors to recover property transferred fraudulently by the debtor. The Elizabethan statute rendered void, at the behest of creditors, transfers that were intended at defeating, hindering or delaying the creditors from collecting their claims.[130] There was need for the creditor to prove actual intent to defraud, hinder or delay creditors.[131] Actual intent to defraud later came to be proved using some indicia of fraud. The earliest case decided under this aspect of the law is *Twyne's Case*[132] where an English farmer, one Pierce, attempted to defraud his creditors by selling his sheep to a man called Twyne while remaining in possession of the sheep, marking and shearing them. A creditor of Pierce sued to set aside the transfer and won. Lord Coke for the court held that the transfer from Pierce to Twyne was actually a fraudulent one under Statute of 13 Elizabeth. The court based its holding on six badges of fraud: the gift was general, of all of Pierce's property, without excepting even his apparel or anything of necessity; Pierce retained possession of the property supposedly transferred, and treated it as his own; the transfer was made in secret; the transfer was made while the particular creditor's suit was pending against Pierce; Twyne held the property in trust for Pierce; and, the deed contained a recital that the gift was bona fide.[133]

The focus of fraudulent transfers law is not on the rights of creditors as against other creditors, as is the case with the law of preferences, but on the rights of creditors as against the debtor.[134] The law permits creditors or the insolvency administrator to apply to court to set aside transfers that place the debtor's property beyond the reach of creditors thereby hindering them

[130] Caulfield S, 'Fraudulent and Preferential Conveyances of the Insolvent Multinational Corporation' (1997) Vol. 17 No. 2 NYLS Journal of International and Comparative Law 571.
[131] Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 580.
[132] 3 Coke Rep 80b; 76 Eng Rep 809.
[133] Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 589.
[134] Jackson T, 'Avoiding Powers in Bankruptcy' (1984) 36 Stanford Law Review 725,777.

from getting paid. Originally, the sole premise for the action was debtor misbehavior whereby transactions could be set aside as fraudulent only if the debtor acted with actual fraudulent intent in making the transfer. Nowadays, with the concept of constructive fraud, proof of subjective fraudulent intent is not the only way to succeed. Any transfer that might injure the debtor's creditors may fall within the ambit of the concept of fraudulent transfers, hence it is becoming increasingly difficult to define the outermost fringes of the concept, absent a purely fault-based principle for limiting the ambit of the concept.[135]

The UNCITRAL Legislative Guide states that modern manifestations of this category of transaction avoidance rules target situations where the debtor has transferred assets to a third party with the intention of putting them beyond the reach of creditors thereby disadvantaging all unsecured creditors.[136] They invariably require proof of the debtor's intent, which is hard to come by through direct evidence, and, accordingly, the law contains indicators or 'badges' of such fraudulent or malevolent intent, which are in reality, a codification of judicial activism in this area of law.[137] These are circumstantial factors deemed to be indicia of the debtor's fraudulent intent.[138] There are many of them and include: the relationship between the parties to the transaction, where a transaction took place directly with a related person or via a third party to a related person; the lack of or inadequacy of the value received for the transaction; the financial condition of the debtor both before and after the transaction was entered into, in particular where the debtor was already insolvent or became insolvent after the transaction occurred; the existence of a pattern or series of transactions transferring some or substantially all the debtor's assets occurring after the onset of financial difficulties or the threat of action by creditors; the general chronology of the events and transactions under inquiry, where, for example, the transaction occurred shortly after a substantial debt was incurred; the transaction is concealed by the debtor, especially when it was not made in the ordinary course of business, or fictitious parties were involved; or, the debtor absconds.

[135] Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 579.
[136] Paragraph 172 on page 142. Available at https://uncitral.un.org>texts>insolvency_law .
[137] ibid, paragraph 172 on page 142.
[138] Tabb C, *The Law of Bankruptcy (*2nd edn, Thomson Reuters/ Foundation Press 2009) 580.

Such laws may also provide for defenses for third parties such as good faith, payment of consideration, lack of notice of intent, and the like.[139]

Just by way of example of the variety of formulations of fraudulent transfers, section 423 of the Insolvency Act, 1986 of the United Kingdom, dealing with transactions defrauding creditors, concerns itself with transactions at an undervalue or gifts made with intent to put the debtor's assets beyond the reach of his creditors or to prejudice their interests.[140] The transfer is actionable at the behest of a creditor or the insolvency practitioner, or indeed anyone prejudiced by it. There is no time limit or claw-back period specified under the provision,[141] nor should the debtor have been insolvent at the time of the transaction. In Germany, however, under section 133 of the Insolvency Act, there is a ten-year claw-back period for transfers by the debtor with intent to defraud creditors, and a four year claw-back period for gifts or transactions at an undervalue. Section 548 of the United States Bankruptcy Code covers fraudulent transfers and these relate both to actual as well as constructive fraud with a two year 'look-back' period regardless of the relationship of the parties to the transaction. The insolvency of the debtor is not a pre-condition for commencement of the action. The definition of fraud is also much broader.

### 2.5. Justification For The Choice Of Preferences, Transactions At An Undervalue and Gifts As The Subject Matter Of The Proposal For Legal Harmonization

From the discussion above, it is evident that the three categories of transaction avoidance rules are not mutually exclusive, and the lines separating them are not clear cut.[142] A transaction may be attacked for being a preference, and at the same time it may be a fraudulent transfer, if involving a creditor. A transaction at an undervalue may also have all the hallmarks of a fraudulent conveyance as well as of a preference. Beyond this, some literature[143] suggests that

[139] UNCITRAL Legislative Guide to Insolvency Law , para 172 Available at https://uncitral.un.org>texts>insolvency_law; See for example s. 37A (3) of the Conveyancing Act of New South Wales.

[140] In *Westbrook Dolphin Square Limited v Friends Life Limited (No.2)* (2014) EWHC 2433 (Ch) Mann J stated that 'the section is …intended to allow the unscrambling of transactions which deplete the assets of a debtor which would otherwise be available to creditors.'

[141] The ability to sue, will, however, be subject to the provisions in the statutes of limitations.

[142] UNCITRAL Legislative Guide on Insolvency Law, available at https://uncitral.un.org>texts>insolvency_law , para 171.

[143] At least in the United States of America: See Tabb C, *The Law of Bankruptcy* (2nd edn, Thomson Reuters/ Foundation Press 2009) 486.

preferences are the most commonly litigated transaction avoidance scheme and deserve to be included in this study for that reason and also because they cut across the other rules. Between transactions at an undervalue and fraudulent transfers, the study has chosen to deal with the former, not only because gifts and transactions at an undervalue also form part of the ingredients of fraudulent conveyances in most statutory schemes, but also because of the plethora of subjective elements that are available as ' badges' of fraudulent intent in fraudulent transfers which have rendered the regime's boundaries fuzzy, thereby making it difficult to mount a meaningful cross-jurisdictional comparison and also rendering a substantive harmonization very difficult to attain. Hence it has been decided to drop fraudulent conveyances from this study.

Most importantly, it is generally recognized that, quite apart from civil law jurisdictions like France, Italy and Spain that provide a single avoidance action that generally captures any harmful transaction to creditors, common law jurisdictions like England, Australia and the United States of America use a double set of avoidance powers, being those targeting gifts and transactions at an undervalue, and those targeting unlawful preferences.[144]

### 2.6. Conclusion

Through their support of collectivism, and, in effect the attainment of *pari passu* distribution and the realization of the statutory priority scheme, transaction avoidance rules do help in the attainment of the various visions or goals of insolvency law. The downside to the rules is that they create legal uncertainty, with parties discouraged from entering into transactions or pricing their investments or transactions high to cover for the risk of avoidance where there is a very lax avoidance regime, and, in the case of a very tough avoidance regime, there may be more legal certainty as transactions will be difficult to avoid, but this comes at the expense of failing to bulk up the debtor's estate and may defeat the objective of creditor equality in terms of *pari passu* distribution.[145] Hence, care and attention must be paid to their design, which affects whether they are geared more towards realizing the goals of insolvency law, like bulking up the insolvent debtor's estate or towards the attainment of contractual certainty and

[144] Gurreia-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.
[145] Ibid.

predictability, which is also a very important factor in the commercial world. Much as opportunistic behavior by some debtors and creditors that defeats the aims of insolvency law must be curbed, care must also be taken to see to it that the cost of reversal of such conduct, and the time taken to do so is kept to a minimum.[146] Ultimately, the design of avoidance provisions may have a direct impact on the promotion of trade, investments and economic growth both at the level of a country and at a regional economic block level.

The next chapter, which precedes a comparative exposition of transaction avoidance legislation dealing with unlawful preferences, gifts and transactions at an undervalue in several member states of COMESA, will dwell on the methodology to be used in the comparative discussion.

[146] Ibid.

# CHAPTER 3

## PREFERRED EPISTEMOLOGICAL TOOL FOR THE STUDY

### 3.1. Introduction

The chapter contains a discussion of the methodology to be used in the study and of how and why the identified methodology is best suited for the task the thesis sets out to accomplish. It will propose the deployment of comparative legal research as the epistemological tool. Within comparative legal research, the chapter will propose the use of the functional method,[1] especially as it is primarily suited to the process of identification and evaluation of the best law to solve a common problem in legal systems.

The chapter commences with a discussion of comparative legal research as a methodological tool focusing on what it is about and why it is well suited for the problem the study is working on. It then moves on to discuss functional methodology, an ends or goals oriented device that primes comparative legal research as a tool to discover the most effective solution to a legal problem that is prevalent in multiple jurisdictions. Following this there will be a discussion of the role of law and economics as a research tool − an efficiency oriented approach that combines with comparative research methodology to aid the quest for the best legal solution to a problem. Weaknesses of the functional methodology will be discussed thereafter followed by a discussion of the role of context in comparative legal research. This will be followed by a largely descriptive outline of the various legal families to which member states of COMESA belong. The purpose of this latter detour will be to sate the curious mind with an explanation as to why the study will not dwell in depth on the legal tradition or the legal family as one of the matrices used in the formulation of a solution to the problems the thesis is dealing with. This notwithstanding, as there are still traces or vestiges of legal familial approaches to the crafting of avoidance rules in the current insolvency laws of some member states, especially those that have not engaged in robust legal reform after gaining independence, the chapter engages in this descriptive narrative of the legal families of COMESA member states with the sole aim of putting the problem of

[1] Michaels R, 'The Functional Method of Comparative Law' in Reimann M and Zimmermann R,(Eds) *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 345.

the current diversity in the rules in its legal familial or cultural context. There will then ensue a discussion of why, within the realm of functional methodology, context or legal family no longer plays a dominant role in the quest for the best solutions to a legal problem, and what the new approach to the task is before the chapter concludes.

### 3.2. Comparative Legal Research As A Methodological Tool

The method a researcher chooses to use in a study will always be dictated by the context and the goal of the research.[2] The type and aim of the particular research as well as the research question will imply the method to be deployed.[3]

The present study has as its major aim an examination of whether the various rules relating to preferences and transactions at undervalue or at no value within the insolvency laws of member states of COMESA are capable of being harmonized, and if so, how this process can be achieved. The auxiliary aim of the thesis is to examine the institutional readiness of COMESA to undertake legal harmonization since it will be otiose to dwell on whether and COMESA as an institute can harmonize its rules without tackling the issue whether as an institution COMESA is well structured for the task. The study has been necessitated not only by the harmonization of laws imperative under the COMESA treaty but also the fact that regional integration and globalization are nowadays levelling economic, political and moral standards in different countries. On the premise that legal rules react to societal needs, as the societal needs are identical legal rules must of needs converge as well. National characteristics of legal rules will gradually disappear with the emergence of a global society, so the theory runs.[4]

The research questions for this study, of necessity, require the researcher to not only access and analyze the content of the transactions avoidance rules relating to preferences, gifts and transactions at undervalue in all the COMESA member states, but also to examine

[2] Oderkerk M, 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of 'Methodological Pluralism' in Comparative Law' (2015) Bd 79, H3 The Rabel Journal of Comparative and International Private Law 589.
[3] Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.
[4] Peters A and Schwenke H, 'Comparative Law Beyond Post-Modernism' (2000) 49(4) International and Comparative Law Quarterly 800.

the rules critically for the possibility of harmonization. This will involve comparing the rules to identify degrees of similarities or differences among them, and where differences are identified, measure or manage the differences[5] as well as devising means on how they can be eliminated, if at all, to achieve the aim of harmonization.[6]

The epistemological tool that is well suited for any study that compares aspects of laws in different legal systems with the aim of harmonizing the laws is the comparative legal research methodology.[7] Comparison is a logical and inductive way of thinking that can objectively identify the advantages and disadvantages of a standard, practice, system, procedure or institution in relation to others.[8] Comparative legal research, necessitated partly by increased economic and commercial contacts between nations[9] and the consequential desire to harmonize their laws to ease trade, involves measuring two or more things together and the identification of similarities and dissimilarities between them. The researcher engages in a systematic presentation of rules in multiple legal systems or sub-systems and conducting a comparative assessment on them based on an objective analysis of similarities and differences.[10] He identifies common points and a common core[11] of aspects of comparative legal systems under study, and picks out any deficiencies or differences in some of the laws in some of the legal systems and this is done with the aim of evaluating the

[5] Adams M and Bomhoff J, *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 3
[6] Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 66.
[7] Van Hoecke M, 'Methodology of Comparative Legal Research' available at<www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024; See also Delmas−Marty M, 'Comparative Law and the Internationalization of Law in Europe' in Van Hoecke M, (Ed) *Epistemology and Methodology of Comparative Law* ( Bloomsbury Publishing 2004) 255; Harasani H, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) Global Journal of Comparative Law 186; Hage J, 'Comparative Law as Method and the Method of Comparative Law' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 37; Oderkerk M 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of 'Methodological Pluralism' in Comparative Law' (2015) Bd 79, H3 The Rabel Journal of Comparative and International Private Law 589.
[8] Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 66.
[9] Grubb C, 'The Implications of Post- Modernism on Comparative Methodology' (2003) UCL Jurisprudence Rev 13
[10] Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 66.
[11] Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.

possibility of convergences between legal systems as well as the possible improvements to and alignments of legislation.[12] Comparative legal research therefore has both an epistemological as well as a practical function.[13] It is the effort that has given birth to community law as a recent legal phenomenon.[14] Legal comparison is an effective tool for measuring the efficiency and effectiveness of legislative solutions introduced by each legal system[15] and therefore of finding good, if not the best possible law.[16] It helps in not only understanding one's own legal system but also benefitting from other legal systems by importing from them what solutions one's system lacks.[17]

There is not one method of doing comparative research. How any comparison is to be done has no standard answer.[18] All depends on the question one would like to answer,[19] as a methodology is not an end in itself but a means to an end.[20] Questions go before methods and until one has specified what the question is, no sensible discussion of methodology is possible.[21] Method is primarily an indication of which data are relevant to support conclusions in a knowledge domain.[22] Comparison of laws is not a systematic or rational

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[12] Ibid.
[13] Samuel G, *An Introduction to Comparative Law: Theory and Method* (Hart Publishing 2014) 2; Smits, J, 'Taking Functionalism Seriously: On the Bright Future of a Contested Method' 2011 (18) Maastricht Journal of European and Comparative Law 554.
[14] Botezatu V, 'Comparative Law and Legal Translation' (2016) Vol 6, No. 2 Journal of Danubian Studies and Research 189.
[15] Ibid.
[16] Hage, 'Comparative Law as Method and the Method of Comparative Law' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 47
[17] Harasani H, 'Islamic Law as a Comparable Model in Comparative Legal Research'(2014) Global Journal of Comparative Law 186.
[18] Husa J, 'Research Designs of Comparative Law − Methodology or Heuristics?' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 37.
[19] Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.
[20] Adams M and Bomhof J, *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 3.
[20] Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 55.
[21] Adam M and Griffiths G, 'Against 'Comparative Method': Explaining Similarities and Differences' in Adams M and Bomhoff J, *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 279; Adams M, ' Doing What Does Not Come Naturally: On the Distinctiveness of Comparative Law' in Van Hoecke M, (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* (1st edn, Bloomsbury Publishing Plc 2013) 236.
[22] Hage, 'Comparative Law as Method and the Method of Comparative Law' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 37.

enterprise, understood as a chain of rational steps allowing the legal mind to conceive and understand, through an orderly, methodical and progressive process, the sameness and differences between legal orders, their structures and functions proper to each of them. It is not based on a methodological unity or on a pregiven structure of ways to follow, but on a multiplicity of methodologies, each one adapted to the institutions it wants to analyze.[23] Comparative legal research has always varied methods according to circumstances, including the objective(s) of the research[24] with the comparatist choosing from his toolbox certain types of instruments that will best accomplish the comparative task at hand.[25] The lack of a uniform agreed corpus of method is seen as an advantage as this eliminates forcing an interpretation onto the track imposed by a unitary method.[26]

The choice of legal systems to be studied, which must always be justified[27] depends on the aims and objectives of the particular comparative investigation[28] and in the case of this study, the choice is restricted to member states of the COMESA regional economic bloc.[29] There are at present twenty-one member states of COMESA.

### 3.3. Functional Methodology In Comparative Legal Research

Since the focus of the research is on transaction avoidance rules, considering how the rules relating to preferences, gifts and transactions at undervalue are framed within COMESA and whether these can be harmonized, the comparison is going to be functional, that is focusing on how a similar problem in various legal systems is solved, and figuring out the best possible solution to the problem.[30] For the auxiliary aim of gauging COMESA's

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[23] Tudor I, 'Theoretical Outlines of Comparative Law Methodology' (2105) Special Issue 2, Journal of Public Administration, Finance and Law 174.

[24] Patrick Glenn H, 'Against Method?' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark van Hoecke* (Hart Publishing 2014) 187.

[25] Tudor I, 'Theoretical Outlines of Comparative Law Methodology' (2105) Special Issue 2, Journal of Public Administration, Finance and Law 174.

[26] Ibid.

[27] Oderkerk M, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research'(2001) 48 (3) Netherlands International Law Review 293.

[28] ibid; De Cruz P, *A Modern Approach to Comparative Law* (Deventer, Kluwer 1993) 36-37; Kamba W, 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 506.

[29] Although, due to constraints relating to electronic sourcing of insolvency law statutes from each and every member state, the aim will be to discuss a sample of more than two thirds of the member states provided they represent all the legal cultures, families or traditions.

[30] Husa J, 'Research Designs of Comparative Law- Methodology or Heuristics?' in Adams M and Heirbaut D, (eds) , *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014).

institutional readiness to conduct legal harmonization, the study will also undertake a comparison of COMESA's constitutive document with the constitutive instruments of a few other regional economic bodies identifying and comparing core aspects of them that are facilitative of the function of legal harmonization.

Functionalism as a methodological tool in comparative legal studies, claimed to have been founded by Rabel,[31] was accentuated by Zweigert and Kötz who postulated that the basic methodological principle of all comparative law is that of functionality. The problems that the law aims to solve are the same everywhere and are solved in a similar way − some sort of *preasumptio similitudinis.* If the law is about solving problems and the problems are the same everywhere, it follows too that the law should be the same everywhere, and it falls to comparative law to make it so.[32] This means-end connection between law and societal problems[33] makes it possible for comparative lawyers to use functionality in identifying legal data to be compared, by way of a 'functionalistic identification' and enables an analysis of this data.[34] It enables the comparator to not only identify the purpose of a rule but also make an evaluation of its purpose, which in turn allows the comparatist to determine which one of the several rules having the same purpose is the better solution to the problem that the rule addresses.[35] Hence it is a useful tool for jurists engaged in a harmonization project, and in legal transplantation.[36] To sum it up, functional

59,61; Valcke C and Grellette M, 'Three Functions of Function in Comparative Legal Studies' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 99.

[31] Peters A and Schwenke H, 'Comparative Law Beyond Post-Modernism' (2000) 49(4) International and Comparative Law Quarterly 800.

[32] Zweigert K and Kötz H, *An Introduction to Comparative Law* (3rd edn, Oxford, OUP 1998) 3, 31; See also Watson A, *Legal Transplants* (2nd edn, University of Georgia Press 1993) 83.

[33] Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' 2007, Vol 32(2) Brooklyn Journal of International Law 405.

[34] Valcke C and Grellette M, 'Three Functions of Function in Comparative Legal Studies' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 101.

[35] Rheinstein M, 'Teaching Comparative Law' (1938) University of Chicago Law Review 615; Oderkerk M, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) 48 (03) Netherlands International Law Review 293; Michaels R, 'The Functional Method in Comparative Law' in Reimann and Zimmermann, (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 348.

[36] Samuel G*, An Introduction to Comparative Law: Theory and Method* (Hart Publishing 2014) 67,68; Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007), Vol 32(2) Brooklyn Journal of International Law 405.

comparative methodology serves various ends including: epistemological, helping in understanding the law; comparative, in helping to achieve comparability; presumptive function of emphasizing similarity; formalizing function of system building; evaluative function of determining the better law; universalizing function of preparing for legal unification; and, critical function of providing tools for the critique of the law.[37]

To avert the obvious risk of bias that may be brought to bear on the comparatist by the conscious or sub-conscious influence of his own legal system,[38] the researcher conducts his study in the context of an objective third element or quality, aptly called the '*tertium comparationis'*. In the particular context of this study, the *tertium comparationis* will be selected qualities or aspects of the relevant transaction avoidance rule, chosen in view of their contribution to the realization of the various goals of an efficient insolvency law regime. With respect to the study of the readiness of COMESA to harmonize its rules it will be those aspects of the institutional edifice of any regional economic body whose presence is key in any harmonization endeavour. The approach arises out of the lawyer's concern with what the law should be[39] to make it serve the goals of efficiency and internal coherence in a market place. These objective criteria are standards at the hands of which the comparative evaluation of the laws will take place.[40] This is because the study is being conducted with the ultimate aim of improving the legal environment for doing business in COMESA member states through an improvement to its commercial laws through harmonization.

### 3.4. The Role Of Law And Economics In Functional Methodology

One development of this functional orientation of legal theory has been the growing influence of the law and economics school: law is not only an expression of economic

[37] Michaels R, 'The Functional Method in Comparative Law' in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 348.
[38] Tudor I, 'Theoretical Outlines of Comparative Law Methodology' (2105) Special Issue 2, Journal of Public Administration, Finance and Law 174.
[39] Bell J, 'Legal Research and the Distinctiveness of Comparative Law' in Van Hoecke (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* (1st edn, Bloomsbury Publishing Plc 2013) 1.
[40] Hage, 'Comparative Law as Method and the Method of Comparative Law' in Adams M and Heirbaut D, (eds), *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 47.

conditions , but is in a causal relationship with such conditions.[41] The people involved within a legal system act as rational maximizers of their satisfaction. Groups react in a predictable way to changes in the cost and benefits of the options they face. This incentive analysis is a direct application of the rationality assumption. As a result, prices and laws are primarily viewed as creating incentives which alter behavior outcomes.[42] The legal system itself −its doctrines, procedures and institutions − has been strongly influenced by a concern (more often implicit than explicit) with promoting economic efficiency.[43] The rules determining liability, the procedures for resolving disputes, the constraints imposed on law enforcers, these and other elements of the legal system can best be understood as attempts, though rarely acknowledged as such, to promote the efficient allocation of resources.[44] Whilst the Chicago school of law and economics hypothesizes that efficiency is the predominant factor shaping rules, procedures and institutions of the law, the Yale school of law and economics postulates that there is a larger need for legal intervention in order to correct pervasive forms of market failure.[45] These positions portray, on the one hand, positivism as embraced by the Chicago school, and, on the other hand, normativism as advocated by the Yale school .[46] This results in economic structures and regimes being seen as a *tertium comparationis* in which comparatists can make quality judgments about different legal institutions, structures and rules. Hence, the economic approach or analysis which uses economic efficiency as an explanatory tool by which existing legal rules and decisions may be rationalized or comprehended can be helpful in understanding and critically assessing the law and designing reforms of a legal system.[47] Comparative law can propose solutions to specific problems through reference to economic conditions and circumstances, these conditions and circumstances providing both a functionalist and normative set of criteria. Moreover, the

[41] Parisi F, 'Positive, Normative and Functional Schools in Law and Economics' 2004 (18) European Journal of Law and Economics 259.
[42] Veljanovski C, *Economic Principles of Law* (Cambridge University Press 2007) 22.
[43] Posner R, 'Economic Approach to Law' (1975) 53 Tex L Rev 757.
[44]Posner R, ibid; Click J and Parisi F, 'Functional Law and Economics' in White M, *Theoretical Foundations of Law and Economics* (Cambridge University Press 2008) 41.
[45] Ibid.
[46] Ibid; Faust F, 'Comparative Law and Economic Analysis of Law' in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 348.
[47] Posner R, 'Economic Approach to Law' (1975) 53 Tex L Rev 757; Veljanovski C, *Economic Principles of Law* (Cambridge University Press 2007) 22; Gurreia-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) 93 Chi-Kent L Rev 711.

idea that the economic efficiency of a rule can explain its diffusion and transplantation into foreign systems suggests the functional method can underpin theories of legal transplants.[48] Comparative law and economics, in other words, explains movements of rules and institutions and indeed convergence between legal systems.[49]

The major weaknesses with the economic approach to law are, among others: that economics is an incomplete and imperfect science; economics has its limitations in that it cannot explain many things (but, at the same time, one cannot ignore a method just because it is not universal and unquestioned); much more than rational maximizing is involved in the behavior of legal institutions and those operating or affected by them, so that an economic theory of law is certain not to capture the full complexity, richness and confusion of the phenomena that it seeks to illuminate[50]; and, the economic approach also ignores 'justice' which should be the central concern of the legal system. Justice, though can have different senses, including moral, distributive and efficiency.

The weaknesses, however, do not invalidate the theory or approach.[51] Mankind being an inherently rational being, inefficient and unpredictable rules or laws, including transaction avoidance rules will not attract him to a market place; hence the need for the rules or laws in any market place to be formulated or improved with efficiency or economic considerations in mind.

### 3.5. Weaknesses Of The Functional Approach In Comparative Legal Research

The weakness of the functional approach to comparison is that the term itself is not clearly defined and may mean a range of methods some of which are not functional at all.[52] Its foundational premises of similarity has also been found wanting.[53] By merely looking at

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[48] Graziadei M, 'Comparative Law, Transplants and Receptions' in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 443.
[49] Samuel G*, An Introduction to Comparative Law: Theory and Method* (Hart Publishing 2014) 77.
[50] Tunick M, 'Efficiency, Practices and the Moral Point of View: Limits of Economic Interpretation of Law' in White M,(ed) *Theoretical Foundations of Law and Economics* (Cambridge University Press 2002) 77.
[51] Posner R, 'Economic Approach to Law' (1975) 53 Tex L Rev 757.
[52] Samuel G, *An Introduction to Comparative Law: Theory and Method* (Hart Publishing 2014) 79; Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.
[53] Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) Vol 32(2) Brooklyn Journal of International Law 405.

how a problem in one system is solved in another, it tends to be mechanistic, ignores historical and social reality,[54] lacks immersion[55] by avoiding the context of the rules being examined,[56] pays no heed to the internal structure of the legal system whose rules it is examining, and betrays a positivist leaning.[57] The fact that it focuses on similarities and ignores differences is perceived to be very problematic.[58] It has been said, however, that any functional analysis implicitly studies the law in its social context[59] and that the similarities between different legal systems revealed by the functional analysis betray deeper universal values.[60]

### 3.6. The Role Of Context In Comparative Legal Research

Comparative law is not just about describing a system and mirroring a rule from one system with one from another.[61] That simply involves comparing and contrasting − a mere particular and early stage moment in a comparative enterprise that precedes the process of explicit evaluative comparison.[62] Comparative legal research is rather oriented towards differences, not sameness.[63] To understand the differences, one must understand the context, whether political, social, moral or cultural in their historical development.[64] Comparative

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[54] Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 66.

[55] Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) Vol 32(2) Brooklyn Journal of International Law 405.

[56] Valke C and Grellette M, 'Three Functions of Function in Comparative Legal Studies' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 65.

[57] Ibid, 80, 81.

[58] Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies'(2007) Vol 32(2) Brooklyn Journal of International Law 405.

[59] Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.

[60]Michaels R, 'The Functional Method in Comparative Law' in Reimann and Zimmermann (Eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 365.

[61] Van Hoecke M, 'Deep Level Comparative Law' in Van Hoecke, M (ed) *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing 2004) 172.

[62] Adams M, 'Doing What Does Not Come Naturally: On the Distinctiveness of Comparative Law' in Van Hoecke M, (Ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* (1st edn, Bloomsbury Publishing Plc 2013) 233.

[63] Samuel G, 'Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?' in Van Hoecke M, (ed) *Methodologies of Legal Research; What Kind of Method for What Kind of Discipline* (1st edn Bloomsbury Publishing Plc 2013) 184.

[64] Tudor I, 'Theoretical Outlines of Comparative Law Methodology' (2105) Special Issue 2, Journal of Public Administration, Finance and Law 174; Samuel G*, An Introduction to Comparative Law: Theory and Method* (Hart

law goes beyond mere fact finding to understanding the social-cultural context giving rise to the differences.[65] This environment must be actively engaged for meaningful comparison to become possible.[66] Note, however, that an overly ambitious law-in-context approach of a topic where there are insufficient available resources will make the research plan unrealistic within the context of comparative research scholarship.[67] Further, with the advent of legal transplants, lengthy or elaborate historical or social contextual studies may be rendered redundant. Finally, context may not be an important backdrop to functional comparative legal research, which instead focuses on the similarity of legal problems and solutions to the problems.[68]

The search for context leads into the categorization of legal systems into legal families[69] founded on the basis of legal tradition, culture, historical background, predominant characteristics, or mode of thought on legal matters.[70] Such categorization aims to offer a first rough sketch map or pre- understanding to guide the comparative endeavour.[71] This is because law in any society can only be explained by its history, and frequently its contacts with foreign legal systems, and the danger that those that do not give due attention to legal history misunderstand the law. Further, context is of fundamental importance in understanding the law. Only an understanding of legal culture can explain the inter- relation between one system and another and the fundamental values[72] and rules cannot be fully understood isolated from their legal and non-legal context.[73] Notably, for the African

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Publishing 2014) 57, 58,82; Ali M, 'Comparative Legal Research − Building a Legal Attitude for a Transnational World' (2020) 26(40) Journal of Legal Studies 66.

[65] Ali M, ibid.

[66] Adams M, 'Doing What Does Not Come Naturally: On the Distinctiveness of Comparative Law' in Van Hoecke M, (Ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* ( 1st edn, Bloomsbury Publishing Plc 2013) 231.

[67] Van Hoecke M, 'Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.

[68] Ibid.

[69] Husa J, 'Legal Families and Research in Comparative Law' (2001) Vol 1, Issue 3 Global Jurist Advances, Article 4

[70] Paul Lumio J, Spang-Hansen H and Spang- Hansen H, *Legal Research Methods in a Modern World: A Course Book* (Djof Forlag 2011) Chapter 3.

[71] Oderkerk M, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) 48(3) Netherlands International Law Review 293.

[72] Watson A, 'Legal Culture and Legal Tradition' in Van Hoecke (ed) *Epistemology and Methodology of Comparative* Law (Bloomsbury Publishing 2004) 1,2,3,5.

[73] Karhu J, 'How to Make Comparable Things: Legal Engineering at the Service of Comparative Law' in Van Hoecke M, (ed) *Epistemology and Methodology of Comparative* Law (Bloomsbury Publishing 2004) 167.

continent, much of the national legal familial affiliations are either borne out of each country's colonial legacy or religious affiliation.[74]

Graziadei[75] posits that transplants and receptions have played an important part in shaping the world's laws since antiquity. Hence, unsurprisingly, the legal systems map of Africa would correspond with the colonial history of each nation[76] with some, like South Africa that were colonized successively by civil law and common law European nations even having mixed legal systems.[77] When independence was gained, most African nations maintained the laws received from the colonizers to avoid a legal vacuum.[78] Depending on whether the colonizer was a civil law country or common law country, the legal system of an African nation would reflect that legacy.

### 3.7. Legal Families Of COMESA Member States

In this section the study exposes the current state of affairs with regards to affiliations of COMESA member states to legal families or cultures, the aim being to showcase the diversity of familial groupings prevalent in the regional economic bloc. The material contributes to an understanding of the cause of the diversity problem. It is only when the source of the problem is understood that a better solution may be fashioned for it.

The legal family did in a huge sense affect the core content of the laws of each colonized African states and traces of family still linger on in substantive as well as procedural laws of most states including their insolvency laws and transaction avoidance rules. The dominant legal families in COMESA to wit, the common law and civil law, each imprinted its legal drafting style and content formulation into the fabric of transaction avoidance rules of the affected member states that fell into each of the two families. The

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[74] Sedler R, 'Law Reform in the Emerging Nations of Sub Saharan Africa: Social Change and the Development of the Modern Legal System' 1968 (13) St Louis U L J 195; Mancuso S, ' The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) (14) Annual Survey of International & Comparative Law, Article 4, 39.

[75] Graziadei, 'Comparative Law, Transplants and Receptions' in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 443.

[76] Mancuso S, ' The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) (14) Annual Survey of International & Comparative Law, Article 4, 39.

[77] Fombad C, 'Mixed Systems in Southern Africa: Divergences and Convergences' 2010 (25) Tulane European and Civil Law Forum 1.

[78] Graziadei, 'Comparative Law, Transplants and Receptions' in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 459.

element of legal family is therefore being discussed in this chapter so as to raise awareness prior to the comparative discussion of elements of avoidance rules that follows in the next chapter that as between civil law and common law jurisdictions of COMESA member states, the rules are drafted in a distinct manner and their content formulation is different. The discussion in this section will therefore merely serve as a descriptive narrative of the inherited laws of COMESA member state.

The major legal families on the African continent are the common law, civil law and religious laws, mostly in the form of Islamic law or Sharia. As indicated above, there are also mixed legal families that may have a combination of common law and civil law, or common law and Islamic law or civil law and Islamic law. In most, if not all African countries, the colonialists found customary laws already in place, and these laws were allowed to continue to apply and they do so to this day alongside the received laws[79]

The common law, championed by England, and civil law, from mainland European nations,[80] emanate substantially from the same pool of Roman law and western legal concepts and share the similar social objectives like individualism, liberalism and personal rights.[81] They have the same underlying philosophy regarding the role of law in the social order, the form to be given to the law, and its application and substance. Comparative analysis has discovered a high degree of convergence between rules belonging to civil law and the common law as well as their fundamental categories, legal concepts and terminology. There are some differences between them, however, the notable ones being that civil law has a large amount of abstract and general rules, presented in elaborate codes and statutory instruments, which the courts must apply, leaving the courts with little discretion as the system is self -sufficient.[82] The common law, on the other hand, only leaves

[79] Verhelst T, 'Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration' Occasional Paper No. 7, 1968, African Studies Centre, University of California, Los Angeles, available at <http:www.escholarship.org/content/qt33g2v27d/qt33g2v27d_noSplash_42d5da862de9136b469c2414312669d6.pdf> accessed on 27th November 2022.

[80] Dainow J, 'The Civil Law and the Common Law: Some Points of Comparison'(1966-1967) Vol 15 No. 3 The American Journal of Comparative Law 419.

[81] Tetley W, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) Vol. 60 Louisiana Law Review 677.

[82] Schwenk E, 'Highlights of a Comparative Study of the Common and Civil Law Systems' (1955) 33 North Carolina Law Review 382.

legislation to the most important elements of the law, and judicial officers have a wider latitude in filling the gaps during decision making, where the system of stare decisis is key.[83]

Countries that use Islamic law purely or in conjunction with other laws have Islam as the dominant religion.[84]

There are basically two models of avoidance actions: the single avoidance action that generally captures all harmful transactions, and this is typical of civil law countries; and, two sets of avoidance actions capturing transactions at undervalue or with no consideration and preferences. This is prevalent within the common law tradition.[85] As will be shown in the next chapter, the ingredients of each type of avoidance action can vary within a particular tradition and the variations could be more marked in mixed legal systems.

The twenty one member states of COMESA fall into the following (dominant) legal families:

### *3.7.1. Common Law*

Within this family group fall Zambia,[86] Uganda,[87] Kenya[88] and Malawi[89]

### *3.7.2. Civil Law*

[83] Verhelst T, 'Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration' Occasional Paper No. 7, 1968, African Studies Centre, University of California, Los Angeles, available at <http:www.escholarship.org/content/qt33g2v27d/qt33g2v27d_noSplash_42d5da862de9136b469c2414312669d6.pdf> accessed on 27th November 2022.

[84] Harasani H, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) Global Journal of Comparative Law 186.

[85] Gurreia-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) Volume 93 Issue 3 Comparative and Cross Border Issues in Bankruptcy and Insolvency Law, Article 5.

[86] <https:zambialaws.com> accessed on 27th November, 2022.

[87] Oloka-Onyango J, 'An Overview of the Legal System in Uganda' Presentation at the China- Africa Legal Forum, November 25, 2015 available at http;//researchgate.net/publication/341776281_AN_OVERVIEW_OF_THE_LEGAL_SYSTEM_IN_UGANDA accessed on 27th November 2022.

[88] Joireman S, 'The Evolution of the Common Law: Legal Developments in Kenya and India' (2006) 41(2) Commonwealth and Comparative Politic 2.

[89] Article 2 of the British Central Africa (Order-In-Council) 1902; See generally, Von Benda- Beckmann F, *Legal Pluralism in Malawi− Historical Development 1858-1970 and Emerging Issues* (Kachere Monographs No. 24, 2007) 56.

Burundi,[90] Democratic Republic of Congo[91] Madagascar,[92] and Tunisia,[93] fall within the civil law group.

*3.7.3. Mixed Common Law and Civil Law*

In this category fall Seychelles,[94] Mauritius,[95] Zimbabwe,[96] Eswatini,[97] Rwanda,[98] Ethiopia,[99] Eritrea[100]

*3.7.4. Mixed Civil Law and Islamic Law*

The Comoros,[101] Libya,[102] Egypt,[103] and Djibouti[104]

*3.7.5. Mixed Common Law and Islamic Law*

The Sudan[105]

*3.7.6. Mixed Common Law, Civil Law and Sharia Law*

Somalia.[106]

## 3.8. Moving Away From Context

[90] https://sunulex.africa>theburundianlegalsystem> accessed on 27th November, 2022.
[91] https://sunulex.africa>thecongoleselegalsystem> accessed on 27th November, 2022.
[92] https://indexmundi.com/madagascar/legal_system.html accessed on 27th November, 2022.
[93] https://www.indexmundi.com>tunisia>legal_system accessed on 27th November, 2022.
[94] https://commonwealthgovernance.org/countries/africa/seychelles/judicial-system/ accessed on 27th November, 2022.
[95] Angelo A, 'Mauritius: The Basis of the Legal System' (1970) Vol.3 No. 2 The Comparative and International Law Journal of Southern Africa 228.
[96] Fombad C, 'Mixed Systems in Southern Africa: Divergences and Convergences' 2010 (25) Tulane European and Civil Law Forum 1.
[97] Ibid.
[98] Kosar W, 'Rwanda's Transition from Civil to Common Law'(2013) Vol 16 No 3 The Globetrotter published by the Ontario Bar Association.
[99] The World Bank Group, *Ethiopia: Legal and Judicial Sector Assessment*, available at <https:www.openknowledge.worldbank.org/handle/10986/14866> accessed on 27th November, 2022.
[100] https://wwwnyulawglobal.org/globalex/Eritrea.html accessed on 27th November, 2022.
[101] https://wwwnyulawglobal.org>globalex>Comoros accessed on 27th November, 2022.
[102] http://wwwnyulawglobal.org/globalex/Libya1.html accessed on 27th November, 2022.
[103] https://wwwnyulawglobal.org/globalex/Egypt1.html accessed on 27th November, 2022.
[104] https://wwwnyulawglobal.org/globalex/Djibouti.html accessed on 27th November, 2022.
[105] https://wwwnyulawglobal.org/globalex/Sudan.html accessed on 27th November, 2022.
[106] Maru M, 'The Future of Somalia's Legal System and Its Contribution to Peace and Development' (2008) Vol.4 No.1 Journal of Peacebuilding and Development 1.

Several factors other than colonial history play a role in shaping a legal system of a country. Factors such as migration of populations, foreign presence in a country, political decisions, religious affiliations, philosophical influences, technological advances and comparative law all have a role to play[107] in shaping a country's laws. Further than this, specific laws of a country may, notwithstanding its legal tradition, possess content that reflects international consensus in a particular area, such as trade, or they may have content that is handed down or adopted from model content suggested by global legal harmonization or global financial and other governance bodies such as UNCITRAL, UNIDROIT or the World Bank Group.[108] The desire to have what others have, motivated by the quest for better or more efficient laws, may also prove a trigger in the adoption of laws other than those that were inherited at independence.[109] All of this waters down the essence of the concept of the legal family or culture in informing the content of modern laws in former colonized territories[110] and in the area of commerce, trade or financial related laws, where efficiency is the universal holy grail, the fading impact of the legal family or culture in shaping the content of legal rules is very visible.[111] Countries that want to promote economic growth want to modernize their laws and legal systems and the need to attract foreign investment has played a decisive role in legal reform in African countries. Legal globalization will be more important than familiarity so much so that, as Simoes argues, the most important legal family will now be international trade law and that all developing countries desire to be members of this family as they struggle to join the world economy.[112] It must also not be assumed that the legal rules in African countries are the same as those in the European countries from which they received their legal system. For one, European law has seen some changes ever since the end of the colonial era, which have not necessarily been transplanted onto their former colonies. African laws have seen some change, too, by reason of the

[107] ibid, 457.
[108] Ibid, 454 and 455.
[109] Ibid, 460 and 461; Botezatu V, 'Comparative Law and Legal Translation' (2016) Vol 6, No. 2 Journal of Danubian Studies and Research 189.
[110] Berinzon M and Briggs R, 'Legal Families Without the Laws: The Fading Colonial Law in French West Africa' (2016) Vol. 64 The American Journal of Comparative Law 329; Simoes F, 'Portuguese – Speaking Africa and the Lusophone Legal System: All in the Family?' (2017) Vol. 76 No. 1 African Studies 86.
[111] Wood P, 'Principles of International Insolvency (Part I)' (1995) Vol 4 International Insolvency Review 94.
[112] Simoes, F, 'Portuguese – Speaking Africa and the Lusophone Legal System: All in the Family?' (2017) Vol. 76 No. 1 African Studies 86.

factors mentioned above.[113] That the concept of legal family or tradition plays very little role in informing the content of transaction avoidance rules among COMESA member states will be demonstrated when their content is discussed in the next chapter.

It ought therefore to be made clear that the next chapter will not use the concept of the legal family as the basis for comparison and that legal context will not play a very significant role in the formulation of the solution to the problem that the thesis is grappling with. The study recognizes that context, in terms of the legal family and legal tradition in which the insolvency laws of member states are located are important tools in comparative legal research methodology. However, though this is the case, regard has been had to the changes in the statutory laws of member states decades after independence. These changes have largely been driven by the need to keep up with modern commercial trends as advocated for by multilateral financial institutions such as the World Bank and the International Monetary Fund.[114] The changes have swayed the content of transaction avoidance rules away from their colonial foundations and outside their legal family or legal tradition archetypes. Hence, as legal harmonization drives focus on the best legal solutions to a common problem, legal family or legal tradition will not play an important role in this comparative study beyond a descriptive portrayal of the legal families and cultures to which each member state belongs.

### 3.9. Conclusion

A quest to determine if the transaction avoidance rules of a multi-member regional economic block can be harmonized will of necessity involve handling a large volume of data and, having captured the data, comparing it to determine the similarities and differences within it before ones then starts thinking of whether the rules are capable of being harmonized or not. This answer to this latter question can at best be informed when one has identified the function or objectives that the ideal rules must aim at serving

[113] Mancuso, ' The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) (14) Annual Survey of International & Comparative Law, Article 4, 39; The World Bank Group, Public Private Partnership Legal Resource Centre, 'Key Features of Common or Civil Law Systems' available at <http;//www.ppp.worldbank.org/public_private_partnership_/legislation-regulatory/framework-assessment/legal-systems/commom-vs-civil-law> accessed on 26th November, 2022.

[114] The textual similarity of the avoidance rules in the insolvency statutes of Malawi, Mauritius and Seychelles can only be explained by this exogenous intervention and not by any historical, cultural or contextual similarity.

or achieving. From the discussion above, comparative legal research methodology is best suited for the task due to its flexibility and also the devise of the functional approach imbedded within it, and this will be aided by the law and economics approach as the best transaction avoidance rules from the lot can only be fashioned with *homo economicus* and his penchant for rational and efficient choices in mind. In that endeavour, mere accidents of legal familial history will play second fiddle.

In the next chapter, there will be a comparative exposition of the transaction avoidance rules relating to preferences and gifts and transactions at undervalue in more than half of the member states of COMESA representing the dominant legal traditions and families.

# CHAPTER 4

# A COMPARATIVE EXPOSITION OF RULES RELATING TO PREFERENCES, GIFTS AND TRANSACTIONS AT UNDERVALUE IN SOME COMESA MEMBER STATES

## 4.1. Introduction

This chapter is aimed at giving a broad comparative overview of the contents of the rules relating to preferences, gifts and transactions at undervalue in the insolvency laws of over half of the member states of COMESA. This is done with a view to create familiarity with the diversity of the selected avoidance rules as this will inform the inquiry, in the latter stages of the study, on whether there is scope for the harmonization of the rules and, if there is, on how best to proceed with the process.[1]

In the previous chapter, it has been stated that the approach to be undertaken to accomplish the task in this chapter as well as during the ultimate problem solving exercise will involve comparative legal research methodology and the deployment of this methodology primarily starts with the identification of similarities and differences in the rules of the member states whose laws are sought to be harmonized. To this end, the section of the chapter that next follows will identify member states of COMESA whose avoidance rules, for the reasons stated below, appear to be quite identical. Following from this, the chapter will discuss what the comparison criteria for the selected avoidance rules in the rest of the member states under study will be and this will be done using functional lens. Proceeding from there, various aspects of the rules relating to preferences, gifts and transactions at undervalue in each of the selected member states, identified using the selective functional criteria, will be compared and assessed. There will then follow some concluding remarks.

The proposed approach for the chapter faces five limitations, though: The first one is the unavailability or inaccessibility, electronically, of the insolvency statutes of some of the member states. The second limitation arises out of a very limited budget[2] that does not allow the author to visit physical libraries of the member states whose materials cannot be accessed

[1] Lemmens K, 'Comparative Law As an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship' in Adams M and Bomhoff J, *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 319.
[2] ibid, 320.

electronically. The third limitation pertains to the fact that some member states use as their official language, a language other than English, the only official language of COMESA which the author is competent in.[3] The fourth challenge is the large number of comparable legal systems − twenty one in all representing a multiplicity of legal cultures.[4] The law of diminishing returns kicks in where one tries to compare too many objects.[5] Comparison is easier the fewer the objects to be compared and the depth level of the comparison gets compromised the larger the number of objects, making it difficult to get below the surface and risking making the research just a mere organized description of statute law.[6] The fifth challenge is that the study only compares legislation of COMESA member states, and does not delve into how the legislation works in practice.[7]

To overcome the first problem the chapter will aim at discussing material relating to, roughly, over half of the member states. These cover the majority of the prevailing legal traditions within the regional economic bloc. The assumption being made is that such a sample is large enough to reveal a strong mosaic of the content of the rules from each legal family or tradition so as to form a solid basis for latter stage proposals for harmonization. As for the second and third problems, some, though not all, of the laws in member states which use a language other than English have been translated into English and are available in English on the internet. The author will use these translations, of course believing they are reflective of the core content of each rule. With regard to the fourth problem, the use of selected objective elements of comparison based on their role in contributing to an effective (in relation to identified visions or goals) insolvency law regime should somehow ease the problem of having numerous legal systems to compare. The fifth is addressed by the fact that the focus of the study is on the harmonization of the statutory laws of member states and not of judicial decisions pertaining to

[3] A good working knowledge of the language in which the laws to be compared are originally written in is essential and one may also need to check the correctness of the interpretation: Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October, 2024.

[4] It is risky to involve legal systems with legal cultures one is not familiar with: Van Hoecke M, ibid.

[5] Oderkerk M, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) (XLVIII) Netherlands International Law Review 293.

[6] Husa J, 'Research Designs of Comparative Law− Methodology or Heuristics?' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 58,59.

[7] Van Hoecke M, 'Methodology of Comparative Legal Research' available at www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/renm-d-14-00001.pdf> accessed on 29 October 2024.

such laws, a secondary task that can best be performed post-harmonization by the COMESA Court of Justice.

### 4.2. Similarities In The Rules Relating To Preferences And Transactions At Undervalue In Some Of The COMESA Member States

The study has identified and engaged for comparison rules relating to preferences and transactions at undervalue in the following 13 member states of COMESA: Comoros,[8] Democratic Republic of Congo[9] (both of whom are members of OHADA), Zambia,[10] Malawi,[11] Zimbabwe,[12] Uganda,[13] Kenya,[14] Eswatini,[15] Mauritius,[16] Seychelles,[17] Rwanda,[18] Ethiopia[19] and Egypt.[20]

It has been observed that the rules on preferences, gifts and transactions at undervalue in Comoros and Democratic Republic of Congo are the same. This is by reason of the fact that these two countries are both members of OHADA whose members all use transaction avoidance rules in the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.[21] Although there is no insolvency law treaty or uniform law among them, and despite having no common legal historical or cultural background, the rules on preferences, gifts and transactions at undervalue in Malawi, Seychelles and Mauritius are also the same, word for word, and this can only be explained by the theory of legal transplants, perhaps using the same change agent.[22] The avoidance rules in Rwanda and Uganda exhibit striking similarities, too, most especially as regards defences to transactions at undervalue. Both countries belong to the East African

[8] OHADA Uniform Act Organizing Proceedings for Collective Clearing of Debt.
[9] Ibid.
[10] Corporate Insolvency Act 2017 as read with the Bankruptcy Act 1967.
[11] Insolvency Act 2016.
[12] Insolvency Act 2018.
[13] Insolvency Act 2011.
[14] Insolvency Act 2015.
[15] Insolvency Act 1955.
[16] Insolvency Act 2009.
[17] Insolvency Act 2013.
[18] Law Relating to Insolvency 2021.
[19] Commercial Code 2021.
[20] Commercial Code 1999.
[21] https://www.droit-afrique.com/uploads/OHADA/Uniform-Act-1998-collective-proceedings-clearing-debts.pdf accessed on December 3, 2022.
[22] With Malawi being a common law jurisdiction and the other two being mixed civil law and common law jurisdictions.

Community regional economic block, but so does Kenya whose rules are different. There also appears to be a similarity in approach to transaction avoidance between Ethiopia and the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts. This could be informed by the common civil law background.

### 4.3. Proposed Comparison Criteria: The *Tertium Comparationis*

Although efficiency has been identified as one of the goals of insolvency law, the previous chapter has exposed the lack of consensus in the meaning or content of the term in as far as it relates to the character or attributes of insolvency laws or the avoidance rules within them. The concept's content fluidity, therefore, does affect its use as the source of yardsticks for the comparison of avoidance rules. The other reason why efficiency may not be utilized in this regard is due to its penchant for quantitative measurement. This study is exclusively qualitative and will not pretend to collect any data measuring the efficiency levels of any avoidance rule(s) whatever the meaning or attributes the concept of efficiency does entail.[23] Instead, the study proposes to use the concept of effectiveness, which is a qualitative reckoning of how well the avoidance rules in member states attain any of the identified goals of insolvency law as well as objectives of the treaty.[24]

In the field of insolvency law, it has been convenient to classify avoidance rules in insolvency regimes as either those promoting contractual certainty, finality and predictability or regimes where the avoidance rules are fashioned in a manner that aims to maximize returns to creditors through the augmentation of the insolvent debtor's estate. The former type of avoidance rules are aimed at protecting concluded transactions for the sake of certainty in commerce, and the latter avoidance rules use wide avoidance criteria aimed at maximizing the debtor's estate.[25] The former regime of avoidance rules are known for the extent to which they endeavour to foster certainty and predictability on the market place by preserving concluded transactions by making it difficult to set them aside through, among others, the requirement of proof of subjective elements, like the state of mind of the parties involved in the transaction, to establish an avoidance rule or as an aspect of a defence by the creditor. This scheme manifests

[23] For a more detailed discussion of efficiency and effectiveness, see chapter seven, *infra*.
[24] Ibid.
[25] Wood P, 'Principles of International Insolvency (Part II)' (1995) Vol. 4 International Insolvency Review 109.

itself in elements such as: whether, in the case of preferences, the insolvency rules prescribe the presence of an intention to prefer before any transaction can be avoided; and, with respect to all the avoidance rules, whether they require prior knowledge of the debtor's insolvency on the part of the creditor or the counterparty; whether they strive to protect transactions entered into in the ordinary course of business; and the length of the suspect period, though this varies for gifts, general preferences and for transactions with related parties. Regimes whose avoidance rules seek to augment the debtor's estate will, by reason of their focus on aiding maximization returns to creditors, be short on elements that make it very onerous to avert the avoidance of an already concluded transaction and will largely focus on objective elements.[26] The width or range of available defences is also indicative of whether the avoidance regime aims at attaining either the goal of contractual certainty or finality or the maximization of returns to creditors.

In avoidance regimes where transactions are hard to set aside or avoid, commercial activity tends to be boosted as participants in the market will be sure that avoiding an already concluded transaction will be a difficult task to achieve. If it were otherwise, the level of commercial activity, especially with seemingly troubled companies, would be slower as market players will be wary of having their transaction reversed with ease. Regimes whose avoidance rules focus on maximization of the debtor's estate are not, relatively, well primed for the task of aiding robust commercial activity. This is because of the ever looming risk of having transactions avoided comfortably or effortlessly, perhaps using objective and oftentimes arbitrary avoidance criteria, like longer suspect periods. Where transactions can be avoided easily due to a very generous regime of avoidance powers, parties will be discouraged to enter into commercial transactions, hence the design of transaction avoidance powers having a direct impact on the promotion of investment and economic growth.[27] Moreover, with such regimes, the debtor's maximized purse will seldom inure to the benefit of unsecured creditors due to the incidence of statutory priorities where, almost invariably, the unsecured creditors will be the last category to be considered during the distribution of the insolvent debtor's estate and yet their numbers are huge.

[26] Ibid.

[27] Gurrea-Martinez A, 'The Avoidance of Pre- Bankruptcy Transactions: An Economic and Comparative Approach' (2018) 93 Chi-Kent L Rev 711.

Therefore, instead of engaging in a comparative narrative focusing on the general content of transaction avoidance rules or a narrative that is not anchored to any functional or problem-solving aspects of the rules, the study proposes to identify aspects of the rules that show whether the rules are geared to either maximize creditor returns or to promote contractual certainty and finality. Indicators derived from this bifurcation of the policy slant of avoidance rules will be used in the ensuing discussion and evaluation of provisions on preferences, gifts and transactions at undervalue in the member states of the COMESA.

It must be stated though that with preferences the counterparty to the debtor is a creditor of the enterprise who is put in a better position than he would have been had he queued up with the rest of the creditors in an insolvency distribution. On the other hand with gifts and transactions at undervalue, the counterparty is not a creditor of the insolvent enterprise prior to the transaction. They are only a counterparty to it. Hence the argument measuring insolvency regimes based on predictability or certainty to creditors may not apply to gifts or transactions at undervalue[28] but the argument will be one of contractual or transactional certainty or finality to counterparties as these need not be placed in a worse situation after the transaction. A person who buys property at a bargain price from the company in the period leading up to its insolvency will be concerned that this should not be voidable. Companies can sell off assets cheaply, among other reasons, to raise money quickly. If there is too broad a scope of avoidance people, including investors will be deterred from dealing with struggling companies. A balance needs to be struck between protecting the interests of creditors, on the one hand, and protecting these other interests, like those of counterparties, on the other.[29] Hence the goal of certainty and predictability cuts across preferences and transactions at undervalue.

There are elements in the formulation of avoidance rules. These fall roughly into subjective and objective categories. Subjective factors require a mental element, for example, an intention or some knowledge that was held by either the debtor or the creditor or counterparty. Objective elements are those that are not peculiar to an individual party to the transaction and their presence can be determined without probing the mental element of any of the parties. These

[28] de Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Volume 20, Issue 3, International Insolvency Review 219.
[29] Ibid.

are elements like the suspect period or the (in) solvency status of the debtor, though not knowledge of the same.

Some jurisdictions use a mixture of subjective and objective elements in framing their transaction avoidance rules. There are some jurisdictions, however, like the Dutch, that use entirely subjective elements.[30] In England, the avoidance of preferences uses subjective criteria,[31] the desire to produce a preferential effect, with no defences, whilst that of transactions at undervalue does not impose subjective elements on the debtor and the state of mind of the counterparty is also irrelevant[32] although there is a defence that the transaction was done to benefit the company and was reasonably believed to be of benefit to the company. This is unlike the German scenario where the avoidance of preferences relies primarily on subjective criteria on the part of the creditor, in particular an awareness by the creditor of the debtor's insolvency, giving no regard to the state of mind of the debtor[33] or the situation in the United States of America where it is enough if the transaction had a 'preferential effect' meaning there is no need to prove an intention to prefer.[34] The United States bankruptcy laws however provide many defences to preferences, though not of the subjective kind.

Usually, though not invariably, there will be a mixture of both elements in the formulation of an avoidance rule. That said, when a rule is formulated, it is easy to discern whether it is leaning towards the goal of aiding contractual certainty or finality or the maximization of returns to creditors. With the former, emphasis will be placed on maximizing proof of subjective elements as these are difficult to establish and shorter suspect periods will also be the order of the day. Where it is sought to maximize returns to creditors, however, there will be more reliance on objective criteria than subjective ones, with longer suspect periods in tow.

With the above in mind, identification of the subjective and objective elements in the avoidance rules in the insolvency laws of each of the member states under study will help in the categorization of the slant of the rules as those either promoting contractual finality and certainty

[30] Ibid.
[31] S. 239 Insolvency Act 1986.
[32] S. 238 Insolvency Act 1986.
[33] S.130 Insolvenzordnung.
[34] S. 547(5) of the Bankruptcy Code of the United States of America.

or those aiming at maximizing returns to creditors. It will also help determine whether the regional economic body is pursuing either of these two goals exclusively and if so which one it is, or if the reality is that there is no discernible homogenous intra-regional economic body avoidance rules policy goal being pursued, hence building a case for a possible harmonization drive. Moving forwards, therefore, the rules on preferences in the avoidance rules of COMESA member states will be compared using the following criteria: (i) whether there is a requirement of an intention to prefer; (ii) whether a close connection or relationship between debtor and creditor, guarantor or surety matters; (iii) whether knowledge of the debtor's insolvency is relevant; (iv) whether the rules protect transactions entered into in the ordinary course of business; (v) the length of the suspect period; and, (vi) the range of available defences. The rules governing gifts and transactions at undervalue will be compared using the following criteria: (i) whether related parties are covered; (ii) whether the counterparty's knowledge of the insolvency status of the debtor is relevant; (iii) whether transactions entered into in the ordinary course of business are protected; (iv) the length of the suspect period; (v) the range of available defences. It should be possible, after the comparative study, to evaluate the avoidance rules in each regime and determine whether they are geared at promoting contractual certainty or finality or maximizing returns to creditors or if they are unpolarized or ambivalent, being located somewhere in between.

In the ensuing comparative exercise, the study will not engage in a word for word repetition of the content of each of the avoidance rules of each member state under study but will engage in a high level analysis involving the identification of the presence or absence of the element of the rules that is being discussed at the particular point in time. This is largely because of space constraints.

## 4.4. Comparing The Elements Of Rules On Preferences Among The Member States Of COMESA

### *4.4.1. The Intention To Prefer*

The intention to prefer is a subjective criteria. It is a difficult task for the insolvency office holder to establish this element[35] and the potential drawback of establishing subjective

[35] Mokal R, 'Adjusting Transactions Involving Distressed Companies' in Mokal R, (ed) *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 311.

criteria are that their judicial evaluation can be time consuming and expensive leading to uncertain outcomes of any avoidance litigation.[36] It has been said that this has the effect of promoting legal certainty by making it difficult for transactions to be avoided thereby discouraging the use of avoidance powers.[37] However, note that as the intention to prefer is the debtor's, creditors will not know if the debtor was dealing with them with that intention, and hence proof of this element is outside their control and so, too, its disproof. The presence of this element therefore has a negative effect on contractual certainty and finality, at least from the perspective of the creditor. In the assessment of this thesis, whatever contractual certainty the element brings by discouraging avoidance actions is far outweighed by the uncertainty brought about by the fact that the creditor is not privy to the intent and proof or disproof thereof is outside the creditor's control, and may even be affected by collusive practices.

There is no requirement of an intention to prefer in the preference laws of Democratic Republic of Congo and Comoros[38] the same being presumed from payment of debts that are not due or of overdue debts in a form other than the usual mode. The insolvency statutes of Malawi,[39] Mauritius[40] and Seychelles[41] also contain no such requirement. So, too of Uganda,[42] Ethiopia,[43] Egypt,[44] Eswatini.[45] This list makes up nine of the thirteen countries under study and these countries cover multiple legal traditions ranging from pure common law to mixed systems of common law and civil law to pure civil law countries. This position (of lack of prescription of an intention to prefer) is akin to the one prevailing in the United States of America.

The office holder is required to prove an intention to prefer in the insolvency laws of Zambia[46] and Kenya.[47] On the part of Zambia this is a relic of the colonial legacy as its

[36] de Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Vol. 20 International Insolvency Review 219.
[37] Ibid.
[38] Articles 68 and 69 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.
[39] Section 282 of the Insolvency Act 2016.
[40] Section 313 of the Insolvency Act 2009.
[41] Section 324 of the Insolvency Act 2013.
[42] Section 15 of the Insolvency Acy 2011.
[43] Articles 671 and 672 of the Commercial Code 2021.
[44] Articles 598 and 599 of the Commercial Code.
[45] Section 29 of the Insolvency Act.
[46] S. 47 of the Bankruptcy Act 1967 as read with s. 128(1) of the Insolvency Act 2017 of Zambia.
[47] S. 683(5) of the Insolvency Act 2015 of Kenya.

preference avoidance rules date back to 1967, but in the case of Kenya it could be the result of a conscious choice, also following the footsteps of the position in England, the former colonial power in the country.

Though not requiring proof of an intention to prefer to establish a preference, in Eswatini, the lack of an intention to prefer is a defence to an avoidance action based on a preference,[48] implying that an intention to prefer needs to be proved. Eswatini is a mixed common law/civil law jurisdiction.

Rwanda has something akin to an intention to prefer, which is phrased as an intention to defraud. Transactions and transfers made where there is evidence of the debtor's actual intent to defraud creditors by placing assets beyond their reach and where the counterparty knew of such an intent is void.[49] Rwanda placed the intention to prefer as an issue to be proven both as against the debtor and the creditor. The debtor must have intended to defraud, *and* the creditor must have known of such an intention. This makes it twice as difficult to avoid the preference. The Rwandan position is a rather unusual one in the regional economic body.

In Zimbabwe, dispositions made within six months prior to liquidation proceedings if to unrelated parties are *deemed* to be preferences and if to associates or related parties the deeming period is 12 months.[50] However, Zimbabwe, does require proof of an intention to prefer for all transactions done 3 years prior to the insolvency proceedings and lack of an intention to prefer is a defence to a claim for transaction avoidance on the basis of a preference.[51] Hence Zimbabwe is a unique case where an intention to prefer is both presumed as well as required to be proven, depending on the circumstances.

Another observation is that several decades after independence, legal family or culture play very little, if any, clear role in the prescription or requirement of an intention to prefer. Zimbabwe and Eswatini, despite being common law and Roman Dutch law mixed systems have different prescriptions. This may be reflective of the age of the current law with the most recent statutes departing from the colonial heritage position. Malawi and Zambia, and so, too, Kenya

[48] S. 29(1) Insolvency Acy 1955 of Eswatini.
[49] S. 215(3) of the Law Relating to Insolvency 2021 of Rwanda.
[50] S. 26(1)(a) of the Insolvency Act 2018 of Zimbabwe.
[51] Ibid.

and Uganda, despite both sets of neighboring states being common law jurisdictions, have antipodean requirements, and there is also quite a mix of legal families in the member states that do not prescribe an intention to prefer, and these are in the majority of the member states studied this far. Zambia's preference laws containing the need to prove an intention to prefer are in the same state they were at independence, hence reflect the English position. Malawi had similar provisions to Zambia until 2016 when it passed the new Insolvency Act, which may reflect the influence of the World Bank and the International Monetary Fund in advocating for dealing away with the need to prove an intention to prefer, and following the United States position of focusing on the preferential effect of a disposition.

#### *4.4.2. The Relevance Of The Relationship Between Insolvent Debtor And Creditor*

The data shows that most member states do not have provisions that make the relationship between the insolvent debtor and the creditor relevant in formulating their rules for the avoidance of preferences. However, it is a fact of life that the insolvent debtor's directors may want to prefer related or connected creditors more than unrelated or unconnected ones in the hope, among others, of maintaining business relations in event the debtor survives the inability to pay debts. Related parties may also be favoured as a way to hive off assets from the ailing debtor for the benefit of the relations of the debtor's directors or shareholders, perhaps so that the directors or shareholders may eventually benefit. Usually, the rules do extend the suspect period where related parties are concerned. In other jurisdictions, like in Kenya,[52] transactions with related parties are deemed to be preferential.

The rules relating to preferences in Eswatini, Malawi, Mauritius, Seychelles, Comoros , Democratic Republic of Congo, Ethiopia and Egypt do not make any mention of transactions with related parties. So too is the case in Zambia and Rwanda. In Zimbabwe, the suspect period is doubled in the case of a preferential transaction with a related party.[53] In Uganda transactions with related parties are deemed to be preferences.[54] The same is the case in Kenya.[55]

[52] Section 18 of the Insolvency Act.
[53] Section 26(1)(b) of the Insolvency Act.
[54] Section 18 (2) of the Insolvency Act.
[55] Section 683(6) of the Insolvency Act.

The situation, therefore, is that the majority of the jurisdictions do not make a distinction between transactions with related and unrelated parties in the formulation of their preference rules and, in the few cases where the relationship is relevant, the effect is either to increase the suspect period or to deem the transactions to be preferences.

### *4.4.3. Knowledge Of The Debtor's Insolvency On The Part Of The Creditor*

The requirement to prove knowledge, on the part of the creditor, of the debtor's insolvency at the time the transaction alleged to be a preference was being effected, is one other subjective element that exists to safeguard the finality of transactions, and hence to preserve it unless it is proven that the creditor knew that the debtor was insolvent when he transacted with him. This requirement also prevents creditors from being put in a worse position without any fault on their part in the form of transacting with the debtor with full knowledge of the debtor's insolvency. The requirement serves to strike home the fact that creditors must not engage in a rush to grab the debtor's assets in the zone when the debtor is evidently insolvent. It lies at the core of the avoidance of preferences, only it tackles the issues from the creditor's perspective. Without it, preference law would be akin to a strict liability regime in the sense that a transaction would be voidable without attributing fault to the creditor. If the creditor dealt with the debtor and got paid whilst knowing the debtor was insolvent, it clearly establishes that the creditor was intent on stealing a march against his fellow creditors and wanted to be paid first in preference to the rest. Absent a requirement to prove that the debtor intended to prefer a creditor, this requirement puts the creditor at the center of the avoidance of preferences and modulates creditor (mis) behavior when dealing with insolvent debtors. If a preference is to be avoided, it will not be because the debtor intended to prefer but the creditor went ahead to transact with it in full knowledge of its insolvent status. The creditor will therefore need to conduct some due diligence on the debtor before transacting, and only deal when it has no knowledge of the debtor's insolvency. This promotes certainty on the creditors' part unlike where the creditor deals blindly and without knowing the debtor's intent, only to have the transaction avoided by reason of the debtor's intent to prefer. As with all subjective elements, knowledge can be a difficult thing to establish or prove. Note, however, that whether a particular creditor knew or acted with a certain state of mind does not necessarily alter the prejudicial effect of a transaction to the whole body of creditors and this requirement of knowledge of a debtor's insolvency when

proved, carries with it some moral reproach and will tend to reflect on the integrity of the creditor.[56]

As indicated above, under English law, the state of mind of the creditor is irrelevant, and what is important is the debtor's intention to prefer. However, this requirement is mainstreamed under German preference law.

The law in Comoros and in the Democratic Republic of Congo targets transactions where loss is occasioned to creditors, and the targeted transactions include the registration of securities on personal and real property given or taken for concomitant debts where the beneficiary had knowledge of the cessation of payments; transactions carried out for valuable consideration where the party who transacted with the debtor had knowledge of the debtor's insolvency at the time; and voluntary payments of overdue debts where the recipient had knowledge of the insolvency may be voidable.[57] In these two countries, however, there are some transactions, in the nature of preferences, where knowledge of the insolvency status of the debtor is not a material element before the transactions are avoided. The law provides that the following shall as of right be non-binding on the body of creditors if and when they are done during the period of suspicion: all payments, irrespective of the method of payment, of debts not payable, except where it concerns the payment of a negotiable instrument; all payments of overdue debts made other than in cash, negotiable instrument, or payment by bank transfer, deduction, payment or credit card or by any legal, judicial or contractual compensation of debts connected to each other or by any other normal method of payment; any contractual mortgage or contractual collateral security, any pledge given on the property of the debtor for debts previously contracted; and any provisional registration of judicial mortgage or pledge as a measure of preservation.[58] The rationale for not requiring prior knowledge of the debtor's insolvency status for these transactions may lay in the fact that, for example, payment of a debt not due or a payment or pledge made based on past consideration does trigger an irrebuttable presumption of an intention to prefer.

[56] de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Volume 20, Issue 3, International Insolvency Review 219-244.
[57] Article 69 of the OHADA Uniform Act Organizing Proceedings for Collective Clearing of Debt.
[58] Ibid, Article 68.

In sum the Democratic Republic of Congo and the Comoros, being civil law countries, have a bifurcated legal regime in terms of the creditor's knowledge of the debtor's insolvency.

For Malawi,[59] Mauritius[60] and Seychelles,[61] there is a presumption that a transaction made within 6 months immediately before the debtor's adjudication or the commencement of the winding up, was, unless the contrary is proved, made when the debtor was unable to pay his debts. It is also a defence against a claim for the avoidance of a preference for the creditor to prove that a reasonable man in his position would not have suspected that the debtor was, or would become, unable to pay his due debts.[62] Hence, much as inability to pay debts is presumed, unless the contrary is proven, for transactions occurring 6 months before commencement of winding up or adjudication, lack of knowledge of debtor's inability to pay debts can be an exonerating factor in an avoidance action. In either case, therefore (even where inability to pay debts is presumed), knowledge of inability to pay debts is a material factor. Note, though that here, it is not for the insolvency officeholder to establish knowledge on the part of the creditor, of the debtor's inability to pay debts, but the onus lies on the creditor itself to prove this lack of knowledge. In other words, there is no duty on the insolvency officeholder to prove the subjective element of knowledge, on the part of the creditor, of the debtor's insolvency. This moves the regime in these countries towards greater reliance on objective elements for preferences,[63] and the fact that the creditor, in his own defence, has to prove lack of knowledge, does not change this objective leaning.

In Zimbabwe, the emphasis is on the preferential effect of the disposition[64] but so, however, that it is a defence for the creditor to prove that the disposition was made in the ordinary course of business and was not intended to prefer one creditor over others. However, if the creditor was an associate of the debtor, the creditor additionally proves that he or she was not aware or had no reason to suspect that the debtor would be unable to pay his debts immediately after the disposition.[65] Hence the issue of knowledge of inability to pay debts only

[59] S. 282(4) Insolvency Act 2016.
[60] S. 313(3) Insolvency Act 2009 of Mauritius.
[61] S. 324(3) of the Insolvency Act 2013 of Seychelles.
[62] S. 292 of the Insolvency Act 2016 of Malawi; S. 323 of the Insolvency Act 2009 of Mauritius and S. 334 of the Insolvency Act 2013 of Seychelles.
[63] When one considers that these regimes do not require proof of an intention to prefer.
[64] S. 26(1) of the Insolvency Act 2018 of Zimbabwe.
[65] Ibid.

arises when the counterparty is an associate of or related party to the debtor, and only in the case where the transaction was made in the ordinary course of business. Inability to pay debts is presumed, until the contrary is proven, in dispositions occurring at any time within one year before the date of presentation of the application for liquidation,[66] and this affects the associate or related party's plea of the defence of lack of knowledge of the debtor's inability to pay his debts. Overall, save for the fact that a lack of knowledge of inability to pay debts is a defence only available to related parties to the debtor, the Zimbabwe situation is pretty much the same as in Malawi, Seychelles and Mauritius. It has an objective leaning on this aspect.

In Ethiopia,[67] like in Comoros and the Democratic Republic of Congo, whilst there is a facility for mandatory invalidation of some transactions regardless of the presence of knowledge on the part of the creditor relating to the debtor's insolvency status at the time of the disposition,[68] there is a facility for optional or discretionary invalidation by the court of preferences made during the suspect period, where the creditor knew or should have known that the debtor was already in a situation of cessation of payments. In that case the supervisor in reorganization shall bear the burden of proof of the knowledge of the creditor except where the act was concluded with a related party. Egypt[69] adopts a similar approach of mandatory invalidation for prescribed transactions regardless of creditor's knowledge of the insolvency status of the debtor and optional invalidation. A court ruling may be issued for non-execution of all disposals by the bankrupt, other than those mentioned in article 598 of the Commercial Code, during the period referred to therein vis a vis the group of creditors, if the disposal is harmful to it and the party disposed to was at the time of that disposal aware of the bankrupts discontinuance of payments.

The Bankruptcy Act of Zambia does not indicate the need to prove knowledge of inability by the debtor to pay debts on the part of the creditor, neither does it make proof of lack of such knowledge a defence to an action for the avoidance of a preference.[70] Proof of the debtor's intention to prefer suffices. This is like the situation in England under section 238 of

[66] S. 33 of the Insolvency Ac, 2018 of Zimbabwe.
[67] Article 672 of the Commercial Code 2021 of Ethiopia.
[68] Article 671 of the Commercial Code of Ethiopia 2021.
[69] Article 599 of the Commercial Code 1999 of Egypt.
[70] Bankruptcy Act 1967 of Zambia.

the Insolvency Act, 1986. In Uganda, too, knowledge by the creditor of the debtor's inability to pay debts is not a material factor in the proof or disproof of preferences.[71] This is odd as Uganda does not require proof of an intention to prefer on the part of the debtor and one would have expected that there would be a requirement for knowledge on the part of the creditor of the debtor's insolvency. The same applies to Kenya, where the Insolvency Act does not make the creditor's knowledge of the debtors inability to pay debts a material factor to consider in avoidance proceedings for preferences.[72] This could be because Kenyan law requires proof of an intention to prefer. There is no mention of knowledge on the part of the creditor, of the debtor's inability to pay debts in the insolvency laws of Eswatini.[73] Hence these four countries lean towards having objective criteria, except that in some of them, like Zambia and Kenya the insolvency office holder is required to prove an intention to prefer though not in Uganda and in Eswatini.

In Rwanda, the Law Relating To Insolvency, 2021 makes no mention of lack of knowledge of the debtor's inability to pay debts as a defence to an action for the avoidance of a preference. However, the statute provides[74] that transactions and transfers made where there is evidence of the debtor's *actual intent to defraud* creditors by placing assets beyond their reach and *where the counterparty knew of such an intent* are considered void at all the times. Arguably, one indicia of actual intent to defraud creditors would be knowledge by the particular creditor who is the subject of the avoidance action, that the disposition or transfer was being made during the debtor's inability to pay its debts or insolvency. Hence, Rwanda has, by implication, the requirement of knowledge of the debtors' insolvency, and this, when coupled with the double-edged requirement on the intention to prefer (which is placed on the part of both the creditor and the debtor) mentioned above, makes the jurisdiction very subjective in leaning.

Again, though this does not appear obvious, a creditor's defence that he acted in good faith would bring into the inquiry the state of the creditor's knowledge regarding the debtor's ability or inability to pay its debts at the time of the transaction. Hence the issue of knowledge of the debtor's insolvency may be brought in indirectly through the availability of the defence

[71] See s.s 15 and 19 of the Insolvency Act 2011 of Uganda.
[72] S. 683 Insolvency Act 2018 of Kenya.
[73] S.s 29 and 33 of the Insolvency Act 1955 of Eswatini.
[74] Article 215 of the Law Relating to Insolvency 2021 of Rwanda.

of good faith. However, for as long as good faith is a defence, it is not an element that the insolvency officeholder will be required to establish, and hence may not directly affect his decision of whether or not to commence avoidance action.

In summary, regarding the element of lack of knowledge of the debtor's insolvency as a defence to an action for the avoidance of a preference, COMESA member states approach the issue differently. At one extreme are countries like Zambia, Uganda, Kenya and Eswatini where there is total silence on the issue, meaning it is not a factor to consider in the avoidance. On the other extreme, countries like Malawi, Mauritius and Seychelles make the absence of knowledge of the debtor's insolvency a defence against an avoidance action based on preferences. Arguably, Rwanda makes it a defence, too, albeit by implication.

For Ethiopia and Egypt knowledge of the debtor's insolvency is a defence in cases of optional invalidation, though for cases of mandatory invalidation, the issue is irrelevant. Comoros and the Democratic Republic of Congo also approach the issue in the same way where, for some dispositions, knowledge by the creditor of the debtor's insolvency is a defence, whilst for other instances of disposition, that knowledge is not a defence at all.

Then there is Zimbabwe, and Ethiopia, where the issue of knowledge of a debtor's insolvency is relevant only when the preferential disposition is to an associate of the debtor.

Once again, legal familial categorization does very little to inform the choices, except perhaps in the case of Ethiopia and Egypt and the OHADA member states.

#### *4.4.4. Length of the Suspect Period*

Contractual finality demands that, at least after a certain period, the parties can presume that the transaction is final.[75] The UNCITRAL Legislative Guide to Insolvency Law provides that with the exception of transactions involving intentionally wrongful behavior, it is highly desirable that suspect periods be of a reasonably short duration to ensure commercial certainty

[75] de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Volume 20, Issue 3, International Insolvency Review 219.

and to reduce any negative impact that avoidance provisions will have on the availability and cost of credit.[76]

There is an unwieldy variety of formulations of suspect periods among COMESA member states.

Some jurisdictions like Comoros and the Democratic Republic of Congo will measure the length of the suspect period from the date of suspension of payments to the date of decision to open proceedings.[77] The same is the case with Egypt.[78] The date of cessation of payments may be a debatable issue as its reckoning could depend on the level of awareness of the cessation by the creditors or by the insolvency officeholder, and the uncertainty may either fuel or lengthen avoidance litigation.

Zambia has 6 months before the adjudication of bankruptcy or presentation of a petition therefor.[79] Though very short, the period caters for finality and certainty at the expense of maximization of the debtors estate.

Malawi,[80] Mauritius[81] and Seychelles[82] have 2 years before the commencement of adjudication or winding up. The suspect periods in their legislation make no distinction between related party and unrelated party beneficiaries of the preferences.

In Kenya, the suspect period is 2 years immediately preceding the onset of insolvency in the case of connected persons other than the debtor's employees.[83] In the case of a preference that is not a transaction at undervalue and is not so given, the suspect period is 6 months immediately before the onset of the insolvency.[84] Hence, the 2 years that Malawi, Seychelles and Mauritius apply to all transactions (regardless of the relationship between the parties) is

[76] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* (United Nations, 2005) Paragraph 189.
[77] Article 67 of the OHADA Uniform Act Organizing Proceedings for Collective Clearing of Debt.
[78] Article 598 of the Commercial Code 1999 of Egypt.
[79] S. 47 of the Bankruptcy Act 1967 of Zambia.
[80] S. 282(1)(b) of the Insolvency Act 2016 of Malawi.
[81] S. 313(1)(b) of the Insolvency Act 2009 of Mauritius.
[82] S. 324(1)(b) of the Insolvency Act 2013 of Seychelles.
[83] S. 684(2)(a) of the Insolvency Act 2015 of Kenya.
[84] S. 684(2)(b) of the Insolvency Act 2015 of Kenya.

only applicable to related party transactions in Kenya, otherwise, the normal suspect period for unrelated parties is 6 months like in Zambia.

Zimbabwe has two categories of suspect periods depending on whether a preference is deemed, in which case the period is 6 months prior to the presentation of an application for liquidation, or 12 months before the presentation in the case of a disposition to an associate of the debtor's[85] Dispositions made where the debtor is unable to pay his debts, and made with the intention to prefer can be set aside if the application for liquidation is made within 3 years after the disposition.[86] The 3 year period appears rather long and may impact on finality.

In Uganda, the suspect period is one year preceding the commencement of liquidation or bankruptcy,[87] and so, too, for Rwanda.[88]

For Eswatini, the suspect period is not more than 6 months before the sequestration of the insolvent's estate if immediately after the disposition the debtor became insolvent, unless the creditor proves that the disposition was made in the ordinary course of business and was not intended to prefer.[89]

For Ethiopia, the suspect period in so far as it is reckoned from the date of cessation of payments can be extended to two years.[90]

#### *4.4.5. Range of Available Defences*

All of the jurisdictions studied afford creditors some defences to actions for the avoidance of preferences, and there is a variety of combinations of such defences. The greater the scope of defences to actions for the avoidance of preferences, the better it is for creditors to stand a chance of preserving the transaction. This would be conducive to the encouragement of trade and attraction of investment, unlike in a situation where there are no, or very few defences.

[85] S. 26(1)(b) of the Insolvency Act 2018 of Zimbabwe.
[86] S. 26(3) of the Insolvency Act 2018 of Zimbabwe.
[87] S. 15(1)(a)(iii) of the Insolvency Act 2011 of Uganda.
[88] Article 215(3) of the Law Relating to Insolvency of Rwanda.
[89] S. 29(1) of the Insolvency Act 1955 of Eswatini.
[90] Article 978 of the Commercial Code of Ethiopia 2021.

In the next section, the study shall discuss the defence of ordinary course of business before delving into the rest of the other defences like good faith, provision of consideration, and the like.

#### *4.4.5.1.Protection of Transactions Entered into In the Ordinary Course of Business*

Preferential transactions entered into in the ordinary course of business are saved from avoidance in some jurisdictions. Under such circumstances, the defence is intended to protect from exposure a debtor's routine payments of recurring credit transactions[91] and to encourage the continuation of business (and the extension of credit) for an entity that is heading towards, but seeking to avoid, an insolvency filing. It is thus an essential provision that serves to facilitate trade and commerce for seemingly ailing firms whilst protecting the interests of creditors. It is a necessary provision to encourage contractual certainty and finality. Those jurisdictions that have the ordinary course of business defence rarely define the term, and whether it can apply to a one-off or first instance business transaction[92] leaving the question hanging as to 'how ordinary is ordinary?'[93]

The fact that a preferential disposition was made in the ordinary course of business is not a defence in Malawi,[94] Mauritius,[95] Seychelles,[96] Zambia,[97] Kenya,[98] Comoros,[99] the Democratic Republic of Congo[100] and Egypt.[101]

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[91] The American Bankruptcy Institute Journal, 'The Ordinary-course-of- business Defence to Preference Claims: First – Time Transactions Count Too' published November 2003 available at<http://www.abi.org>abi-journal accessed on February 7, 2023.

[92] In *Jubber v SMC Electrical Products (In re C.W. Mining Co.)* 798 F 3d 983 ( 10th Cir 2015) the United States Court of Appeals for the Tenth Circuit considered whether a first time transaction between a debtor and creditor can satisfy the ordinary course exception. It held that it would qualify if (i) the debt was ordinary in accordance to with the past practices of the debtor and the creditor when dealing with other, similarly situated parties; and (ii) the payment was made in the ordinary course of business of the debtor and the transferee.

[93] See for example United States Bankruptcy Code, s. 547.

[94] Insolvency Act 2016 of Malawi.

[95] Insolvency Act 2009 of Mauritius.

[96] Insolvency Act 2013 of Seychelles.

[97] Bankruptcy Act 1967 of Zambia.

[98] Insolvency Act 2015 of Kenya.

[99] OHADA Uniform Act Organizing Proceedings for Collective Clearing of Debt.

[100] Ibid.

[101] Commercial Code 1999 of Egypt.

On the other hand, for Zimbabwe, the fact that the preferential disposition was made in the ordinary course of business and was not intended to prefer is a defence against an action for the avoidance of the preference.[102] The same is the case with Uganda,[103] Eswatini,[104] Rwanda[105]

In Ethiopia, transactions for the acquisition of assets necessary for carrying out the ordinary course of business by the debtor may not subject to avoidance.[106] This makes it safer and more certain to transact business.

#### *4.4.5.2. Other Defences*

Malawi,[107] Mauritius[108] and Seychelles[109] have three defences, to wit, creditor acting in good faith, that a reasonable person in the position of the creditor would not have suspected that the debtor was, or would become, unable to pay his due debts (knowledge of insolvency), and that the creditor gave value for the property or altered his position in the reasonably held belief that the transfer of the property to him was valid and would not be set aside. Hence, payment of consideration alone is not enough for the last limb of the defence. The mental state of the creditor when furnishing the consideration also comes under inquiry. There is no ordinary course of business defence.

For Comoros and the Democratic Republic of Congo, for transactions avoidable when loss has been occasioned to the group of creditors, lack of knowledge of the insolvency status of the debtor at the time of the transaction affords a defence.[110] The transactions that the defence applies to are: registrations of securities on personal and real property given or taken for concomitant debts where their beneficiary has had knowledge of the cessation of payments by

[102] Proviso to s. 26(1)(b) of the Insolvency Act 2018 of Zimbabwe. S. 26(2) states that it is presumed, unless the contrary is proved, that a transaction was made not in the ordinary course of business if (a) it was made by way of payment of a debt that was not due and payable or not legally enforceable (b) it embodied payment in an unusual form or a form other than originally agreed upon.
[103] S. 15(1)(b) Insolvency Act 2011 of Uganda. By s. 15(2)(b) a transfer made within six months preceding the commencement of the liquidation is, unless the contrary is proven, presumed to have been made on account of a debt not incurred in the ordinary course of business.
[104] S. 29(1) Insolvency Act 1955.
[105] S. 215 of the Law Relating to Insolvency 2021 of Rwanda.
[106] Article 674(3) of the Commercial Code 2021 of Ethiopia.
[107] S. 292 of the Insolvency Act 2016.
[108] S. 323 of the Insolvency Act 2009 of Mauritius.
[109] S. 334 of the Insolvency Act 2013 of Seychelles.
[110] Article 69 of the OHADA Uniform Act Organizing Collective Proceedings for the Clearing of Debts.

the debtor; and, transactions carried out for valuable consideration where the party who transacted with the debtor had knowledge of the latter's insolvency at the time of the transactions. Hence, there is only one ground of defence, the (lack of) knowledge defence. There are no defences relating to good faith or furnishing of valuable consideration or even that of a transaction in the ordinary course of business.

Zambia puts as a defence to actions for the avoidance of preferences taking title in good faith for valuable consideration, through or under a creditor of the bankrupt. Hence the defence is not available to the insolvent debtor's creditor.[111] That creditors are not covered by the defence copies the situation in the United Kingdom, but is largely because there is a requirement of proof of the debtor's intention to prefer, whose establishment takes away the need for defences.

In Zimbabwe, where a disposition is one of deemed preferential effect (concluded 6 months before application for liquidation or 12 months in case of debtors associates), the creditor may prove as a defence, that: (a) the disposition was made in the ordinary course of business and *was not meant to prefer*. It is presumed that the disposition was not in the ordinary course of business if the debt was not due or payable or legally enforceable or the payment was in an unusual form or form not originally agreed upon; (b) if the creditor is an associate of the debtor, the creditor must prove that he was not aware and had no reason to suspect that debtor would be unable to pay its debts immediately after disposition[112] The law in Zimbabwe provides a general defence to actions for the avoidance of preferences, applicable whether there was an intention to prefer or not. This relates to payment of valuable consideration through parting with property or security or losing rights against another person where the person acts in good faith.[113] Zimbabwe nearly covers all bases in relation to the defences.

For Uganda, it is a defence to a preference avoidance action to prove that the debt was incurred in the ordinary course of business (except where transfer is made within 6 months preceding the commencement of liquidation) and that the transfer was made not later than 45 working days after the debt was incurred.[114] The law in Uganda also affords a general defence[115]

[111] S. 47 of the Bankruptcy Act 1967 of Zambia.
[112] S. 26(1)(b) of the Insolvency Act 2018 of Zimbabwe.
[113] S. 30(1) of the Insolvency Act 2018 of Zimbabwe.
[114] S. 15(1)(b) of the Insolvency Act 2011 of Uganda.
[115] S. 19(6) and (7) of the Insolvency Act 2011 of Uganda.

which, like in the case of Zambia, is available only to those who acquire property from a person other than the insolvent (not available to direct creditors of the insolvent) who made a payment of valuable consideration without knowledge of the circumstances of the transaction under which the person other than the insolvent acquired the property from the company. It is a defence in Uganda for the creditor or person that acquired the property from the creditor to show he acquired the property in good faith and altered his position in the reasonably held belief that the transfer or payment of the property to that person was validly made and would not be set aside. Recovery in such instances may also be denied where, in the opinion of the court it is inequitable to order recovery.[116]

In the case of Rwanda, where the debt that is the subject matter of a preference avoidance action was incurred in the ordinary course of the company's business and the transfer was made no later than 45 days after the debt was incurred[117] the transaction may not be avoided. This provision is similar to the one in Uganda mentioned above.[118] Recovery is also not possible where the person has acquired the property from a person other than the company or individual (i) for a valuable contract; (ii) without knowledge of the fact that another person has acquired it from a company or an individual.[119] Recovery by the liquidator or trustee may be denied wholly or partially if (i) the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer of payment of the property to that person was validly made and would not be set aside; (ii) in the opinion of the court it is inequitable to order partial or full recovery.[120] The regime of defences against preference avoidance actions in Rwanda and Uganda is similar, word for word.

In Uganda's neighboring member state, Kenya, it is a defence to a preference avoidance action, available to a person who acquired property from a person other than the debtor to prove that he acquired the property in good faith and for value, with no notice of the relevant surrounding circumstances and of the relevant proceedings. In making orders avoiding preferences, the court shall also ensure that the order does not require a person who received a

[116] Ibid.
[117] S. 215 of the Law Relating to Insolvency 2021 of Rwanda.
[118] S. 15(1)(b) of the Insolvency Act 2011 of Uganda.
[119] S. 220 of the Law Relating to Insolvency 2021 of Rwanda.
[120] Ibid, s. 220.

benefit from the transaction or preference in good faith for value to pay an amount to the relevant office-holder unless the person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when the person was a creditor of the company.[121] Knowledge of relevant circumstances surrounding the transaction or the fact that the person is connected with or was an associate of the relevant insolvent or the creditor who entered into the transaction or to whom the company gave a preference vitiates the defence of good faith.[122] The ordinary course of business defence does not apply.

In Eswatini, the lack of an intention to prefer is a defence, and so, too that the disposition was made in the ordinary course of business[123] The furnishing of consideration by way of parting with any property or security or losing any right against another person, and acting in good faith are also availed as defences to actions to avoid a preference.[124] A person that acquires the property in good faith and for value from a person other than the insolvent is not affected by an avoidance action.[125] The only shortfall with this regime of defences is that it omits knowledge of the insolvency status of the debtor.

The Commercial Code of Ethiopia, 2021 lists lack of knowledge of cessation of payments as a defence to optional validation, except where the transaction was with a related party.[126] Further, the acquisition of assets necessary for carrying out the ordinary course of business and the acquisition of goods by and rendering of services to third parties in good faith provided a fair price is paid for the goods and services may not be subject to invalidation.[127] This regime, too, does not cover knowledge of the insolvency status of the debtor.

In Egypt there are no defences for cases of mandatory invalidation. For cases of optional invalidation a defence is available where the receiving party was aware of the cessation of payments (knowledge of insolvency status of the debtor)[128]

[121] S. 685 of the Insolvency Act 2015 of Kenya.
[122] Ibid.
[123] S. 29(1) Insolvency Act 1955 of Eswatini.
[124] S. 33(1) of the Insolvency Act 1955 of Eswatini.
[125] S. 33(2) of the Insolvency Act 1955 of Eswatini.
[126] Article 672 of the Commercial Code 2021 of Ethiopia.
[127] Article 674 of the Commercial Code 2021 of Ethiopia.
[128] Article 599 of the Commercial Code of Egypt.

In sum, there are member states where the defences regime for preferences is very narrow, like Egypt, which only lists awareness of cessation of payments, and Zambia where, because there is a requirement to prove an intention to prefer, there are no defences to those dealing with the insolvent debtor and defences are only afforded to persons taking from the party that dealt with the insolvent. Only two countries, Uganda and Rwanda, introduce equitable considerations as a ground for avoiding or not avoiding a preference, and three countries, Ethiopia, Zimbabwe and Kenya specifically mention the incidence of dealings with related parties or associates of the debtor. Five countries, to wit, Uganda, Zambia, Rwanda, Kenya and Eswatini concern themselves with persons that did not take from the creditor who dealt directly from the insolvent debtor, and the rest are blind to that fact. Five countries, Zimbabwe, Uganda, Rwanda, Eswatini and Ethiopia preserve transactions arrived at in the ordinary course of business. The most popular grounds of defence relate to (lack of) knowledge of insolvency, good faith and payment of consideration.

### *4.4.6. Tabulated Presentation Of The Data Relating To Elements Of Rules For The Avoidance Of Preferences*

In tabulated format[129] the overall picture that emerges on the issue of preferential transactions looks as follows:

| ***Member State(s)*** | ***Need for Intention to Prefer*** | ***Need for knowledge of debtor's insolvency*** | ***Ordinary course of business ?*** | ***Length of suspect period ( in years)*** | ***Number of Available Defences*** |
|---|---|---|---|---|---|
| Comoros and Congo, DR | None | Yes/ No | No | From suspension of payments | 1 |
| Malawi, Mauritius and Seychelles | None | Yes | No | 2 | 3 |
| Zambia | Yes | No | No | .5 | 2 |

[129] Table compiled by the author.

| | | | | | |
|---|---|---|---|---|---|
| Zimbabwe | Yes and No (for related parties) | Yes | Yes | 5 and 1 | 4 |
| Uganda | None | No | Yes | 5 and 3 | 3 |
| Rwanda | Yes | Yes | Yes | 1 | 3 |
| Kenya | Yes | No | No | .5 and 2 | 3 |
| Eswatini | Yes | No | Yes | .5 | 4 |
| Ethiopia | No | Yes/ No | Yes | Suspect period | 4 |
| Egypt | No | Yes/ No | No | From suspension of payments | 1 |
| Total number of countries requiring the element | Both= 1<br>Yes- 4<br>No=8 | Both= 4<br>Yes= 5<br>No=4 | No= 8<br>Yes= 5 | From cessation of payment= 2<br>2 year= 5<br>1 year=1<br>3 years= 1<br>Unknown= 1 | 4 types= 3<br>3 types=4<br>2 types=1<br>1 type=2 |

### *4.4.7. Evaluative Assessment of Preference Rules of COMESA Member States*

It has been noted that the majority of the countries do not prescribe an intention to prefer, and that instead they have provided for defences including knowledge of the debtor's insolvency, good faith and the furnishing of consideration on the part of the creditor. These largely leave the avoidance of a preference to depend on the fault of the creditor. For as long as it is creditor action or omission and not the debtor's that determines whether a preference is avoided, it can be argued that there is a measure of contractual certainty and finality. There are a few countries, however, that still prescribe an intention to prefer and provide no defences for those that deal with the insolvent debtor directly. Much as the lack of defences will speed up proceedings, and, coupled with the fact that the need for proof of an intention to prefer will discourage avoidance proceedings and hence cater for finality of transactions, the fact that the creditor is left at the mercy of the debtor's subjective intention means there will always be some

lingering uncertainty, even with good faith and prudent and diligent conduct on the creditor's part, that the transaction could still be avoided.

A minority of the countries render relevant the relationship between the insolvent debtor and the creditor, albeit in a different manner. Some use the incidence of a close relationship to extend the suspect period and others use it to derive an intention to prefer from the existence of the relationship.

The suspect periods are not uniform. The defences are also not uniformly prescribed.

In all, the approaches by the member states are mottled as there is no uniform or consistent policy approach to be discerned from the way the elements of preferences are laid down in the insolvency laws of the member states under study.

### 4.5. Comparing The Rules Relating To Gifts And Transactions At Undervalue Among The Member States

This discussion will cover both gifts (which are transactions without value) as well as transactions at undervalue. The distinguishing feature between the two is that the former are concluded between and the property is transferred by the debtor to a counterparty who has provided no *quid pro quo* for the transfer, whilst in the case of the latter, some value moves from the counterparty to the debtor in exchange for the debtor's consideration, only that it is not adequate compared to the goods or services offered in exchange for it.[130] Under the former, the counterparty cannot enforce the transaction in case the debtor does not perform his side of the bargain as no consideration would have moved from the promisee,[131] whilst in the latter case a binding and enforceable contract would have been concluded.

In the case of both gifts and transactions at undervalue, the counterparty will suffer prejudice when the transaction gets avoided. Most specifically in the case of transactions at undervalue, the counterparty to the binding contract would want some contractual finality and will be disadvantaged through loss of the bargain when it gets avoided.[132] Transactions at

[130] *Thomas v Thomas* (1842) 2 QB 851.
[131] *White v Bluett* (1853) 23 LJ Ex 36.
[132] de Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Vol. 20 International Insolvency Review 219.

undervalue may not necessarily be aimed at disadvantaging the general body of creditors as, in the run up to an insolvency filing, the debtor may want to raise as much cash as it can to enable it stay afloat in business and hence the transaction may not be tainted with ill intentions at all. However, the general body of creditors may still be prejudiced by it as the value of the debtor's estate will be reduced by the difference between actual market value and the transaction value which falls below that market value.

In England, under section 238 of the Insolvency Act, 1986, no subjective element is placed on the side of the debtor for gifts and transactions at undervalue. The transaction merely needs to have been entered into not more than two years before the commencement of proceedings, in a situation where the counterparty paid no consideration or where the transaction was at undervalue. These are all objective elements. The state of mind of the counterparty is also irrelevant. Hence, for these, there is complete reliance on objective or mechanical elements and intention plays no role. This is because the benefit gained by the counterparty comes at the expense of the creditors as the counterparty would not have paid any consideration or would have paid less than the market value. The sanction is also limited to the benefit gained by the counterparty at the expense of the creditors. That way the counterparty is not placed in any worse position.[133]

Within COMESA, for gifts and transactions at undervalue, we will use, as the yardsticks for comparison are: whether unrelated parties are covered; whether knowledge of the insolvency status of the debtor is an element; whether the fact that the transaction was entered into in the ordinary course of business provides a justification; the length of the suspect period; and the range of available defences. These factors are key in determining the policy leaning of the avoidance provisions for this regime of transactions, that is to say, whether the goal is to maximize returns to creditors or to protect contractual finality.

We should mention, at the outset, and this will be demonstrated in detail below, that the study has noted that there is no uniform approach in the treatment of transactions at undervalue and gifts in that: (a) in some jurisdictions there are separate provisions dealing with gifts and transactions at undervalue. These are countries like Malawi, Mauritius, Seychelles, Comoros,

[133] Ibid.

Democratic Republic of Congo, Ethiopia and Kenya; (b) some countries deal with gifts or transactions at no value only and do not cover transactions at undervalue. This relates to Egypt, Zimbabwe and Eswatini; (c) some countries deal with transactions at undervalue only and not gifts. These are Uganda and Rwanda; (d) one country, Kenya, follows the United Kingdom[134] approach by defining transactions at undervalue to include gifts; (e) some countries provide defences for gifts and not for transactions at undervalue. These are Malawi, Mauritius and Seychelles; (f) almost all countries but Malawi, Mauritius and Seychelles do not give any regard to whether transactions at undervalue are with a related party or not. The three countries mentioned here only capture transactions at undervalue between related parties and do not deal with those between unrelated parties; and (g) in the majority of the member states of COMESA under study knowledge of the insolvency status of the debtor is a defence for actions to avoid gifts and not transactions at undervalue.

### *4.5.1. Whether Unrelated Parties Are Covered*

For gifts, Malawi,[135] Mauritius[136] and Seychelles[137] do not make a distinction between a gift to a related or to an unrelated party− a gift to either of these is avoidable. However, with respect to transactions at undervalue, only transactions with related parties are avoidable.[138] Beyond the possibility that the debtor would be more tempted to favour related parties for transactions at undervalue, the justification for such a dichotomy is difficult to establish as, in the run up to insolvency, in a bid to raise quick money to repay mounting debts or to try to stay in business, transactions at undervalue may also occur with unrelated parties or with such parties as may not be easily caught within the statutory definition of a related party but from whom a benefit may inure to the debtor's officers downstream. Moreover, transactions at undervalue affect all the insolvent debtor's creditors directly so much so that in the final analysis, it ought not to matter whether the transaction at undervalue was with the debtor's related party or not. Either of these will reduce the size of the cake that is ultimately available to unsecured creditors.

[134] Section 238 of the Insolvency Act 1986.
[135] S. 289 of the Insolvency Act 2016 of Malawi.
[136] S. 320 of the Insolvency Act 2009 of Mauritius.
[137] S. 331 of the Insolvency Act 2013 of Seychelles.
[138] S. 293 of the Insolvency Act 2016 of Malawi; S. 324 of the Insolvency Act of Mauritius and s. 335 of the Insolvency Act of Seychelles.

Uganda has a provision for insider dealings between related parties, which are deemed to be preferences.[139] For transactions at undervalue, Uganda, unlike Malawi, Mauritius and Seychelles, makes the rules on transactions at undervalue apply generally and does not make it apply exclusively to related parties.[140]

For gifts, Zimbabwe only discusses the issue of the relationship of the parties with respect to the length of the suspect period for dispositions without value. It is twice as long when compared with a disposition without value to an unrelated party.[141]

Zambia makes no mention of any relationship between the parties.[142]

In Kenya, a close relationship with the debtor is a relevant factor as it vitiates the defence of good faith.[143]

In Eswatini, the relationship of the parties is not a relevant factor in dispositions without value.[144] So, too in Rwanda, for dispositions at undervalue.[145] This situation is akin to the one obtaining in Malawi, Seychelles, Mauritius and Uganda.

Egypt and Ethiopia make no mention of the relationship of the parties to gratuitous donations.[146] The same is the case in the Comoros and in the Democratic Republic of Congo.[147]

The dominant position therefore is that, for gifts, the relationship between the parties is not a material consideration in most of the member states.

### *4.5.2. Knowledge Of The Insolvency Status Of The Debtor*

[139] S. 18 of the Insolvency Act 2011 of Uganda.
[140] S. 16 of the Insolvency Act 2011 of Uganda.
[141] S. 24 Insolvency Act 2018 of Zimbabwe.
[142] S. 45 of the Bankruptcy Act 1967 of Zambia.
[143] S. 685(5) of the Insolvency Act 2015 of Kenya.
[144] S. 26, Insolvency Act 1955 of Eswatini.
[145] Article 216 of the Law Relating to Insolvency 2021 of Rwanda.
[146] Article 671 of the Commercial Code 2021 of Ethiopia and Article 598 of the Commercial Code of Egypt
[147] Articles 67 and 69 of the of the OHADA Uniform Act Organizing Collecting Proceedings for the Clearing of Debts.

For Malawi,[148] Mauritius[149] and Seychelles,[150] in relation to voidable gifts, knowledge by the creditor of the insolvency status of the debtor is a material element to be proved by the person seeking to have the transaction avoided. Knowledge of the insolvency status of the debtor is not a material element in relation to transactions at undervalue.[151] Again, it begs questions why knowledge of the insolvency status of the debtor is an irrelevant factor for transactions at undervalue. Why should this knowledge be relevant for gifts, where no consideration moves from the recipient, but be made irrelevant in cases where some value moves from the counterparty?

Zambia,[152] Kenya,[153] Uganda,[154] Eswatini,[155] Kenya,[156] Rwanda,[157] Ethiopia,[158] Egypt,[159] the Comoros and the Democratic Republic of Congo[160] make no mention of knowledge on the part of the counterparty of the insolvency status of the debtor as a defence to transactions at undervalue.  and so, too Eswatini.[161]

The dominant position in relation to knowledge of the insolvency status of the debtor as a defence to transactions at under value therefore is that this is not provided in the insolvency statutes of COMESA member states.

In relation to gifts, Zimbabwe's law makes no mention of knowledge of the insolvency status of the debtor, though a transaction can only be avoided to the extent that the liabilities of the debtor at any time after the disposition exceeded his assets by less than the value of the property disposed of, in which case the disposition may be set aside only to the extent of the

[148] S. 292(b) of the Insolvency Act 2016 of Malawi.
[149] S. 323(b) of the Insolvency Act 2009 of Mauritius.
[150] S. 334(b) of the Insolvency Act 2013 of Seychelles.
[151] S. 293 of the Insolvency Act 2016 of Malawi; S. 324 of the Insolvency Act of Mauritius and s. 335 of the Insolvency Act of Seychelles.
[152] S. 45 of the Bankruptcy Act 1967 of Zambia.
[153] S. 685 of the Insolvency Act 2015 of Kenya.
[154] S. 16 of the Insolvency Act 2011 of Uganda.
[155] S. 26 of the Insolvency Act 1955 of Eswatini.
[156] S. 685 of the Insolvency Act 2015 of Kenya.
[157] Article 220 of the Law Relating to Insolvency 2021 of Rwanda.
[158] Article 671 of the Commercial Code 2021 of Ethiopia.
[159] Article 598 of the Commercial Code of Egypt.
[160] Articles 67 and 69 of the of the OHADA Uniform Act Organizing Collecting Proceedings for the Clearing of Debts.
[161] S. 26 of the Insolvency Act 1955 of Eswatini.

excess.[162] Malawi,[163] Seychelles[164] and Mauritius[165] make knowledge of the insolvency status of the debtor a defence to an avoidance action relating to gifts. So, too, with the two OHADA Countries of Comoros and Democratic Republic of Congo[166] and Ethiopia,[167] with relation to optional invalidation. Egypt provides no defence to gifts.[168]

Therefore the absence of knowledge of the insolvency status of the debtor is a defence to avoidance actions for gifts in most of the countries under study.

#### *4.5.3. Whether The Transaction Was Entered Into In The Ordinary Course Of Business*

In Kenya, a transaction at undervalue may not be set aside if the court is satisfied that the company entered into the transaction in good faith for the purpose of carrying on its business, and that at the time it did so, there were reasonable grounds to believe that the transaction would benefit the company.[169]

This is not a material element for voidable gifts in Malawi, Mauritius and Seychelles.[170] It is also not a relevant element with regards to transactions at undervalue. It is not a material element for dispositions at undervalue in Zimbabwe,[171] Zambia,[172] Uganda,[173] Eswatini[174] and Rwanda[175] and for gratuitous donations in Ethiopia and Egypt[176] and in Comoros and the Democratic Republic of Congo.[177] This is surprising because gratuitous donations in the form

[162] S. 24 of the Insolvency Act 2018 of Zimbabwe.
[163] Section 292 of the Insolvency Act of Malawi.
[164] Section 334 of the Insolvency Act of Seychelles.
[165] Section 323 of the Insolvency Act of Mauritius.
[166] Articles 67 and 69 of the of the OHADA Uniform Act Organizing Collecting Proceedings for the Clearing of Debts.
[167] Articles 671 and 672 of the Commercial Code 2021 of Ethiopia.
[168] Article 598 of the Commercial Code of Egypt.
[169] S. 682(6) of the Insolvency Act 2015 of Kenya.
[170] S. 292 of the Insolvency Act 2016 of Malawi; S. 323(b) of the Insolvency Act 2009 of Mauritius and S. 334(b) of the Insolvency Act 2013 of Seychelles.

[171] S. 24 of the Insolvency Act 2018 of Zimbabwe.
[172] S. 45 of the Bankruptcy Act 1967 of Zambia.
[173] S. 16 of the Insolvency Act 2011 of Uganda.
[174] S. 33 of the Insolvency Act 1955 of Eswatini.
[175] Article 216 and 220 of the Law Relating to Insolvency 2021 of Rwanda.
[176] Article 671 of the Commercial Code 2021 of Ethiopia and Article 598 of the Commercial Code of Egypt.
[177] Articles 67 and 69 of the OHADA Uniform Act Organizing Collecting Proceedings for the Clearing of Debts.

of corporate social responsibility are common place in today's business world, and, to stay afloat during periods leading up to inability to pay debts, companies may be inclined to dispose of some assets in quick sales in order to stay in business. For transactions at undervalue, the absence of this element as a defence factor may therefore may hurt the business more than it may help it as counterparties will be disincentivized from dealing with struggling businesses, thereby accelerating the demise of the business. Further, counterparties that deal with companies selling their wares or assets at bargain prices stand to lose. This negatively affects contractual certainty.

The dominant position therefore is that the majority of the member states of COMESA do not have the ordinary course of business factor as a defence to the avoidance of gifts or transactions at undervalue.

#### *4.5.4. The Length Of The Suspect Period*

There is a huge variation.

For Comoros and the Democratic Republic of Congo, the suspect period runs from the date of suspension of payments to the date of decision to open proceedings[178] Where they have caused loss to creditors, gratuitous transfers made within six months preceding the period of suspicion are avoidable[179]

In the case of Malawi, Mauritius and Seychelles, for gifts, the suspect period is two years immediately before date of adjudication or commencement of winding up.[180] For transactions at undervalue it is also two years before the date of adjudication or commencement of winding up.[181]

In Zambia, if settlor becomes bankrupt two years from date of settlement, the settlement is void. If settlor becomes bankrupt within ten years from date of settlement, the creditor needs

[178] Article 67 of the OHADA Uniform Act Organizing Collective Proceedings for the Clearing of Debts.
[179] Article 69(1) of the OHADA Uniform Act Organizing Collective Proceedings for Clearing Debts.
[180] S. 289(1)(a) of the Insolvency Act 2016 of Malawi; S.320(1) (a) of the Insolvency Act 2009 of Mauritius and s. 331 (1)(a) of the Insolvency Act 2013 of Seychelles.
[181] S. 293(2) of the Insolvency Act 2016 of Malawi; S. 324(3) of the Insolvency Act 2009 of Mauritius and s. 335 (2) of the Insolvency Act 2013 of Seychelles.

to prove that the settlor was able to settle his debts without the aid of the property in issue and interest in property passed from settlor.[182]

Zimbabwe's transactions without value are avoidable within two years before the presentation of the application for liquidation or within three years if the disposition was made in favour of an associate[183]

For Uganda it is voidable if entered into one year preceding the commencement of the liquidation[184]

In Kenya the transactions are avoidable during two years immediately preceding the onset of insolvency[185] (being the date following conversion of administration into liquidation or the time when the appointment of an administrator ends or the date of commencement of liquidation)[186]

In the case of Eswatini, there is a suspect period of more than two years before the sequestration of his estate if it is proved that immediately after the disposition, the liabilities of the insolvent exceeded his assets[187] and another one of within two years of the sequestration of his estate, where the person claiming under or benefitted by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.

Rwandan transactions without value are avoidable if entered into within the year preceding the commencement of the insolvency proceedings.[188]

For Ethiopia voidability is for Acts performed during the suspect period.[189] In Egypt these are voidable after the date of discontinuing the payments and before issuance of the

[182] S. 45(1) of the Bankruptcy Act 1967 of Zambia.
[183] S. 24(1) of the Insolvency Act 2018 of Zimbabwe.
[184] S. 16(a) of the Insolvency Act 2011 of Uganda.
[185] S. 684(1)(a) Insolvency Act 2015 of Kenya.
[186] S. 684(5) of the Insolvency Act 2015 of Kenya.
[187] S. 26(1)(a) of the Insolvency Act 1955 of Eswatini.
[188] S. 216(1) of the Insolvency Act 2021 of Rwanda.
[189] It can go up to two years, according to Article 978 of the Commercial Code of Ethiopia 2021.

bankruptcy declaration ruling:[190] The date of discontinuing payments could be a problematic issue where the payments do not stop completely or where only the value of the payments drops.

#### *4.5.5. The Range Of Available Defences*

Malawi,[191] Mauritius[192] and Seychelles[193] have three defences, to wit, a creditor acting in good faith; that a reasonable person in the position of the creditor would not have suspected that the debtor was, or would become, unable to pay his due debts (knowledge of insolvency); and, that the creditor had value for the property or altered his position in the reasonably held belief that the transfer of the property to him was valid and would not be set aside. These apply only for gifts but not for transactions at undervalue for which there is no available defence.[194]

For Comoros and Democratic Republic of Congo, there is no defence for gratuitous transfers or sub transfers, except that for sub transfers, payment of valuable consideration entitles the sub transferee to a refund.[195]

In Zimbabwe, for dispositions without value, a payment of valuable consideration and acting in good faith when doing so are defences, and the avoidance action may not affect those taking from the creditor.[196]

Zambia would have the same range of defences as are there for preferences, to wit, taking title in good faith for valuable consideration.[197]

In Kenya, persons that acquired the property from a person other than the debtor, in good faith and for value are protected from avoidance orders.[198] Knowledge of the circumstances surrounding the transaction or close connectedness with the debtor or the company's creditor will vitiate the defence of good faith[199]

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[190] Article 598 of the Commercial Code of Egypt.
[191] S. 292 of the Insolvency Act 2016 of Malawi.
[192] S. 323 of the Insolvency Act 2009 of Mauritius.
[193] S. 334 of the Insolvency Act 2013 of Seychelles.
[194] S. 293 of the Insolvency Act 2016 of Malawi; S. 324 of the Insolvency Act of Mauritius and s. 335 of the Insolvency Act of Seychelles.
[195] Article 71 of the OHADA Uniform Act Organizing Collecting Proceedings for the Clearing of Debts.
[196] S. 30 of the Insolvency Act 2018 of Zimbabwe.
[197] S. 45 of the Bankruptcy Act 1967 of Zambia.
[198] S. 685(4) of the Insolvency Act 2015 of Kenya.
[199] S. 685(5) of the Insolvency Act 2015 of Kenya.

In Uganda[200] the general defences to transactions at undervalue are available only to those who acquire property from a person other than the insolvent, hence they are not available to creditors of the insolvent. These defences include payment of valuable consideration and without knowledge of the circumstances of the transaction under which the person other than the insolvent acquired the property from the company. Recovery may also be barred where the person received the property in good faith and altered his position in the reasonably held belief that the transfer or payment of the property to that person was validly made and would not be set aside. Recovery may be denied where, in the opinion of the court it is inequitable to order recovery. Rwanda has a similar line of defences as Uganda.[201]

Eswatini affords the defences of good faith and payment of valuable consideration.[202]

In Ethiopia there are no defences indicated for gratuitous transfers as these are subject to mandatory avoidance.[203] The same position holds in Egypt.[204]

### *4.5.6. Tabulated Summary Of Positions Of COMESA Member States On Elements Of Rules Relating To Transactions At Undervalue And Gifts*

To sum it up, the positions taken by COMESA member states in relation to elements of their rules relating to gifts and transactions at undervalue are as follows[205]:

| ***Member State*** | ***Application of rules to unrelated parties*** | ***Knowledge of Insolvency status of debtor*** | ***Whether it matters if transaction was made in ordinary course of business*** | ***Length of suspect period (In years)*** | ***Range of Defences*** |
|---|---|---|---|---|---|
| Comoros, and Democratic | No | No | No | From date of suspension of payments. | 0 except for sub-transferees |

[200] S. 19(6) and (7) of the Insolvency Act 2011 of Uganda.
[201] Article 220 of the Law Relating to Insolvency 2021 of Rwanda.
[202] S. 33 of the Insolvency Act 1955 of Eswatini.
[203] Commercial Code of Ethiopia 2019, Article 671(1).
[204] Article 598 (1) of the Commercial Code of Egypt.
[205] Table compiled by author.

| | | | | | |
|---|---|---|---|---|---|
| Republic of Congo | | | | Where loss to creditors= .5months | that paid consideration |
| Malawi, Mauritius and Seychelles | For gifts no distinction. The rules on transaction undervalue only apply to related party transactions | Knowledge relevant for gifts only. Not relevant for transactions at undervalue | No for both gifts and transactions at undervalue | 2 | 3 for gifts 0 for transactions at undervalue |
| Zambia | No | No | No | 2 years, or if settlor becomes bankrupt within 10 years from date of settlement, prove he was unable to pay debts | 2 |
| Zimbabwe | Yes | No | No | 2 generally but 3 if disposition was in favour of an associate | 2 |
| Uganda | No | No | No | 1 | 4 |
| Rwanda | No | No | No | 1 | 4 |
| Kenya | Yes | No | Yes | 2 | 3 |
| Eswatini | No | No | No | 2 | 2 |
| Ethiopia | No | No | No | Suspect period | 0 |
| Egypt | No | No | No | After cessation of payments | 0 |

| | | | | | |
|---|---|---|---|---|---|
| Summary | No= 7<br>Yes 2<br>No for Gifts only=1<br>Transactions at undervalue rules applying exclusively to related parties= 3 | Knowledge relevant for gifts only= 3<br>Knowledge not relevant to transactions at undervalue= All | Yes= 1<br>No: 12 | 2years= 7<br>1 year= 2<br>.5 year 1<br>From date of suspension of payments= 1<br>Suspect period 1<br>Where loss to creditors only= 1 | 4 grounds= 2<br>3 grounds=1<br>2 grounds= 3<br>0 grounds= 5<br>3 grounds for gifts only= 3 |

### *4.5.7. Evaluative Assessment Of Rules Governing Gifts And Transactions At Undervalue Of COMESA Member States*

For Malawi, Mauritius and Seychelles, they exhibit a heavy creditor return maximization leaning for transactions at undervalue in so far as they permit no grounds of defence and make knowledge of insolvency status and whether transaction was entered into in the ordinary course of business irrelevant considerations. But notice that their rules relating to transactions at undervalue only apply to related parties. There is no plausible reason why the rules should not apply to unrelated parties, and if they have to, knowledge should arguably become a relevant factor in defence.

Ethiopia and Egypt also evidence a mean, creditor return maximization streak for all gratuitous transactions with zero defences. Rwanda and Uganda, too, exclude as relevant elements knowledge of the insolvency status of the debtor and that the transaction was entered into in the course of business. Zambia, Zimbabwe and the Comoros are in this league, too.

In essence, on average, there is heavy creditor return maximization leaning in the member states in so far as transactions at undervalue and gifts are concerned. Though this is the case, it is evident the member states approach the issues differently, especially as regards related parties, the length of the suspect period and number of available defences.

## 4.6. Conclusion

With the exception of transactions at undervalue and gifts where there is an indication that most member states lean towards creditor return maximization, albeit in a not so uniform manner, the study has revealed that most of the transaction avoidance rules in COMESA member states are randomly or haphazardly drawn with no clear or consistency policy framework informing their existence or choice. This is evident from the fact that there seems to be no uniform pattern in most member states that shows whether they are leaning towards contractual certainty and predictability or creditor return maximization friendly alignments. This is of course with the exception of those member states with the most recent laws like Rwanda. The older the laws of a member state, the more confusing it is to determine its leaning. An example is with Zambia where a 1967 Bankruptcy Act remains in force when England, its former colonial governor, reviewed and upgraded their insolvency laws in 1986, 2002 and 2020.

The above narrative has also revealed that family or legal culture or tradition has a diminishing or minimal role, at least currently, in informing the content of transaction avoidance rules in the member states. Of course, notably, countries like Egypt, Ethiopia, Comoros and the Democratic Republic of Congo have exhibited structural or formulaic similitude in their transaction avoidance rules, though the content has tended to differ in some cases. This can be attributed to their common civil law heritage. Member states within the same legal family sometimes exhibit glaring differences in their approach to the subject and this is very common with those states that have had an experience with legal reform since independence. In the case of preferences, some member states' avoidance rules show a leaning towards the goal of contractual certainty in their approach and a few promote creditor return maximization with the majority having a mixture of both elements. There is no clear intra-regional economic bloc policy with regards to preferences, and, for transactions at undervalue and gifts, it appears, too, that any similarities in the general policy approach are purely coincidental and not as a result of a deliberate policy consensus. In sum, the countries have come to the party but each is singing from its own playlist, though the general themes are the same in so far as their insolvency laws all have avoidance rules dealing with preferences, transactions at undervalue and gifts. This situation where legal family plays little or no role in informing the content of the rules may have some significance in efforts to harmonize the rules and this will be explored further in the chapters that follow.

As the above narrative and analysis was undertaken so as to reveal the material that is proposed to be harmonized, in the chapter that follows, the study will embark on a general discussion of the subject matter of harmonization of laws, delving into its meaning, importance, historical foundations, developments to modern day, theories and general approaches to the subject matter.

# CHAPTER 5

# HARMONIZATION OF LAWS: A RE−APPRAISAL OF THE THEORY AND PRACTICE

## 5.1. Introduction

In the previous chapter, the content of transaction avoidance rules relating to preferences, gifts and transactions at undervalue in most of the member states of the COMESA regional economic bloc has been discussed. It has been observed that aspects of the content of each of the rules vary, sometimes in a very significant way. This is not surprising as insolvency law's visions or goals are many and there is no commonly agreed or preferred order of importance of the various visions of insolvency law among member states the world over. This is therefore not even a case of common objectives[1] but divergent approaches.[2] The divergent approaches arise from a lack of ordering of the identified objectives. Bearing in mind that this thesis has set out to inquire if these diverges can be eliminated or minimized through the harmonization or approximation of the selected avoidance rules under study,[3] this chapter aims to re-appraise the theory and practice relating to harmonization of laws.

The chapter begins with a discussion of the disadvantages that stem from having unharmonized transaction avoidance rules in a market place in the areas of preferences, gifts and transactions at undervalue. The identified negativities are the drivers of this study's quest for harmonization. A discussion of the meaning and importance of the idea of harmonization of laws will then be undertaken, followed by a brief take on the history of harmonization of laws, identifying the major players in harmonization processes across the globe. Practices that have developed in relation to harmonization of laws will then be reviewed together with a discussion of the main arguments against harmonization. Finally, there will be a discussion of the ideal

[1] Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) 8 (2) European Company and Financial Law Review 235.
[2] Schorr S, 'Avoidance Actions Under Chapter 15: Was Condor Correct?' (2016) Volume 35 Issue 1 Fordham International Law Journal 350.
[3] Article 4(6) of the Treaty Establishing the Common Market for Eastern and Southern Africa available at https://www.comesa.int>comesa-treaty/ accessed on April 15, 2023.

method or approach to be followed in any harmonization endeavour for transaction avoidance rules.

The chapter aims to create a platform for later discussion on whether it is feasible to harmonize the laws relating to preferences, gifts and transactions at undervalue in the COMESA regional economic block, and if so, how that can best be achieved. If not, what alternative(s) may be explored to attain a similar outcome.

## 5.2. The Problem With Having Divergent Transaction Avoidance Rules In A Regional Economic Block

### *5.2.1. The Current State Of Affairs*

Despite the fact that article 4(6)(b) of the COMESA Treaty contains a specific undertaking by member states to harmonize their laws to the extent required for the better functioning of the common market, the insolvency laws of the COMESA member states in general, and their transaction avoidance rules in particular, remain in a state of dissonance, content-wise. There is no insolvency law treaty currently in force covering or binding all or even the majority of the member states of COMESA, and there are no commonly applicable transaction avoidance rules on preferences, gifts or transactions at undervalue in the regional economic block. Observably, the OHADA member states have, in contrast, a uniform law on bankruptcy, and avoidance provisions for both gratuitous transfers and preferences are covered under it.[4] However, within COMESA only Comoros and the Democratic Republic of Congo are members of OHADA and therefore the uniform law governing transaction avoidance is only applicable to these two OHADA member states to the exclusion of the rest of the member states. Of course, notably, Malawi, Seychelles and Mauritius also share the same avoidance rules, word for word, and so, too, to a large extent, Uganda and Rwanda. There are therefore three different sets of countries (cumulatively seven COMESA member states in total) where each set or grouping has similar avoidance rules in a case where there is no inter-group or inter-set similarity in avoidance provisions.

[4] Articles 67, 68 and 69 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.

It ought to be mentioned also, that some nine COMESA member states have taken the progressive step of adapting and enacting within their national legislations the UNCITRAL Model Law on Cross-Border Insolvency, 1997. The countries are: The Democratic Republic of Congo, Comoros, Kenya, Malawi, Mauritius, Rwanda, Seychelles, Uganda and Zimbabwe.[5] Comoros and Democratic Republic of Congo's adoption of the Model Law came by virtue of their membership of OHADA. The countries that adopted the Model Law are just below half the member states of COMESA. Their adoption of the Model Law goes some way towards the harmonization of insolvency laws albeit only at a cross border and therefore private international law level and not at substantive law level. That said, however, whilst the UNCITRAL Model Law on Cross-Border Insolvency, 1997 grants rights to the insolvency practitioner from the jurisdiction where the foreign main insolvency proceeding has been opened to commence transaction avoidance proceedings in any jurisdiction where the foreign main proceeding has been granted recognition,[6] that right does not entail the application, in the foreign non-main proceeding, of the law of the jurisdiction where the foreign main proceeding has been commenced, meaning, potentially, that local transaction avoidance rules in the countries where secondary insolvency proceedings are taking place − the so called *lex fori concursus* − would apply. The absence of any choice of law guidance under the UNCITRAL Model Law[7] leaves the determination of the issue of applicable law to local conflict of law rules,[8] and given the fact that COMESA member states are from different legal traditions or families, this makes the quest for applicable law in transaction avoidance proceedings having a cross-border element quite a task. This will mean that in cross-border insolvency law cases where there is need for transaction avoidance, lawyers have to familiarize themselves with the avoidance rules of all the member states of COMESA or incur the costs of briefing local lawyers to advise them on their content, and the same thing applies where an investor wants to place their investments in multiple jurisdictions in the common market.

[5] https://uncitral.un.org.
[6] Article 23 of the UNCITRAL Model Law on Cross Border Insolvency 1997.
[7] Kaphale K, 'Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Law Judgments and Orders in Malawi' Unpublished LLM Thesis, University of Malawi, Chancellor College (2013), page 43; *Re SPhinX Ltd*, 351 BR 103, 115-116 (S D N Y 2006).
[8] Ho L, 'Conflict of Laws in Insolvency Transaction Avoidance' (2008) 20 S Ac L J 343

### *5.2.2. Problems With The Current State Of Affairs*

The diversity of laws in one market place is an impediment to trade, and so, too, the multiplicity of legal traditions in one market place, making the issue of harmonization of laws a very urgent one.[9] It should be possible to come up with several hypothetical examples of how the current discordant situation in the content of transaction avoidance rules within COMESA may lead to uncertainties going beyond mere choice of law issues. Such an exercise may not be very useful as the fertile nature of the human imagination may generate countless fictional situations a handful of which may, by chance, arise in real life, but the majority of which may possibly never arise at all. Possible variations of factual and legal situations that may cause problems are endless.[10] The sheer variety of differences in the functional aspects of the content of the avoidance rules relating to preferences, gifts and transactions at undervalue which have been identified in the previous chapter should serve to raise the red flag as to the levels of possibilities for legal uncertainty that are available in the common market, and so too, give a hint on variations in effectiveness levels of the various legal regimes in so far as the attainment of the objectives of insolvency law are concerned. The differences, in reality, reflect divergent national insolvency and commercial policy choices.[11]

Consider for example, the situation where, for both transactions at undervalue and preferences, the suspect period is reckoned differently among the studied jurisdictions, with the Democratic Republic of Congo, the Comoros and Egypt calculating the period from the suspension or cessation of payments, and the other member states calculating the period from the commencement of insolvency proceedings or the appointment of a receiver. The date when the debtor ceases to make or suspends payments is seldom the date for the commencement of winding up proceedings or the appointment of a receiver. This disparity in reckoning the suspect period would lead to different outcomes with, in some instances, the appointment of a receiver or commencement of insolvency proceedings happening before a complete cessation or

[9] Shumba T, 'Revisiting Legal Harmonization Under the Southern African Development Treaty (2015) Vol.19 Law, Democracy and Development 127; Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965, United National Commission on International Trade Law Yearbook Vol 1: 1968-70 (1971) 18

[10] Westbrook J, 'Choice of Avoidance Law in Global Insolvencies' (1991) Volume 17, Issue 3, Article 3, Brooklyn Journal of International Law 499.

[11] Schorr S, 'Avoidance Actions Under Chapter 15: Was Condor Correct?' (2016) Volume 35 Issue 1 Fordham International Law Journal 350.

suspension of payments and vice versa. Then there is the fact that where the period is reckoned from the appointment of a receiver or the commencement of insolvency proceedings, the actual time period prior to appointment of a receiver or commencement of winding up proceedings within the common market ranges from half a year in some cases to two years, and in the case of preferential payments in Zimbabwe, for example, the period goes as far back as three years.

The fact that for preferences, the majority of the jurisdictions studied do not require the subjective element of an intention to prefer, with only four of the studied jurisdictions requiring the same is also remarkable as it reveals the direction the common market has taken with regards to the choice between avoidance provisions relating to preferences which are geared to promote contractual certainty and predictability on the one hand and those that seek to maximize returns to creditors on the other hand. Then, again, there is the divergence in relation to whether the counterparty must know of the debtor's insolvency status and whether the alleged preferential transaction was conducted in the ordinary course of business. The diversity in the nature and range of available defences (with some member states having as few as one ground of defence only whilst others have as many as four) also brings with it its own challenges on the certainty front − a typical case of local sensitivities to commercial uncertainty shaping the nature and number of defences to avoidance actions.[12]

The previous chapter also revealed quite some differences in the rules on transactions at undervalue with member states taking different positions on whether the rules applied to transactions with unrelated parties; whether knowledge of the insolvency status of the debtor mattered to the question of voidability of the transaction; whether transaction entered into in the ordinary course of business were vulnerable; the length of the suspect period and the range of available defences.

### *5.2.3. The Impact Or Significance Of The Differences*

Having unharmonized preferences, gifts and transaction avoidance rules will negatively affect the efficiency of the common market and drive up transaction costs[13] due to the prevailing

[12] Ho L, 'Conflict of Laws in Insolvency Transaction Avoidance' (2008) 20 S Ac L J 343.
[13] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.

uncertainties on applicable law in cross-border insolvency scenarios. It has also been said that the diversity of transaction avoidance rules hampers cross-border business, insolvency proceedings and restructuring efforts in the sense that creditors who give a loan to a financially weak debtor located in another member state must be aware of the risk of the debtor's insolvency which may involve the application of the transaction avoidance rules of the *lex fori concursus* which may differ massively from the creditor's home country insolvency laws. This leads to uncertainty of the creditor's legal position and raises transaction costs for loan and security agreements in that the insolvency practitioner will have to commission legal opinions and to pay significant solicitor's fees when contemplating the decision to commence avoidance action.[14] The diversity in the laws also affects the efficiency of transaction avoidance proceedings in cross-border proceedings.[15] Hence the proposal to avoid these uncertainties, inconveniences and resultant costs through the harmonization of national transaction avoidance rules in the common market area.[16]

## 5.3. The Meaning And Importance Of Harmonization Of Laws

### *5.3.1. Harmonization Compared To Approximation And Unification Of Laws*

Leebron has defined harmonization as making the regulatory rights or government policies of different jurisdictions identical or at least more similar.[17] Keay, on the other hand,

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[14] Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance rules* (Intersentia 2022) 13, 18.

[15] Ibid, pages 13 to 14.

[16] Insol Europe, 'Harmonization of Insolvency Laws at European Union Level' PE 419.633 (April, 2010) available at <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf; accessed on April 30, 2023; See also Frit D, 'European Union Briefing Note: Harmonization of Insolvency Law at European Union Level: Avoidance Actions and Rules on Contracts', 2011 pp 10-15 available at https://www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22311/201106622311ATT2231EN.pdf accessed on April 30, 2023; de Weijs R, 'Towards an Objective European Rule in Transaction Avoidance' (2011) International Insolvency Review 219; Wessels B, 'Harmonization of Insolvency Law in Europe' (2011) 8 European Company Law 27; Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79; Leandro A, ' Harmonization and Avoidance Disputes Against the Background of the European Insolvency Regulation' in Grant J, (ed) *Harmonization of European Insolvency Law(*Insol Europe 2017) 71, 81.

[17] Leebron D, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 Can Bus L J 63; Fontaine M, 'Law Harmonization and Local Specificities– A Case Study: OHADA and the Law of Contracts' (2013) Volume 18 Issue 1, Uniform Law Review 50.

posits that the word approximation, which, incidentally, is also used in article 4(6) of the COMESA Treaty, is synonymous in meaning with harmonization[18] and that they both mean the adoption of binding[19] legislative measures setting out common regulatory standards across member states in a common market area. He states that harmonization refers to efforts to change the laws of two or more countries to be more substantively similar to each other.[20] Mugasha,[21] having defined harmonization as the process where laws, regulatory frameworks or standards of member states are aligned to make them more uniform or coherent, notes that though the term is used interchangeably with approximation, the two terms are technically different with approximation being the process of removing undesired or unwarranted differences in national laws, or bringing different elements closer together by eliminating their differences to accomplish a specific objective. He believes that harmonization involves a greater degree of integration that replaces national provisions with those provisions common to all partner states.[22] Observably, the dividing line between harmonization and approximation is too thin as to be almost imperceptible, and the shared goals informing each of the processes add to the blurring of the divide. That said, unification of laws is at the extreme end of the scale where the laws of different countries are made to be uniform.[23] It is difficult to achieve compared to harmonization[24] which is primarily aimed at the elimination of discord with a view to avoiding incompatible outcomes associated with the application of rules of different legal systems.[25]

[18] Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.

[19] Harmonization efforts may sometimes result in the making of non- binding or optional ' soft-law' however, one example of which is the UNICTRAL Model Law on Cross-border Insolvency 1997; Mancuso S, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157.

[20] Mancuso S, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157; Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79; Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.

[21] Mugasha A, ibid.

[22] Mathijsen P and Dryberg P, *Mathijsen's Guide to European Union Law* (11th edn, Sweet and Maxwell 2013) 475-479.

[23] Porcelli S and Zhai Y, 'The Challenge for the Harmonization of Law' (2010) 17 Transit Stud Rev 430.

[24] Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 108.

[25] Nicholson C, 'Some Preliminary Thoughts on a Comparative Law Model for Harmonization of Laws in Africa' (2008) Vol. 14 (2) Fundamina 50.

The above are just some attempts at defining the concept of harmonization of laws. Though there is some disagreement as to whether it should lead to total uniformity or substantial similarity of laws, Patrick Glenn sums it up well when he says that the harmonization process is an evolutionary process that results in ever greater levels of uniformity and correspondingly greater levels of supranational governance.[26] It is the removal of discord and the reconciliation of contradictory elements between the rules of two or more legal systems often by elimination of major differences.[27] Hence, harmonization does not necessarily have to be discussed using the absolutist lens of total unification of laws, but may also describe all or any of the activities that eliminate differences in the laws[28] and leading to the eventual unification of laws ranging from partial to substantial to total uniformity.[29] Harmonization is not synonymous with unification of laws as unification would lead to identical rules whereas harmonization leads to ' more or less similar' laws in different countries.[30] As Gopalan puts it, harmonization (within the context of international trade and commerce) is any attempt, by whatever instrument to minimize or eliminate discord between national laws as they apply to international commercial transactions.[31]

### *5.3.2. Benefits Of Harmonization Of Laws*

[26] Smit J, 'The Harmonization of Private Law in Europe: Some Insights from Evolutionary Theory' (2002) 31 Ga J Int'l & Comp L 79; Patrick Glen H, 'Harmony of Laws in the Americas' (2003) 34 U Miami Inter Am L Rev 223.
[27] Shumba T, 'Revisiting Legal Harmonization Under the Southern African Development Treaty (2015) Vol.19 Law, Democracy and Development 127; Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965, United National Commission on International Trade Law Yearbook Vol 1: 1968-70 (1971) 18.

[28] Twigg-Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross-Border Transactions' in Twigg-Flessner C and Puig G, (eds) *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.
[29] Zamora S, 'NAFTA and the Harmonization of the Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12 Ariz J Int'l & Comp L 401. In Zamora's view, harmonization should not be confused with unification of laws or with the imposition of one legal model on all jurisdictions; See also Broadman M, 'The Myth of Harmonization of Laws' (1991) 39 Am J Comp L 699.
[30] ILO Decent Working Team and Office for the Caribbean, 'ILO Background Paper No. 2, Strategy for the Harmonization of Labor Law: A Discussion of Options' 10th ILO Meeting of Caribbean Ministers of Labor, Kingston, Jamaica, 23-24 February, 2017.
[31] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Vol. 5. Issue 1 San Diego Int'l Law Journal 267.

Within the context of insolvency laws, harmonization has been defined by UNCITRAL to mean the process through which domestic laws may be modified to enhance predictability in cross-border transactions[32] and its deployment is key to the realization of market integration as only a harmonization of laws is seen as being able to solve legal uncertainty resulting from legal diversity,[33] prevent forum shopping in a common market area and promote a feeling of fairness as one rule applies in the same factual and legal scenario no matter where the assets are located.[34] Given that in international commerce the allocation of risk is predicated on certainty,[35] a diversity of laws in any trading area or market place increases transaction costs, hence the need for the harmonization of laws.

According to Mancuso, economic integration cannot subsist without a solid legal framework[36] attainable through legal reforms aimed at reducing transaction costs supporting economic growth and facilitating transnational business transactions. As economic activities become increasingly global, there is a strong incentive for the law to follow the same pattern. The diversity of national laws is seen as an important obstacle to economic development[37] as it affects trade negatively.[38] Being the goal of African countries to promote economic development through the integration of their economies,[39] to facilitate this goal, they must, of needs, also direct their efforts towards the harmonization of substantive laws relating to trade

[32] Block-Lieb S and Halliday R, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42 Texas International Law Journal 475, 494.
[33] Fontaine M, 'Law Harmonization and Local Specificities– A Case Study: OHADA and the Law of Contracts' (2013) Volume 18 Issue 1, Uniform Law Review 50.
[34] Mancuso, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157; Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.
[35] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Vol. 18. No. 4 American University International Law Review 803.
[36] Mancuso, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157.
[37] See also, Allot A, 'Towards the Unification of Laws in Africa' (1965) International and Comparative Law Quarterly 366, 378; Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 107.
[38] Ndulo M, 'Harmonization of Trade Laws in the African Economic Community (1993) Vol 42 International and Comparative Law Quarterly 101, 103.
[39] Article 4(1) of the Treaty Establishing the African Economic Community, signed at Abuja, Nigeria in 1991. Article 28 of the said treaty aspires to promote existing and yet to be established regional economic blocs on the continent and also mentions the issue of harmonization of various activities within the regional economic blocs, and arguably, this embraces the issue of harmonization of trade laws.

and investment.[40] Following a single set of rules, instead of having to consider various state laws is more efficient, fair, reduces transaction costs through the promotion of legal certainty and predictability[41] and facilitates the development of economic activities.[42]

While the major detractors from harmonization efforts are state sovereignty and national pride in socio-legal or cultural heritage,[43] principal motivators for the harmonization of laws in a regional economic block, apart from the belief that we now live in a 'global village'[44] include: (i) uncertainty (and therefore risk)[45] caused by a plethora of national laws, any of which may apply.[46] The reduction of such risk leads to an increase in the value of the transaction;[47] (ii) the fact that a harmonizing instrument provides another choice that is neutral, for both parties, when neither entity is willing to surrender reliance on their own law;[48] (iii) the unsuitability of some national laws for international transactions;[49] (iv) disparities between different national laws;

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[40] Mancuso, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157.

[41] Estrella Faria J, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage? (2009) Unif L Rev 5.

[42] Estrella Faria J, Ibid; Oppong, R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 108; Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.

[43] Gopalan, S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Vol. 5. Issue 1 San Diego Int'l Law Journal 267; Pottow J, 'Greed and Pride in International Bankruptcy: The Problem of and Proposed Solutions to 'Local Interests' (2006) 104:8 Michigan Law Review 1899; Faure M, 'Legal Harmonization From the Perspective of the Economic Analysis of Law' in Faure M, Koziol H and Puntscher-Riekmann S, (eds) *Vereintes Europa-Vereinheitlichtes Recht?* (Australian Academy of Science Press 2008) available at https://verlag.oeaw.ac.at/en/product/vereintes-europa-vereinheitlichtes-recht/30270 accessed May 3, 2023.

[44] Westbrook J, 'Creating International Insolvency Law' (1996) 70 American Bankruptcy Law Journal 563

[45] Stephan P, 'The Futility of Unification and Harmonization of International Commercial Law' University of Virginia School of Law, Legal Studies Working Papers Series, Working Paper No. 99, 10 June, 1999 available at http://papers.ssrn.com/paper.taf?abstract_id=169209 accessed on May 3, 2023.

[46] Kennedy LJ, 'The Unification of Law' (1910) Vol. 10 No 2 Journal of the Society of Comparative Legislation 212 where he said: '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…'. See also Ansell M, 'From the Unification of Law to Harmonization' (1976) 51 Tul L Rev 108; Stephan P, 'The Futility of Unification and Harmonization of International Commercial Law' (1999) 39 Va J Int'l L 743.

[47] Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.

[48] Twigg-Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross Border Transactions' in Twigg-Flessner C and Puig G, (Eds) *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.

[49] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Vol. 5. Issue 1 San Diego Int'l Law Journal 267; Stephan P, footnote 45 above cites the need to improve the law as one of the motivators for harmonization of law. See also Eiselen S, 'Teaching Transnational Commercial Law in the African Context'

(v) some national laws being written in languages less understood at international level; (vi) a harmonizing instrument being drafted in more languages therefore being more accessible; (vii) the difficulty of proving foreign laws in local courts, an exercise that is both time consuming and expensive; (viii) the new (harmonizing) instruments providing an opportunity to regimes with deficient laws for an upgrade and developing countries with an opportunity to get rid of their colonial laws in favour of a modern (and workable, at cross-border level) regime;[50] (ix) the existing international legal regime may be inadequate; and (x) harmonizing promotes international trade and economic development by eliminating barriers.[51]

With specific reference to the harmonization of avoidance rules, Keay[52] points at the following six points in favour of the process: (i) it would reduce conflicts and diverges and bring uniformity and consistency, which in turn would enhance the development of the internal market, in this case that of the EU; (ii) a common framework might facilitate credit because it increases predictability of outcomes of legal disputes; (iii) harmonized rules will foster equality among creditors as the same rules would apply to all insolvency proceedings opened within the common market; (iv) harmonized rules may overcome peculiarities of individual national systems that allow avoidance claims in limited circumstances; (v) harmonized rules would improve procedural efficiency in terms of the time and costs - a practitioner needs to know only one set of rules to challenge any transaction regardless of the law applicable to the transaction; and, (vi) it will prevent forum shopping. Overall, this might positively impact the cost of credit which may decrease due to improved predictability of the laws relating to legal disputes, taking away the need for creditors to protect themselves against the risk of avoidance by increasing

(2016) Vol 40(2) The University of Western Australia Law Review 3; Twigg-Flessner C , 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross Border Transactions' in Twigg-Flessner C and Puig G, (eds), *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.

[50] Stephan P, 'The Futility of Unification and Harmonization of International Commercial Law' University of Virginia School of Law, Legal Studies Working Papers Series, Working Paper No. 99, 10 June, 1999 available at http://papers.ssrn.com/paper.taf?abstract_id=169209 accessed on May 3, 2023; Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.

[51] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Vol. 18. No. 4 American University International Law Review 803.

[52] Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.

interest rates in transactions.[53] Further, transaction costs would be lower as only one set of avoidance rules would need to be worried about.

Goode[54] sums it all up when he says, within the context of regional economic groups, that harmonization facilitates the common market or political economic grouping by creating a similarity in national laws governing domestic transactions, so that the boundaries do not affect commerce within the grouping.[55] There seems to have emerged some consensus that harmonization of transaction avoidance rules, not only in the EU, would resolve major obstacles in the functioning of the internal market and is hence desirable.[56] Harmonization of commercial laws also harmonizes conditions of competition in a common market area[57] and averts forum shopping that may attract investors to only flock to the member state with the best laws.[58] It creates a disincentive for member states engaging in a 'race to the bottom'[59] in terms of the content of their avoidance rules.

At the supranational level, the rationales for harmonization therefore include efficiency, clarity, fairness and predictability.[60]

## 5.4. A Snapshot Of The Historical Development Of The Harmonization Of Laws

[53] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.
[54] Goode R, 'Reflections on the Harmonization of Commercial Law' in Cranston R and Goode R, (eds*) Commercial and Consumer Law: National and International Dimensions* (Oxford: Clarendon Press 1993) 3.
[55] Shumba 'Revisiting Legal Harmonization Under the Southern African Development Treaty (2015) Vol.19 Law, Democracy and Development 127; Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965, United National Commission on International Trade Law Yearbook Vol 1: 1968-70 (1971) 18,
[56] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Am U Int'l L Rev 803, 804-805; Mancuso S, ' Trends in the Harmonization of Contract Law in Africa' (2007) Vol. 13 Issue 1, Annual Survey of International and Comparative Law 157; Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 17;
[57] Faure M, 'Harmonization of Environmental Law and Market Integration: Harmonizing for Wrong Reasons?' (1998) European Environmental Law Review 169.
[58] Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis of Comparative Law' (1999) 48 International Comparative Law Quarterly 405.
[59]Faure M, 'Legal Harmonization From the Perspective of the Economic Analysis of Law' in Faure M, Koziol, H and Puntscher-Riekmann S, (eds) *Vereintes Europa-Vereinheitlichtes Recht?* (Australian Academy of Science Press 2008) available at https://verlag.oeaw.ac.at/en/product/vereintes-europa-vereinheitlichtes-recht/30270 accessed May 3, 2023.
[60] Backer L, 'Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition within Federative and International Legal Systems' (1996) Volume 4, Issue 2 Tulsa Journal of Comparative and International Law 185.

### *5.4.1. Roman Law Era*

The impulse to reduce diversity among the legal systems governing commerce has manifested itself for as long as people have traded across political boundaries. This can be traced as far back as the times of the Roman empire where Roman law reigned supreme and unified the rules of commerce for large portions of the commercial world, through to medieval period with the development of the *lex mercatoria,*[61] and through to the revival of Roman law in western and central Europe during the 12th and 13th centuries.[62] This was led by the desire for various market cities to acquire a single template of rules governing trade.[63] Much of the spread of such uniform laws was through the process of legal transplantation,[64] where entire codes or aspects of foreign laws were 'borrowed' so to speak, from a common source and made to apply in territories and cultures far removed from the place of origin of such laws.

### *5.4.2. The Period Of Colonization By Western Powers*

Nineteenth and twentieth century manifestations of harmonization of laws through legal transplantation occurred during the period of colonization in Africa and elsewhere, where the colonies received laws wholesale from the colonizing powers, hence leading to a similarity in the laws. Civil laws, Roman Dutch laws or the Common law found their way into African and other colonized territories depending on the nature of law applicable in the colonizing country.[65] Entire statutes or codes governing commerce or other fields were transplanted as 'received' law.[66] This type of harmonization through received law differs from modern harmonization, as

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[61] Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965, United National Commission on International Trade Law Yearbook Vol 1: 1968-70 (1971) 18; Cremades B and Plehn C, 'The New Lex Mercatoria and the Harmonization of Laws' (1984) 2 Boston University Law Journal 319: Shumba T, 'Revisiting Legal Harmonization Under the Southern African Development Treaty (2015) Vol.19 Law, Democracy and Development 127. The Paulian action which is an avoidance law in Roman law, spread through the Lex Mercatoria to other countries including the UK and elsewhere as fraudulent conveyance law.

[62] Zeller B, 'The Development of Uniform Laws−A Historical Perspective' (2002) 14(1) Pace Int'l L Rev 163

[63] Stephan P, 'The Futility of Unification and Harmonization of International Commercial Law' University of Virginia School of Law, Legal Studies Working Papers Series, Working Paper No. 99, 10 June, 1999 available at http://papers.ssrn.com/paper.taf?abstract_id=169209 accessed on May 3, 2023.

[64] Watson A, *Legal Transplants: An Approach to Comparative Law'* (Athens: University of Georgia Press 1993) 21

[65] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Volume 5 Issue 1, San Diego International Law Journal 267.

[66] Bamodu G, 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa' (1994) Volume 38, Issue 2, Journal of African Law 125

the former was almost always imposed on the recipients, while the latter is, presumably, a product of free choice by an independent legal system.[67] The latter, voluntary form of harmonization is being used by former colonies to rid themselves of the 'received laws' in place of modern laws that are more facilitative of international trade and commerce. A typical example within COMESA is Malawi which enacted a standalone Insolvency Act in 2016.

Another type of received laws are religious laws, mostly Islamic law, prevalent in African and other countries[68] with a predominant Muslim population, and existing side by side with local customary and sometimes other 'received laws' from the west.[69]

### *5.4.3. Modern Day Harmonization Drives And The Lead Players In The Process*

The advent of globalization through increasing cross-border trade led to the quest for the introduction of world-wide uniform laws relating to various aspects of trade.[70] The process of globalization in all spheres of life, but most importantly in international trade, has placed a strain on domestic laws to properly provide for acceptable solutions in international commercial relations, and globalization is also detected in the regional organizations that are coming into existence to overcome the obstacles of national borders, such as different legal systems, customs and excise duties, the free movement of goods and so on.[71] There is now a greater impetus to create international commercial law instruments because insularity is no longer possible as contacts between legal systems that are foreign are more common than ever before.[72]

The need for the harmonization of laws at multinational level proved to be so important that it led to the creation of international member state led institutions whose sole mandate is to promote and oversee the process. These modern endeavours at harmonization at multinational level can trace their roots to the second half of the 19th century with the establishment of the Hague Conference on Private International Law in 1893 focusing on conflict of laws instruments

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[67] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Volume 5 Issue 1, San Diego International Law Journal 267.
[68] See for example, section 24(4) of the Constitution of the Republic of Kenya in relation to the applicability of Islamic law to marriage, divorce and inheritance.
[69] Oppong R *, Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 106.
[70] Zeller B, 'The Development of Uniform Laws− A Historical Perspective' (2002) 14 (1) Pace Int'l L Rev 163
[71] Eiselen S, 'Teaching Transnational Commercial Law in the African Context' (2016) Vol 40(2) The University of Western Australia Law Review 3 .
[72] Westbrook J, 'Creating International Insolvency Law' (1996) 70 American Bankruptcy Law Journal 563.

within the realm of Europe.[73] The International Institute for the Unification of Private Law (UNIDROIT), established in 1926[74] currently has 63 member states drawn from five continents and the membership includes the African nations of Egypt, Nigeria and South Africa.[75] At United Nations level, the General Assembly did in 1966 establish the United Nations Commission on International Trade Law[76] (UNCITRAL) with the mandate to further the progressive harmonization and unification of international trade law.[77] One of its outputs is the United Nations Convention on Contracts for the International Sale of Goods.[78]

The above mentioned multinational bodies are not the only ones involved in the area of harmonization of laws. Harmonization of laws also occurs at the level of regional trading blocs, for example at European Union level where several regulations and directives have been enacted governing various aspects of commercial and trade laws.[79] Article 4(6)(b) of the COMESA Treaty is also an example of a provision in a foundational instrument of a regional economic bloc creating an imperative for legal harmonization,[80] and so is article 126(2)(b) of the Treaty Establishing the East African Community and, at continent wide level in Africa, article 11(3) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament. With most of the African regional economic groupings, harmonization is just one of the ways of enhancing economic integration,[81] and is not the primary aim of the

[73] Estrella Faria J, 'Future Directions of Legal Harmonization and Law Reform: Stormy Seas or Prosperous Voyage? (2009) Unif L Rev 1

[74] Ibid.

[75] Amongst the soft laws produced by UNIDROIT is the UNIDROIT Principles of International Commercial Contracts available at https://www.unidroit.org/wp-content/uploads/2021/06/unidroit-Principles-2016-English.bl.pdf accessed 1 November 2024.

[76] United Nations General Assembly Resolution 2205 (XXI), of 17 December, 1966 (Reproduced in UNCITRAL Yearbook Vol 1: 1968-1970, Part One, Chapter II, Sec. E)

[77] Among its outputs is the United Nations Convention on Contracts for the International Sale of Goods, April 1980, available at < https://uncitral.un.org/en/texts/salegoods > accessed on May 20, 2023. It is in the category of hard law.

[78] https://uncitral.un.org.

[79] Letto-Vanamo P, 'Harmonization of Law: From European to Global Approach' in Lin L and Zengyi X, (eds) *China Forum on the Rule of Law: Rule of Law in China and Finland; Comparative Studies of their Development, History and Model* ( Social Sciences Academic Press, China 2013) 162; Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.

[80] Regional trading blocs such as ASEAN, NAFTA, OAS are also among those that engage in harmonization of law endeavours- See Zeller B, 'The Development of Uniform Laws– A Historical Perspective' (2002) 14 (1) Pace Int'l L Rev 163.

[81] Ndulo M, 'The Need for the Harmonization of Trade Laws in the SADC' (1996) 4 African Yearbook of International Law 195.

organizations.[82] This could explain why not much progress has been made in the direction of harmonization of laws by African regional economic groups, this far.[83] This is unlike the case of OHADA, a member state led grouping of African states established in 1993, mostly composed of francophone states in west and central Africa, solely dedicated to the harmonization of business laws through the enactment of 'Uniform Acts'.[84]

Harmonization of laws is not the sole preserve of nation states.[85] Some private sector driven non-governmental bodies such as the International Chamber of Commerce (ICC), founded in 1919 are also active in the field of harmonization of laws relating to international trade and commerce.[86] This growing trend tends to suggest that legal harmonization is an essential consequence of the ever-increasing international trade, and that it not only follows, but also enables and facilitates economic integration.[87]

## 5.5. A Review Of Types Of Harmonization And of The Different Instruments Used In The Processes

### *5.5.1. Broad Archetypes Of Harmonization Processes*

Harmonization of laws can be achieved through the adoption of measures which are designed for transnational transactions only, and which do not apply to or affect the validity of domestic laws;[88] or it can be done through measures intended to change domestic law irrespective of whether a transaction has transnational dimensions or not.[89] Finally, it can simply

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[82] Eiselen, 'Teaching Transnational Commercial Law in the African Context' (2016) Vol 40(2) The University of Western Australia Law Review 3 .

[83] Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 109

[84] Fagbayigbo B, 'Towards the Harmonization of Laws in Africa: Is OHADA The Way to Go?' (2009) Volume 42, No. 3,The Comparative and International Law Journal of Southern Africa 309; Eiselen, 'Teaching Transnational Commercial Law in the African Context' (2016) Vol 40(2) The University of Western Australia Law Review 3 ; Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 109,111.

[85] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Volume 5 Issue 1, San Diego International Law Journal 267.

[86] Kelly D, 'The International Chamber of Commerce' (2005) Vol. 10. No. 2 New Political Economy 259.

[87] Zeller B, 'The Development of Uniform Laws− A Historical Perspective' (2002) 14 (1) Pace Int'l L Rev 163; Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 108; Nicholson C, 'Some Preliminary Thoughts on a Comparative Law Model for Harmonization of Laws in Africa' (2008) Vol 14(2) Fundamina 50.

[88] An example would be the UNCITRAL promoted United Nations Convention on the International Sale of Goods.

[89] For Example, the European Insolvency Regulation and the OHADA Uniform Law Organizing Collective Proceedings for the Clearing of Debt.

be designed to approximate the laws of several jurisdictions, or, it might go further and effectively provide one single text to be applied in several jurisdictions as uniform laws.[90]

### *5.5.2. What Is To Be Harmonized − Substantive Law Or Private International Law?*

The question must be asked as to what is to be harmonized. This could either be substantive law, where this is possible, or private international law rules, where the differences between the jurisdictions whose legislation is sought to be harmonized are too wide, either by reason of religious, linguistic, legal culture or mode of legal thought,[91] sovereignty concerns[92] or where the current private international law rules governing the area sought to be harmonized lack clarity, certainty and predictability.[93] Here, the diversity of substantive laws remains untouched. What are harmonized are choice of law, jurisdiction and rules relating to the recognition and enforcement of foreign judgments and orders.[94] It is important to note that uniformity in the substantive content of national laws is not the purpose of private international law which merely seeks to enhance the predictability of the outcome in litigation.[95]

The harmonization of substantive laws in a market area obviates the need for establishing the applicable law by means of conflict of law rules, which are often more difficult to apply and create an opportunity for forum shopping.[96] There is however, an argument against the harmonization of substantive laws. In a free market economy, the law is in itself a tool for competitiveness. Traders and investors must have the freedom to choose where to conduct their

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[90] Twigg-Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross-Border Transactions' in Twigg-Flessner C and Puig G, (eds) *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022; Kuruk P and Fifatin D, 'Support for the Promotion of the Business Law Harmonization in Africa−Final Study Report' (2021) Federation of West African Chambers of Commerce and Industry.

[91] Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 110.

[92] Twigg- Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross Border Transactions' in Twigg-Flessner C and Puig G, (eds) *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.

[93] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.

[94] Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 110.

[95] Mills A, 'The Identities of Private International Law: Lessons From the United States and European Union Revolutions' (2013) 23 Duke Journal of Comparative and International Law 445

[96] Twigg-Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross Border Transactions' in Twigg-Flessner C and Puig G, (eds) *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.

trade depending on the availability of favourable jurisdictional laws.[97] In a market area with poor access to law, however, the above argument may not hold and the need for costly specialist legal services to determine the applicable law will be ever present, affecting transaction costs in the process.[98] Again, the concentration of investment in the legal system(s) with the most favourable laws may lead to disillusionment and resentment on the part of the other member states in the regional economic block and could even lead to its disintegration.[99] Then there is the danger of a 'race to the bottom' among member states to provide the most favourable laws,[100] something that may lead them to compromise on the foundational goals of insolvency law.

Whilst the harmonization of substantive laws creates more legal certainty and predictability and reduces the scope of private international law problems in the common market area, it requires greater effort to achieve in a place with diverse legal cultures and traditions. Even when done, there will still be a need to address private international law rules in cases of cross-border disputes. Private international law harmonization is relatively much easier as mostly choice of law rules are targeted.[101]

The evaluation of whether to harmonize the substantive rules or not, may involve a cost-benefit analysis − a legal analysis of the current law combined with a forecast on the impact of any harmonized rules on the legal framework.[102]

### *5.5.3. Different Forms And Instruments Of Harmonization*

[97] Twigg-Flessner C, Ibid; See also Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis to Comparative Law' (1999) 48 International and Comparative Law Quarterly 405; Faure M, 'Legal Harmonization From the Perspective of the Economic Analysis of Law' in Faure M, Koziol H and Puntscher-Riekmann S, (eds) *Vereintes Europa-Vereinheitlichtes Recht?* (Australian Academy of Science Press 2008) available at https://verlag.oeaw.ac.at/en/product/vereintes-europa-vereinheitlichtes-recht/30270 accessed May 3, 2023.

[98] Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis to Comparative Law' (1999) 48 International and Comparative Law Quarterly 405.

[99] Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 110

[100] Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis to Comparative Law' (1999) 48 International and Comparative Law Quarterly 405.

[101] Ibid.

[102] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.

Keay[103] groups harmonization into (a) minimum harmonization, where the harmonizing body sets minimum rules or a 'floor of rights', leaving member states to individually or jointly establish more stringent or demanding rules; (b) alternative harmonization, which involves the provision in directives of alternative methods of harmonization to attain goals. Here, member states choose which alternative they decide to adopt; (c) optional harmonization, where a directive permits a member states to follow either harmonized rules or national rules; (d) partial harmonization, where harmonized rules only cover cross-border transactions; and finally, (e) total harmonization which is exhaustive, hard, maximum and strong harmonization requiring total adherence to rules save where safeguards are needed. Here, members have no flexibility and power to determine the law at national level. Whilst total harmonization reduces conflicts and divergences, prevents forum shopping, promotes uniformity, consistency and efficiency , reduces transaction costs and fosters equality, it poses a difficulty in drafting rules that will work, that will be adhered to, and that are fair and reasonable.[104] Total harmonization also prevents national governments from enacting new rules to react to emerging challenges and abuses.

Basically, there are three types of harmonizing instruments: legislative, coming in the form treaties, conventions, regulations, directives and model laws; contractual, which take the form of standard contract clauses and terms; and explanatory, which take the form of legislative guides and legal guides.[105] The instruments of harmonization range from hard law instruments to soft law instruments.[106] Among the hard law instruments are conventions, uniform Acts, regulations and directives. Soft law instruments include model laws, model clauses and provisions.. Then there are explanatory material like legislative guides and legal guides; and, finally, contractual material like standard terms and international trade terms.[107]

Conventions or treaties are usually multilateral. They are international treaties that states may join and ratify into domestic legal frameworks. They create binding obligations and are

[103] Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.
[104] ibid.
[105] Cremades B and Plehn C, 'The New Lex Mercatoria and the Harmonization of Laws' (1984) 2 Boston University Law Journal 319.
[106] Oppong R, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 111
[107] Estrella Faria J, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage? (2009) Unif L Rev 5.

used where there is need to achieve a higher degree of uniformity of law. Uniform Acts also have binding effect within member states' domestic laws and they cancel any existing conflicting domestic legislation. Regulations and directives operate at regional economic block level and have binding legislative effect that override provisions in domestic law.[108] On the other hand, model laws are templates of legislation created by harmonizing agencies, like UNCITRAL which a state may adopt whole or with modifications as part of national legal reform. Legislative guides and guidelines are non-binding soft law, and they will merely list issues which governments may wish to consider when enacting national legislations.[109] The same with model clauses, provisions or rules. Principles are also non-binding soft law. Standard terms and international trade terms are definitional in outlook − words that carry a specific meaning within a particular trade context, and which parties are free to incorporate into their contractual dealings.

Despite some remarkable outcomes, the majority of bilateral and multilateral conventions on legal unification or harmonization have not been very effective as witnessed by subsequent limited use or even failure.[110] This is because of the rigidity of the treaty-making process in seeking universal consensus.[111] Treaties are difficult to draft, adopt and also to amend.[112] The treaty making process itself is slow, unwieldy and contentious and states, not business entities, are the only participants in the process.[113] Differences in commercial practices, differences in legal theory and traditions as well as in legal policies make treaties slow and difficult to come up with, and when eventually achieved the preferred rule in a given system may be mitigated or abandoned and any resulting rules thereby created are sub-optimal and

[108] Turner L, 'Researching the Harmonization of International Commercial Law' available at <http://www.nyulawglobal.org/globalex/unification_harmonization.html>accessed on 1 November, 2024; *Mohochi v Uganda,* East African Court of Justice, Reference Case No. 5 of 2011.
[109] Turner L, Ibid.
[110] The Council of Europe's insolvency convention, normally called the Istanbul Convention, is an example. A lot of work would have gone into it but only Cyprus ratified it and it never gained enough support to come into force.https://rm.coe.int/168007b3d0. Note that this is different from the European Union Insolvency Regulation.
[111] Estrella Faria J, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage? (2009) Unif L Rev 5.
[112] Mancuso S, ' The New African Law: Beyond the Difference Between Common Law and Civil Law' 2008 (14) Annual Survey of International & Comparative Law, Article 4, 39.
[113] Durkee M, 'The Business of Treaties' (2016) 63 UCLA L Rev 264.

vague, reflecting the product of some political give and take.[114] Apart from speed issues, there is the attendant issue of cost. Due to the amount of time taken, treaties impose a huge cost on the treaty making body and questions have to be asked whether savings on transaction costs justify the treaty making endeavour.[115] Hence, the adoption of the 'soft law' method of harmonization by way of model laws, clauses and so on.[116] These are normative in nature with no legally binding force and are primarily used as a means of developing international legal norms. They are not created by political entities and rarely pose a threat to national legal systems.[117] They are flexible and neutral, and their adoption is voluntary. Their use dates back to the period of the *lex mercatoria.* [118] Despite their attraction, however, model laws may not always produce uniform results as some countries may alter their content to suit their national policy choices.[119]

### 5.6. Arguments Against Harmonization Of Laws

Gopalan[120] states that opponents of harmonization point to the following arguments against the process: (a) international covenants are drafted as multinational or multicultural compromises between different legal orders[121] and hence are enervated, inconsistent and sometimes incoherent;[122] (b) the systemic faults in international drafting deprive the instrument of the force that is required for it to be an effective tool to tackle the problems of international

[114] Estrella Faria, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage? (2009) Unif L Rev 5; Gabriel H, 'The Use of Soft Law in the Creation of Legal Norms in International Commercial Law: How Successful Has it Been?' (2019) 40(3) Mich J Int'l L 413.
[115] Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis to Comparative Law' (1999) 48 International and Comparative Law Quarterly 405.
[116] Ibid.
[117] Gopalan S, 'New Trends in the Making of International Commercial Law' (2004) Journal of Law and Commerce 117.
[118] Gabriel H, 'The Use of Soft Law in the Creation of Legal Norms in International Commercial Law: How Successful Has it Been?' (2019) 40(3) Mich J Int'l L 413.
[119] For example, in its adaptation of the UNCITRAL Model Law on Cross-border Insolvency, South Africa in s. 2(b) of its Cross-border Insolvency Act, 2000 made the Act applicable where, by implication the other country also adapted the UNCITRAL Model Law on Cross-border Insolvency. Malawi's adoption of the UNICTRAL Model Law on Cross-border Insolvency in Part X of the Insolvency Act, 2016 is open ended with no reciprocity pre-requisites.
[120] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Volume 5 Issue 1 San Diego International Law Journal 267.
[121] Hobhouse J, 'International Conventions and Commercial Law: The Pursuit of Uniformity (1990) 106 The Law Quarterly Review 530.
[122] Estrella Faria J, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage?' (2009) Unif L Rev 5.

commerce; (c) the pursuit of uniformity is an idealistic notion since national laws are premised on different legal traditions and assumptions; (d) any uniformity that is achieved is born with an inherent brittleness caused by the realization that national courts will interpret the instrument in the backdrop of their own legal system with the resultant diverges of interpretation, and judgments from national courts interpreting the harmonized law may not always be readily available;[123] (e) there may be inserted in a treaty overly broad exceptions to the rules, thereby emasculating the essence of the rule; (f) the different official languages used for international treaties may water down the content of some of the provisions; (g) treaties take too long to produce,[124] hence are costly.[125] They are also difficult to amend, therefore they hamper the ability to respond quickly to emerging urgent problems, unlike the case with national laws; (h) treaties start from the incorrect premise that diversity in laws is not a good thing. On occasion, the market should determine the best law; (i) some legal concepts cannot be expressed in other languages without losing their essential meaning;[126] (j) bodies that harmonize laws lack representative capacity; and finally, (k)[127] treaties may also have low levels of ratification, and may take years to be fully ratified.[128]

It has also been said that replacing existing law with a new rule common to a group of countries means losing the benefit of the expertise achieved in one's own system and having to learn a new set of rules. Time and effort will have to be exerted again to become initiated and competent, after an initial period of risk and uncertainty. The change will also entail abandoning a system often rooted in a long tradition and replacing it with new rules which may be much less adapted to the local culture and environment. However, promoters of harmonization are aware of the obstacles linked to the weight of tradition and may draft the new rules so as not to

[123] Zeller B, 'The Development of Uniform Laws− A Historical Perspective' (2002) 14 (1) Pace Int'l L Rev 163.
[124] Farnsworth A, 'Unification and Harmonization of Private Law' (1996) Volume 48 Canadian Business Law Journal 48.
[125] Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.
[126] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Volume 18 Number 4, American University International Law Review 803.
[127] Gopalan S, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) Volume 5 Issue 1 San Diego International Law Journal 267.
[128] Estrella Faria J, 'Future Directions of Legal Harmonization: Stormy Seas or Prosperous Voyage?' (2009) Unif L Rev 5.

clash too strongly with the old ones in order to facilitate acceptance. This, though, is not an easy task where laws from multiple jurisdictions and legal cultures are being harmonized.[129]

Note that the above reservations relate mostly to treaties and treaty making processes, and yet, as seen above, harmonization of law may occur through modes other than treaties. Note, too, that at a global level, the truly successful binding instruments in the form of treaties are in the minority,[130] and the bulk of the harmonization processes for commercial law use the other instruments like model laws, directives, regulations, and the like. Treaties, therefore may have to be used with parsimony, and need to be deployed for cases where there is need for mandatory law.[131] At a multilateral level, model laws have been used with much success,[132] due to their flexibility and the fact that states have a choice as to what to add in or remove when enacting them.[133]

Having said all the above, in a world of increasing cross-border trade, none of the above criticisms can outweigh the benefits of harmonization of laws, the most important ones being certainty and predictability in the law, and the fact that the harmonization endeavour, which involves the comparative law methodology, will promote the best law, or the best possible solution to tackle the subject matter that the harmonized law seeks to address.[134]

### 5.7. Methodological Issues

This part of the chapter will review some debates surrounding the appropriate method(s) to use in the process of harmonization of laws. As with most academic discourses, there is no unanimity of views on the issue of methodology. The section will discuss the dominant rhetoric

[129] Fontaine M, 'Law Harmonization and Local Specificities– A Case Study: OHADA and the Law of Contracts' (2013) Volume 18 Issue 1, Uniform Law Review 50.

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[130] ibid.

[131] Ibid.

[132] The UNICTRAL Model Law on Cross Border Insolvency is one such progressively popular model laws.

[133] Ibid; Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Vol. 19(4) European Journal of Law Reform 306.

[134] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Volume 18 Number 4, American University International Law Review 803; Mayer L, 'Soft Law for Solid Contracts? A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization' (2006) Volume 34 Issue 1 Denv J Int'l L & Pol'y 119

and will propose an appropriate methodology that suits the subject matter under consideration, giving reasons for the choice.

### *5.7.1. Harmonization Of Laws As Legal Transplantation*

Watson defined legal transplantation as 'the moving of a rule or system of law from one country to another or from one people to the other.'[135] It is evident from this definition that harmonization of laws may involve legal transplantation, that is, the borrowing of a rule or law by one country or several countries from another or others. It may not always involve legal transplantation, however, as when countries 'pluck from the air' a common, hitherto non-existent solution to a problem − the approach is a harmonized one, though not necessarily a transplanted one.

Globalization is often seen as the main reason to explain legal transplants, and legal transplantation, which has been occurring since antiquity, has been observed to take place for various reasons including any or a combination of the following: (i) authority; (ii) prestige and imposition; (iii) chance and necessity; (iv) expected efficacy; and, (v) political economic and reputational incentives.[136] Therefore, in this study, if any proposed harmonization of laws will involve the movement of a rule from one country to another, such will have to be justified and explained on one or more of the reasons above. In the field of commercial law, the most likely justifications would be economic, necessity or expected efficacy, and where this is the case, this has to be demonstrated. It has been said that the borrowing or reception of a foreign law (outside of the colonial set up) is usually a matter of usefulness and need since no one bothers to fetch a thing from a far when one has one as good or even better at home.[137] It has also been observed that only a fool would refuse a good medicine just because it did not grow in his own back garden.[138] Hence, legislators, when considering different possible approaches to resolving a

[135] Watson A , *Legal Transplants* (Scottish Academic Press Limited 1974) 21.
[136] Valderrama I, 'Legal Transplants and Comparative Law' (2004) International Law Journal 261.
[137] Mousourakis G, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) Volume 54 Number 3 Acta Juridica Hungarica 219.
[138] Ibid, citing Jhering R, *Geist römischen Rechts.*I, (9th edn, Wissenschaftliche Buchgemeinschaft 1955) 8f quoted in Zweigert K and Kötz H, *An Introduction to Comparative* Law (Oxford 1987) 6.

particular problem, often take into account how the same problem is dealt with in other jurisdictions.

The borrowing to resolve social economic problems may even involve countries outside the broader legal family as that of the borrowing country, provided an inquiry has first been made that the rule has proved efficient[139] to solve the particular problem in the country of origin. Of course the borrowers would have to be mindful as to whether it would produce similar results in the country contemplating its adoption.[140]

As harmonization of laws may involve legal transplantation, the question then becomes, under what conditions is legal transplantation possible? This issue is a concern for comparatists, who engage in investigating what transplants have successfully occurred in the past, how and why this was possible and from or between which legal systems successful legal transplantation has occurred.[141] The quest does involve looking not only at the rules, but at historical influences, the cultures, traditions, ideals, ideologies and identities and entire legal discourses.[142]

On the relevance of culture to the success or failure of legal transplants, there are basically three schools of thought. Watson sought to demonstrate the pervasiveness and success of legal transplants despite dramatically different socio-political contexts between the donor and the recipient[143] whilst Pierre Legrand, echoing the anti-legal transplant views in *Nyali Limited v Attorney General*[144] and taking a culturalist perspective proclaimed the impossibility of legal transplants, contending that any purportedly transplanted rule will not be interpreted in its new context the same way as it was in its place of origin – what can be displaced from one country to another is basically a meaningless form of words as law could not be separated from its context. Law only existed as interpreted and applied within an interpretative community. It only has meaning in context so that when you change the context, the law also changes, so he

[139] Mattei U, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) International Review of Law and Economics 93.
[140] Mousorakis G, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) Volume 54 Number 3 Acta Juridica Hungarica 219.
[141] Ewald W, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) Volume 43 American Journal of Comparative Law 309.
[142] Valderrama I, 'Legal Transplants and Comparative Law' (2004) International Law Journal 261.
[143] Watson A, *Legal Transplants* ( Scottish Academic Press Limited 1974) 21
, 88 et seq.
[144] (1955) 1 All ER 646 at 653 (CA), affirmed [1957] AC 253 (HL).

reasoned.[145] Taking the middle ground, Kahn-Freund tried to develop an analysis of when borrowing could take place and to establish its pre-requisites. He argued that constitutional and political factors like the nature of the society that generated the borrowed rule could have a bearing on its 'transplantability' into another society. [146] Teubner[147] on the other hand, whilst accepting that transplants were the main source of legal change, argued that the results of a transplant can be anything, and hence advised against the use of the word 'legal transplant' advocating the use of the word 'legal irritants' instead.

In sum, there is a whole range of views on legal transplantation, from the Watsonian overly-optimistic view, to Legrand's transplant denialism to the middle of the field and cautious approaches by Kahn-Freund and Teubner.

That legal change in most parts of the world starting from Europe to developing countries is a product of legal transplants cannot be denied.[148] From the 1970's going forwards there has been a lot of legal transplantation of entire laws and institutions from the developed to the developing world under the aegis of the World Bank and the International Monetary Fund where ambitious projects of legal assistance and law reform in commercial and civil laws have been undertaken mostly in the name of enhancing the efficiency of the developing economies. Development partners have also midwifed the birth or transplantation of entire new constitutions into several developing countries,[149] which, for example, have included the wholesale importation of institutions like that of the Swedish born and bred 'Ombudsman', sometimes even audaciously borrowing not just the idea, but the name[150] as well.[151] This shows that perhaps culture may not be as much of a barrier to legal transplantation as Legrand and others thought

[145] Legrand P, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111.
[146] Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) Volume 37 Modern Law Review 1
[147] Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 MLR 11.
[148] Mousourakis, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) Volume 54 Number 3 Acta Juridica Hungarica 219.
[149] Lockert M, 'Transplanting and Customizing Legal Systems: Lessons from Namibian Legal History' (2014) 13 Rich J Global L & Bus 173.
[150] See, for example, s. 123 of the Constitution of the Republic of Malawi 1994. At least South Africa changed the name of the institution to 'Public Protector' though the idea, judged from the functions of the Public Protector, is a legal transplant borrowed from the Swedish Ombudsman- See Public Protector Act No. 23 of 1994 of South Africa.
[151] Engelbrekt A, 'Legal and Economic Discourses on Legal Transplants: Lost in Translation' in Engelbrekt A and Wahlgren P, *Law and Development* Volume 60 (Scandinavian Studies in Law 2015)111.

it would be but that it is the nature of the concept or idea being borrowed and its utility in the recipient legal system that may matter after all. This calls for an inquiry as to why this could be the case.

Much as Hussa observes that transplantations between civil and common law or religious and secular law are more difficult than between systems belonging to a similar type of legal culture,[152] legal cultures and families, however, are not always water-tight or hermetically sealed phenomenon, and it is sometimes difficult to categorize to which legal family a legal system belongs to.[153] Further, there is, currently, with increasing ease of communication, an intense interaction of cultures, and cultures not being insular but highly interactive, the 'culture' refrain or mantra, as a purported impediment to the harmonization of laws, will have to be re-examined.[154] Culture apologism gets more threadbare when one considers that there could be uniformity in terms of the emergence of certain needs among various cultures as societies progress through similar stages of development and a natural tendency exists towards imitation, precipitated by a desire to accelerate progress or pursue common political or socio-economic objectives.[155] This takes us back to the concept of the *preasumptio similitudinis* in comparative legal research prompted by the prevalence or commonality of demands and needs between culturally different societies. If the law is about solving problems and the problems are the same everywhere, it follows too that the law should be the same everywhere, and it falls to comparative law to make it so.[156] This may call for common solutions, and hence legal transplantation, especially in 'unpolitical' areas of private law, such as commercial law.[157] Mousourakis concludes that if it is true that legal rules emanate as a response to social needs, the emergence of a global society will almost inevitably lead to a degree of convergence between

[152] Husa J, 'Developing Legal System, Legal Transplants and Path Dependence: Reflections on the Rule of Law' (2018) Volume 6 Number 2 Journal of Comparative Law 129.
[153] Mousourakis, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) Volume 54 Number 3 Acta Juridica Hungarica 219.
[154] Ibid.
[155] Ibid.
[156] Zweigert K and Kötz H, *An Introduction to Comparative Law* ( 3rd Ed, Oxford, OUP 1998) 3, 31; See also Watson A, *Legal Transplants* (2nd edn, Athens, Georgia, University of Georgia Press 1993) 83.
[157] Watson A, ibid; Hill G, 'How Does the Area of Law Predict the Prospects of Harmonization?' (2020) (4)(1) Adelaide Law Review 267. The paper, a quantitative study of the ease of harmonization of laws in Australia, a federal country, found commercial laws to be one of the easiest to harmonize, compared to family law and criminal law.

legal systems.[158] Examples abound. The spread of Roman law and of the *lex mercatoria* arguably were not predicated on a similarity of legal cultures, but possibly of legal problems and needs. The same with the spread of the concept of the private limited liability company throughout the world from its English source. 'Received laws' during colonialism were so received regardless of cultural diverges, but through sheer similarity of legal needs. Post-colonialism, only legal transplantation would explain the word-for-word uniformity of transaction avoidance rules in such culturally diverse and disparate countries as Malawi, Mauritius and Seychelles, as observed in the previous chapter.

### *5.7.2. Points To Consider Before Settling On Harmonization*

The first question the harmonizing authority or agent must ask themselves is: is there a problem that needs transnational action? To answer this, one needs to look at legal issues, current and potential, to assess the necessity and feasibility of harmonization, that is, whether harmonization is a proportionate answer to these issues. Will the benefits introduced by the harmonized rules balance or overcome the cost of the process?[159] If a legal problem is identified, it must then be studied whether the problem is amenable to resolution by agreeing a transnational text.[160] Those that consider harmonization of commercial laws should always ask themselves the question' what is in the best interest of business?'[161] Are we seeking to merely overcome legal differences for the sake of it?, meaning, are we proposing to harmonize the laws in order to solve a problem or simply to overcome legal differences?[162]

The starting point is therefore a comparative study of the different national laws tackling the particular issue under consideration, in this particular case, transaction avoidance rules dealing with preferences gifts and transactions at undervalue, to identify any similarities and differences, and if the latter, considering whether they pose any serious problem to the conduct

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[158] Ibid.
[159] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.
[160] Twigg-Flessner C, 'Some Thoughts on the Harmonization of Commercial Law and the Impact on Cross Border Transactions' in Twigg-Flessner C and Puig G, (eds), *Boundaries of Commercial and Trade Law* (Otto Schmidt/De Gruyter European law Pub 2011*)* 106-107 available at https://ssrn.com/abstract=1957618 accessed on 7th July, 2022.
[161] Ibid.
[162] Ibid.

of business in that particular area of human endeavour. The effectiveness and appropriateness of current law needs to be carefully examined.[163] If differences are identified, these should not daunt, but should motivate harmonization where they are of such a kind as to negatively impact the efficient conduct of business.[164] The differences need to be studied, though, to see if they reflect a lack of a common understanding of policy issues in the area under study.[165] If harmonization of substantive law cannot be achieved, the question must then arise whether harmonization of private international law would be feasible, as private international law is a useful tool to coordinate different legal systems. If the substantive transaction avoidance rules will not be harmonized, work must be done on choice of law rules[166] by developing connecting factors that govern the choice of law or grant jurisdiction to a particular member state.[167] However, it may also be possible to attempt both substantive law harmonization at whatever level along the continuum from soft to hard harmonization as well as attend to some private international law concerns in the legal framework.

### *5.7.3. The 'Best Law' Or A Principle Focused Approach To The Harmonization Of Transaction Avoidance Rules?*

Having decided on harmonization, an appropriate technique must be adopted and deployed.[168] The method and technique used should always be determined by prevailing circumstances in a region because the nature and level of harmonization required will depend on its specific circumstances.[169] For legal harmonization to take place in a regional economic community, the regional economic community's constitutive document must create a framework for the possibility of such harmonization work, otherwise the task will be difficult.[170]

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[163] Twigg-Flessner, C ibid; Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16.
[164] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.
[165] Ibid.
[166] Ho L, 'Conflict of Laws in Insolvency Transaction Avoidance' (2008) 20 S Ac L J 343.
[167] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Vol 29 Issue 5 Norton Journal of Bankruptcy Law and Practice, Article Number 3.
[168] Shumba T, 'Revisiting Legal Harmonization Under the Southern African Development Treaty (2015) Vol.19 Law, Democracy and Development 127.
[169] Ibid.
[170] Ibid.

There is also need for some intangibles, in the form of political will, for any harmonization work to occur.[171]

The traditional approach to harmonization has been to compare the solutions to the problem from several states and opt for the best law or best solution among the several options on the table.[172] Bork and Veder have proposed a more refined version of this approach − what they call a principled or principle based approach[173] to harmonization of transaction avoidance rules. They postulate that harmonization should start by elaborating underlying principles, then proceed by identifying the issues, that is listing the subjects which must be regulated according to a principle based point of law and finally solve the issue by determining what seems like an appropriate solution guided by the principles.[174] The advantage of the principle oriented approach is that it would potentially work for all legal cultures, so Bork and Veder hope,[175] as legal rules link back to basic principles, both procedural and substantive, which are fundamental or basic standards − building blocks underlying the rules in a field of law.[176] Transaction avoidance law is informed by principles such as the *pari passu* principle calling for the equal treatment of similarly situated creditors, the principle of the best possible realization of the debtors' assets (creditor return maximization), the principle of protection of trust and of legal certainty.[177] Procedural principles of insolvency law include collectivity (linked to *pari passu*), efficiency, effectiveness or efficacy (related to speed and comprehensiveness), creditors' autonomy, transparency and predictability, reduction in transaction costs, and procedural justice and procedural privity.[178] Substantive principles of insolvency law will include *pari passu*, creditor returns maximization, best possible satisfaction of creditors' claims, protection of debtors' rights, protection of trust (secured creditors), social protection (of employees) fixation

[171] Killander M, 'Legal Harmonization in Africa: Taking Stock and Moving Forward' (2012) Volume 47- Issue 1, The Italian Spectator: Italian Journal of International Affairs 83
[172] Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16.
[173] The ILO also advocates a principle based approach to the harmonization of laws. See ILO Working Team and Office for the Caribbean, 'ILO Background Paper No. 2, Strategy for the Harmonization of Labor Law: A Discussion of Options' 10th ILO Meeting of Caribbean Ministers of Labor, Kingston, Jamaica, 23-24 February, 2017.
[174] Ibid.
[175] Ibid, 17.
[176] Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16, 27.
[177] Ibid, 28.
[178] Ibid, 34-35.

and proportionality.[179] With specific reference to transaction avoidance rules, the focus must be on creditor returns maximization, equal treatment of creditors, and efficiency.[180] The efficiency dimension will involve a quest for transaction avoidance rules which are clear, easy to apply, and which avoid unnecessary, protracted and costly litigation through deployment of overly subjective or indeterminate elements or terms rendering the appraisal of the issues by the courts difficult. The nature of available defences will also inform the efficacy matrix.

Bork and Veder are therefore not introducing a new approach to the harmonization of laws but merely fine tuning the pre- existing 'best solution' or ' best law' approach by filling it with details of what it means to determine the 'best law'. The best law can only be such if it fulfils identified principles or goals served by any law in an efficient manner. This notwithstanding, any choice of a provision to be included in the harmonized law must be justified, and such justification can only best be anchored on an established principle if available, or a new one if such has emerged through the exigencies and vagaries of commercial life.

**5.8. Conclusion**

In the preceding discussion, it has been noted that harmonization of laws through transplantation has been taking place since time immemorial as various cultures then, and later on trading places and finally nation states sought quicker ways to address common problems in commercial and other areas of human endeavour. With the increase in globalization and the need to ease the doing of business, the quest for the harmonization of laws has become an urgent and well institutionalized phenomenon at state level as well as at the level of non-governmental organizations. The harmonization of commercial laws has attained such primacy that even at United Nations level, an agency was formed way back in the 1960's specifically to address the problem. The need for harmonization of commercial laws also manifests itself at regional economic block level and COMESA is one such body that embedded the aspiration in its constitutive document.

Much as the harmonization drive has its detractors who mostly cite sovereign pride and cultural differences among the stumbling blocks, it is evident that harmonization of laws through

[179] Ibid, 47-48.
[180] Ibid, 48.

legal transplantation has taken root and is seemingly an irreversible trend. This is predicated on the commonality or similarity of societal problems regardless of cultural differences, and the need for common solutions to common problems. Much as harmonization of laws may be difficult to achieve in other culturally or politically sensitive fields, commercial law has been seen to be 'unpolitical' enough to lend itself to successful harmonization efforts. With the exception of allocative issues like statutory priorities and employee rights which are informed by political choices, insolvency law is one of such commercial laws that are largely unpolitical. Surprisingly though, it is a field that has not registered much harmonization success at substantive law level. The discussion above has dealt with the advantages and stumbling blocks to the harmonization of transaction avoidance rules. The merits of harmonization of transaction avoidance rules are myriad, and the proposed approach, a principle based approach enmeshed in the identification of the best law or the best solution has been hailed as the magic bullet.[181]

In the chapter that follows the study shall consider whether structurally, the constitutive document of COMESA is formulated in such a manner, comparatively, as will facilitate harmonization of transaction avoidance rules.

[181] Ibid.

# CHAPTER 6

# A COMPARATIVE ASSESSMENT OF COMESA'S INSTITUTIONAL READINESS TO UNDERTAKE THE HARMONIZATION OF COMMUNITY LAWS

## 6.1.Introduction

### *6.1.1. Aims And Objectives Of The Chapter*

Bearing in mind that the main task of the thesis is to explore if transaction avoidance rules in COMESA can be harmonized and if so how that can possibly be done, this chapter aims to assess, from a comparative perspective, COMESA's institutional readiness to undertake the harmonization of laws. It will discuss the institutional framework for the harmonization of laws within some selected regional economic communities (RECs) including COMESA, with the aim of finding out how their foundational or constitutive documents enable the process of legal harmonization to be undertaken. This will facilitate a comparative assessment of whether COMESA's constitutive document optimally equips it for the task. The comparator RECs are: the Southern African Development Community (SADC), the East African Community (EAC), OHADA and the European Union (EU). SADC and EAC have been chosen because some members states of COMESA belong to SADC and the others to EAC, and together with COMESA, they are members of the Tripartite Free Trade Area established in 2015.[1] The levels of economic development in COMESA, SADC and EAC may not be starkly different and the thesis has assumed, based on experience, that with similarity in levels of development comes similarity in legal issues, hence the need for common solutions to them. OHADA has been selected largely as a standard of comparison because of its unique status as a special purpose vehicle exclusively created for legal harmonization of business laws among countries that are largely from the same legal and linguistic culture, meaning it may offer the best institutional and procedural set up for the attainment of the goal. The EU has been selected because it belongs to the developed world and it is always important for least developed nations to look outside the window to see how their more progressive counterparts are doing things. The aim will be to pick

[1] Onyango C, 'Why the COMESA-EAC-SADC Tripartite Free Trade Area is Ideal for Strengthening African Continental Integration' available at https://www.comesa.int/wp-content/uploads/2020/09/Tripartite-FTA-is-ideal-for-strengthening-AfCFTA.pdf accessed on September 27, 2023.

an idea or two on why they succeed doing what they do, and see if some ideas can be transplanted onto African soil. The focus will be on how, through their respective constitutive documents, member states belonging to each of the RECs have granted their communities the power to harmonize laws; what institutions have been set up to conduct the harmonization processes; and, how these institutions have fared in the legal harmonization endeavour. This chapter is not going to discuss how to conduct the actual harmonization of the selected transaction avoidance rules within COMESA . That is for the next chapter. The discussion in this chapter is necessary because it would be futile to discuss how COMESA as a REC can harmonize its laws before one considers whether it is properly organized for the task.

### *6.1.2. Methodology*

RECs, created by agreement among member states are, in essence, associations formed by countries to achieve stated objectives. Associations are essentially governed and guided by their constitutive documents which, in the case of RECs, are usually in the form of treaties.[2] Associations can only exercise such power as their constitutive documents have expressly or by necessary implication given them, and RECs can only do what their treaties have given them the power to do. Much as the idea of regional integration presupposes or necessitates harmonization of laws,[3] such harmonization of laws cannot occur in a vacuum.[4] There must be a legal foundation for such an initiative.[5] It is only if the treaty creating a REC gives it the mandate to harmonize laws, expressly or by necessary implication, that the REC can competently embark on the process,[6] otherwise it would be acting *ultra vires*.[7] The first thing to

[2] Killander M, 'Harmonization in Africa: Taking Stock and Moving Forward' (2012) 47:1 The International Spectator, Italian Journal of International Affairs 83.

[3] Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress?' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 118.

[4] Wandrag R, 'Unification of Southern African Contract Law' (2011) 13 European Journal of Law Reform 451

[5] Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress?' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 118.

[6] Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Volume 19 (4) European Journal of Law Reform 306.

[7] Keay A, 'The Harmonization of Avoidance Rules in European Union Insolvencies' (2017) 66(1) International and Comparative Law Quarterly 79.

look out for in a REC's constitutive document therefore is whether it has the mandate to conduct legal harmonization. This power may come out either in the preambular narratives of the treaty or right within the main body of the treaty.[8] The clarity with which the power to harmonize laws is expressed is key.[9]

It has also long been recognized that for a REC to undertake the harmonization of its laws, it must have well developed and efficient institutional arrangements to facilitate the process. The institutions are the pillars of the legal harmonization and regional integration process.[10] The presence of well-developed and sufficiently empowered institutions to foster and sustain the harmonization of laws is important, and so, too, is the issue whether the institutions so created have been given an adequate procedural framework to facilitate the process.[11] The absence of strong and specialized institutional arrangements to foster and sustain the harmonization of laws is seen as one of the obstacles to the harmonization of laws within African RECs[12] and so too, the absence of proper guidance in the RECs foundational treaties on how legal harmonization should be implemented.[13]

Quite apart from administrative institutions to undertake the harmonization process, the creation within a REC of a supranational judicial body mandated with treaty and community law interpretation plays a crucial role in the legal harmonization and regional integration

[8] See for example article 126(2)(b) of the Treaty Establishing the East African Community; Ndayikengurukiye M, 'Some Observations on Practical Aspects of the Harmonization of Economic Laws in the East African Community Context' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 3.

[9] Dickerson C, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) 44 Columbia Journal of Transnational Law 17.

[10] Anukpe Ovrawah O, 'Harmonization of Laws within the Economic Community of West African States' (1994) 6(1) Afr J Int'l & Comp L 76.

[11] Shumba T, 'Harmonizing the Law of Sale in the Southern African Development Community SADC: An Analysis of Selected Models; Ph. D Dissertation, Stellenbosch University, 2014 p106-107.

[12] Fombad C, 'Some Reflections on the Prospects of the Harmonization of International Business Law in Africa' (2013) 59(3) Africa Today 50 also available at http://hdl.handle.net/2263/31659 accessed on August 26, 2023.

[13] Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress?' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 124 ,125,137; Milej T, 'Legal Harmonization in the Regional Economic Communities – The Case of the European Union' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 139; Anukpe Ovrawah O, 'Harmonization of Laws within the Economic Community of West African States' (1994) 6(1) Afr J Int'l & Comp L 76.

process as it serves, firstly, to avoid disparate or divergent interpretations of a REC's foundational treaty as well as of its harmonized legal instruments[14] and, secondly, it provides an enforcement mechanism to ensure compliance with the treaty and community laws.[15] Thirdly, it plays a dispute resolution role which, if robustly engaged through widening access channels or routes, will ensure regular interpretation of treaty and community laws, something that will foster the market integration process.[16] For REC judicial bodies, the issues to look out for are: firstly, what is the jurisdiction of the judicial body; secondly, who can invoke its jurisdiction; and, thirdly, the enforceability of the judicial body's decisions. Also to look out for is how the judicial body's decisions will relate to decisions of national courts. It is posited that weak, unreliable, inefficient and often corrupt national court systems are ill-suited for the task of a uniform interpretation and enforcement of harmonized of laws, and are the Achilles heel to regional integration efforts.[17] It has been said, for example, that the European Court of Justice has been the main facilitator in the legal integration of Europe as it is charged with the duty of interpreting treaties and making sure that member states comply with community laws.[18] The same has been said of OHADA's Common Court for Justice and Arbitration (CCJA).[19] The interpretative monopoly enjoyed by the REC courts is said to ensure the effectiveness of the harmonization process.[20]

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[14] Killander M, 'Harmonization in Africa: Taking Stock and Moving Forward' (2012) 47:1 The International Spectator, Italian Journal of International Affairs 83; Gierczyck Y, 'The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2005) Vol. 12 ILSA Journal of International and Comparative Law 153; Dubos O, ' The Different Incarnations of the Member States in Legal Harmonization Processes: A Comparative Study of the East African Community, the European Union and OHADA' in Döveling J, Majamba H, Oppong R, Wanitzek U (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 97, 98 and 106; Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 131,132.

[15] Voeten E, 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia' Asian Development Bank, ADB Working Paper Series on Regional Economic Integration; Number 65, November, 2010, 2

[16] Ibid, 5.

[17] Ibid. Ogwezzy M, 'CCJA; A Supranational Institution for the Administration of Commercial Disputes in Africa' (2013) (2) Nordic Journal of Commercial Law 1.

[18] Gierczyck Y, The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2005) Vol. 12 ILSA Journal of International and Comparative Law 153.

[19] Dickerson C, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) 44 Columbia Journal of Transnational Law 17.

[20] Dubos O, ' The Different Incarnations of the Member States in Legal Harmonization Processes: A Comparative Study of the East African Community, the European Union and OHADA' in Döveling J, Majamba H, Oppong R,

Beyond the creation of institutions capable of conducting legal harmonization, focus must also turn to the legal instruments that the institutions will utilize in this endeavour: whether these are binding on member states of the REC; whether they can be enforced in member states by private citizens and the relationship of those instruments to national laws. This is because a REC is a legal system in its own right, albeit at an international level, with the treaty and community laws forming the system. This system exists side by side with various national legal systems of the REC's member states.[21] The issue this poses is how the laws or legal instruments in these two legal systems will interact with each other. It is how the two legal systems interact with each other that determines whether they will foster market integration or not.[22] It will be an exercise in futility for a REC to harmonize its laws when these will be inferior to or not be directly applicable or have direct effect in all member states of the REC.[23] Focus will therefore be on whether the REC's laws have direct effect in or are directly applicable in the REC's member states and how they rank in relation to the laws of the member states in the RECs.

In addition to the above, the political will of member states to harmonize their laws or to create or sustain structures and institutional mandates to achieve that is another very important factor as harmonization of laws has implications on national sovereignty[24] and political will seems in short supply in most RECs that have all the constitutional and institutional provisions conducive to the harmonization process.[25] The effect of political will in the harmonization of laws process was clearly manifest in the decision by SADC to suspend its

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Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 106.

[21] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' ( Unpublished, LL.D Thesis, University of British Columbia, 2009) 37,86; *Van Gend en Loos v. Nederlandse Tariefcommissie,* Case No 26/62 [1962] CMLR 105.

[22] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town, 2017 available at <http://hdl.handle.net/11427/25481.

[23] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' ( Unpublished, LL.D Thesis, University of British Columbia, 2009) 95,96

[24] Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 127.

[25] Shumba T, 'Harmonizing the Law of Sale in the Southern African Development Community SADC: An Analysis of Selected Models; Ph. D Dissertation, Stellenbosch University, 2014 p106-107; Anukpe Ovrawah O, 'Harmonization of Laws within the Economic Community of West African States' (1994) 6(1) Afr J Int'l & Comp L 76.

judicial organ, the Tribunal and to later on alter its mandate to remove its jurisdiction to handle cases referred to it by individuals affected by decisions of member states.[26] Unfortunately, as one cannot legislate for political will, it will not form part of the factors in the analysis that this chapter undertakes to carry out.

Besides the lack of political will, Shumba[27] lists the following as the general challenges in the harmonization of laws within African RECs: lack of financial resources; capacity constraints; socio-economic and political challenges mostly due to the difficulty of attempting to bring together the fragmented, outdated and diverse laws of underdeveloped economies; legal and cultural diversity; membership of states in multiple RECs; linguistic diversity; and the absence of efficient institutional arrangements.[28] The chapter does not propose to deal with most of these factors as they are beyond its scope, but will focus on constitutional and institutional arrangements.

Among the objectives of comparative law is the evaluative function which, essentially, is a quest to determine the better law.[29] However, what is the better law is a complex question as it will depend on various factors in different countries. Comparative methodology also serves a critical function.[30] This chapter seeks to achieve its aims and objectives using comparative methodological techniques whereby the various legal instruments setting up the RECs under study will be analyzed and a critical evaluation undertaken to find out which REC is better suited to effectively and efficiently undertake the process of harmonization of laws, and also how COMESA's foundational instrument comparably measures up to the task. To facilitate this process, a functional approach will be deployed whereby ideal conditions that must exist for a

[26] See Article 33 of the Protocol on the Tribunal in the Southern African Development Community signed at Victoria Falls, Zimbabwe on 18th August, 2014; Tladi D, 'The Constitutional Court's Judgment in the *SADC Tribunal* Case: International Law Continues to Befuddle' (2020) Volume 10 Constitutional Law Review, 129; *Law Society of South Africa v The President of South Africa and Others* [2018] ZACC 51; Shivamba A, 'The Demise of a Legitimate Southern African Regional Court' SALC Policy Brief No. 6 of 2019.

[27] Ibid.

[28] See also Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 116.

[29] Gopalan S, 'Transnational Commercial Law: The Way Forward' (2003) Volume 18 Number 4, American University International Law Review 803.

[30] Michaels R, 'The Functional Method in Comparative Law' in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd Ed, OUP 2019) 348.

REC to perform harmonization of laws will be identified and used as *tertium comparationis*, or yardsticks to measure the REC's suitability to venture into legal harmonization.[31]

Consequent from the above, in the comparative study of the capacity of the identified RECs to undertake the legal harmonization process that this chapter sets out to undertake, the *tertium comparationis* that shall be deployed are: (a) the presence of the power to harmonize laws; (b) the availability and mandate of institutions for the harmonization of laws; (c) the instruments intended for use in the harmonization process and their relationship with national legal systems in the REC; and (d) the presence, accessibility and enforcement powers of a supranational court in the REC set up. These identified parameters play a crucial role in informing the ease with which legal harmonization can occur in a REC. The parameters are broadly expressed, however. Within each broad category are other sub-functional components that will be identified and studied in detail.

### *6.1.3. Outline of the chapter*

The next section contains a REC by REC comparative discussion of how the constitutive or foundational treaties of the selected RECs empower each of them to conduct legal harmonization. This will be followed by a study of what structures or institutions, if any, each REC has created to implement the process. The narrative will focus on the availability or lack thereof of institutions that are specifically tasked or mandated with overseeing the harmonization agenda and their respective roles in the creation of community law. After that, legal instruments used in the harmonization process will be identified and their relationship with national legal systems discussed. The chapter will then move on to discuss the role of a supranational judicial body to aid the legal harmonization efforts and an assessment of the judicial bodies in the various RECs under study. Finally the chapter will evaluate the institutional readiness for harmonization of laws of COMESA and investigate what lessons it must draw from the experiences of the other RECs in its efforts to harmonize the transaction avoidance rules of its member states. Focus will be on what aspects COMESA can adopt from the other RECs and which ones may be difficult to adopt.

[31] Hage J, 'Comparative Law as Method and the Method of Comparative Law' in Adams M and Heirbaut D, (eds) *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing 2014) 37.

## 6.2. How The Foundational Treaties Have Conferred On The RECs The Power Harmonize Laws

As indicated above, the expression of the mandate to conduct legal harmonization is key as RECs, founded under a constitutive treaty, can only do that which their constitutive documents empower them to do. Where no mandate to conduct legal harmonization is expressed at all or is expressed in a vague way there may not be any impetus in the REC to embark on the process, let alone to give the process priority.

### *6.2.1. The SADC Treaty*

In the preamble to the SADC Treaty member states, among other things, express their determination to ensure, through common action, the progress and well-being of the people of Southern Africa as well as consciousness of their duty to promote the interdependence and integration of their national economies for the harmonious, balanced and equitable development of the region. They also show determination to alleviate poverty, with the ultimate objective of its eradication, through 'deeper regional integration' and sustainable economic growth and development. The term ' deeper regional integration' remains an undefined concept in the Treaty.

Among the objectives of SADC as provided for under article 5 of the Treaty is the promotion of sustainable and equitable economic and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.[32] This shall be achieved through, among others, the harmonization of political and socio-economic policies and plans of member states,[33] and the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labor, goods and services, and of the people of the region generally, among member states.[34] There is also a general provision stating that to achieve the objectives of the treaty member states shall develop such other activities as member states may decide in furtherance of the

[32] Article 5(1)(a) of the SADC Treaty.
[33] Article 5(2)(a) of the SADC Treaty.
[34] Article 5(2)(d).

objectives of the treaty.[35] Member states then undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the treaty.[36]

There is no express provision in either the preamble or the statement of aims and objectives of the SADC Treaty that gives member states the express duty to harmonize their laws. Though Shumba[37] and Oppong[38] contrive such a duty from a strained reading of articles 5(2)(d) and 21(2) of the SADC Treaty, this is only through some torturous ratiocination, and the conclusion is arrived at through implied reasoning that veers dangerously close to apologism. The reality is that the duty to harmonize laws does not exist under the SADC Treaty, and though there is a duty to harmonize political and socio- economic policies, it is a fact that policies are not laws, and, though common policies may lead to common or harmonized laws, that may not necessarily be the case as, acting within a common policy framework it is possible to come up with variegated laws.

That said, article 21 of the SADC Treaty identifies areas on which member states agree to co-operate, and these include trade, industry, finance, investment and mining among others and on such others areas as may be decided upon by the Council. By article 22, member states shall conclude protocols in each area of co-operation, which shall spell out the objectives and scope of and institutional mechanisms for co-operation and integration. Such protocols are open to signature and ratification by choice by member states and shall be binding only on such member states as are party to them. The protocols are the nearest SADC member states get to common binding legal obligations and would serve as legal harmonization instruments but for the inclusion of the right of member states to not accede to any protocol they choose.

### *6.2.2. The Treaty Establishing the EAC*

[35] Article 5(2)(j) of the SADC Treaty.
[36] Article 6(1) of the SADC Treaty.
[37] Shumba T, 'Harmonizing the Law of Sale in the Southern African Development Community SADC: An Analysis of Selected Models; Ph. D Dissertation, Stellenbosch University, 2014 p106-107.
[38] Oppong R, 'Legal Harmonization in African Regional Economic Communities: Progress, Inertia or Regress' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 123,124.

Under article 5(1) it is provided that the objectives of the community shall be to develop policies and programs aimed at widening and deepening co-operation among Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit. The expressed objective under article 5(1) of developing policies and programs aimed at widening and deepening co-operation in, among others, legal and judicial affairs, gave birth to article 126(2)(b) of the Treaty which creates a mandate on Partner States to harmonize all their national laws appertaining to the community. Hence, there is an express duty to harmonize laws. The treaty has identified several areas where Partner States have agreed and undertaken to harmonize their laws.[39]

The second source of power for legal harmonization under the EAC treaty is found under article 14(3)(d) which gives the Council of the EAC the power to make regulations, issue directives, take decisions, make recommendations, and give opinions in accordance with the provisions of the Treaty. These regulations, directives and decisions of the Council shall, according to article 16 of the Treaty, be binding on the Partner States and on all organs and institutions of the EAC other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may, under the treaty, be addressed.[40]

The third source of power to harmonize laws under the EAC Treaty is found under article 85(b) and (d) which expressly mandates Partner States to harmonize their Banking Acts and their regulatory and legislative frameworks and structures.

Fourthly, the power to harmonize laws is located under various protocols of the EAC.[41]

### *6.2.3. COMESA Treaty*

[39] See for example, article 89 (transport and communication); article 90 (traffic laws, roads and road transport); article 91 (railways and rail transport); article 92 (civil aviation rules and regulations); article 94 (inland water transport); article 95(multi-modal transport); article 97 (freight forwarders, customs clearing agents and shipping agents); article 102 (education and training); article 104 (labor legislation); article 106 (seed multiplication and distribution); article 107 (livestock multiplication and distribution); article 108 (plant and animal diseases and control); article 112 (environmental management); article 113 (prevention of Illegal trade in and the movement of toxic chemical substances and hazardous waste; article 114 (management of natural resources); article 118 (drug registration procedures).

[40] Mugasha A, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) Volume 19 (4) European Journal of Law Reform 306.

[41] Articles 12, 32 and 47 of the East African Community Common Market Protocol; Article 22 of the Protocol on the Establishment of the East African Community Monetary Union; Article 39 of the East African Customs Union Protocol.

Like their counterparts at SADC, COMESA member states also show a determination, in the preamble to the treaty, to mark a new stage in the process of economic integration through the consolidation of their economic cooperation and the implementation of common policies and programs aimed at achieving sustainable growth and development. They also aspire for 'full market integration', though the term, like in the case of SADC, remains undefined. That said, COMESA member states go a step further than SADC in the sense that apart from identifying as an objective the need to cooperate in the creation of an enabling environment for foreign, cross border and domestic investment,[42] they do, under article 4(6)(b) create a specific treaty undertaking by member states to harmonize or approximate their laws to the extent required for the proper functioning of the common market. That required extent is not defined. A few other provisions in the COMESA Treaty also create a legal obligation to harmonize particular laws.[43] The wide wording of article 4(6)(b) means that the areas of legal harmonization are open ended provided these relate to boosting the proper functioning of the common market.

Hence, both COMESA and the EAC have created some express treaty undertakings to harmonize laws, and this creates an obligation on member states to fulfil the undertaking.

Note, however, that in COMESA a functional or teleological signpost is placed on the extent of any approximation or harmonization exercise. The exercise should be carried out ' to the extent required for the proper functioning of the common market.' Though this extent is undefined, perhaps a cue can be taken from the fact that what is aspired for in the preamble to the COMESA Treaty is full market integration that will, under article 4(6)(b) of the treaty, lead to the proper functioning of the common market. Hence, the harmonization drive, aimed at full market integration, will be aimed at the proper functioning of the common market. In the EAC, on the other hand, the functional aim of the legal harmonization exercise appears to be poorly stated. It is, under article 5(1) said to be aimed at deepening co-operation among Partner States

[42] Article 3(c) of the COMESA Treaty.

[43] Article 55 (competition regulations); Article 63 (customs regulations); Article 64 (uniform classification of goods); Article 69 (trade documents and procedures); Article 85 (road transport); Article 86(2)(d) relating to inter-state railways; Article 87 (civil aviation rules); Article 88 (maritime transport legislation); Article 89 (inland water transport); Article 91 (multi-modal transport); Article 110 (drug registration procedures); Article 113 (national standards); Article 115 (certification and laboratory accreditation); Article 116 (metrology); Article124 (environmental management).

in, among others, legal and judicial affairs. This may need improving upon to include a market integration aim.

### *6.2.4. OHADA*

The RECs studied this far were set up to realize various goals among which is market integration. To attain market integration legal harmonization must be undertaken, hence the express mention of legal harmonization in the aims and objectives or specific undertakings clauses of the COMESA and EAC foundational treaties for example, and the postulation that the SADC Treaty also mandates harmonization of laws by necessary implication.[44] OHADA, on the other hand, whose stated overall aim is realizing economic integration[45] was created solely and specifically to undertake legal harmonization among member states the overwhelming majority of whom are located in a common geographical zone in Central and West Africa and share a common currency, the Franc, as well as a common linguistic and legal-historical or legal traditional or cultural background being French speaking countries that were former French colonies and follow the civil law tradition.[46]

Article 1 of the OHADA Treaty comes out clearly and expressly that the object of the treaty is to harmonize business laws of State Parties by elaboration and adoption of simple modern common rules adapted to their economies. For certainty and clarity, article 2 of the OHADA Treaty describes the laws to be harmonized. It states that business laws *shall include* all regulations relating to company law, the definition and classification of traders, recovery procedures, measures of enforcement, liquidation and administration proceedings and arbitration, labor law, accounting law, carriage and sale of goods, and any such other matters that the Council of Ministers shall unanimously decide to include in accordance with the object of the treaty. This broad definition of business laws is not restricted to the examples given but is expansive[47] with the cited examples serving as necessary pointers to the categories of laws to

[44] Shumba T, 'Harmonizing the Law of Sale in the Southern African Development Community SADC: An Analysis of Selected Models; Ph. D Dissertation, Stellenbosch University, 2014 p106-107.
[45] Preamble to the Amended OHADA Treaty 2008.
[46] Mancuso S, 'The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) 14(1) Annual Survey of International and Comparative Law 39.
[47] *Dilworth v Commissioner of Stamps* [1899] AC 99; *Reynolds v The Commissioner of Income Tax* [1966] 2 WLR 408.

be targeted for harmonization. The treaty then proceeds to set up a special purpose vehicle[48] for the task and the institutions both within and outside it as well as the procedures and mechanisms for legal harmonization.

Hence, unlike the situation in COMESA and EAC, there is, in the case of OHADA, not only the central theme of market integration legally mandated to be undertaken through harmonization of laws, but also the definition or description of what those laws that need harmonization are, as well as the creation of a special purpose vehicle specifically tasked with the attainment of the legal harmonization objective.

#### *6.2.5. The EU*

Article 26 (1) of the Treaty on the Functioning of the European Union ('TFEU') provides that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. Article 114(1) of the TFEU then states that save as where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in article 26: the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their objective the establishment and functioning of the internal market. Article 81(1) of the TFEU provides that the Union shall develop judicial cooperation in civil matters having cross-border implications based on mutual recognition of judgments and of decisions in extrajudicial cases, and such cooperation may include the adoption of measures for the approximation of the laws and regulations of the member states. Hence, there is a mandate[49] on the European Parliament and the European Council to approximate laws, regulations and administrative action in Member States geared at improving the functioning of the internal market and enhancing judicial cooperation in civil matters having cross-border implications. The expression of the mandate to undertake legal harmonization in the European Union is not

[48] Article 3 of the OHADA Treaty provides that the execution of the tasks laid down in the Treaty shall be ensured by an Organization known as the Organization for the Harmonization of Business Law in Africa.
[49] Not an unlimited one though as there must be a Treaty basis and the harmonization must be proportionate and observe the principle of subsidiarity.

unlike the one under the COMESA Treaty which identifies the aim of harmonization being market integration before creating the duty to harmonize laws.

#### *6.2.6. Assessment*

From the above, the SADC treaty has the weakest expression of the power to harmonize laws. It has no express provision referring to the harmonization of laws at all, except for the power to make Protocols which is vested in the Summit. The EAC, COMESA, OHADA and EU all expressly mention harmonization of laws and vest the power, in the case of the EAC and COMESA in the Council. COMESA and the EAC treaties have also identified specific areas of commerce whose laws will need to be harmonized but, evidently, these are not exhaustive if the stated aim is full market integration. More areas for legal harmonization exist outside the expressly stated ones, and these additional areas need to be specifically mentioned the way they were in the OHADA treaty if RECs are to feel compelled to attend to these. Hence, OHADA ranks superior among the African RECs studied with respect to the expression of the power to harmonize laws with SADC ranking last.

### 6.3. Institutions Tasked To Conduct Legal Harmonization

With regards to the institutions that are mandated to approximate or harmonize laws, focus may not necessarily have to be on what the name of the institutions is as these go by various names in the RECs. As harmonization of laws is essentially law making, attention will have to dwell on aspects of the process that grant the rules legitimacy and also aspects of the institutional set up that foster speed and efficiency of the rule making process. Hence the focus will be firstly, on whether there is popular participation in the rule making process, and, secondly, on the question whether the institutions are specifically dedicated to legal harmonization or approximation as this will determine the speed at which the legal harmonization process could proceed as well as the quality of the final product in the sense that specialized institutions would over time develop the intellectual capacity to undertake the process. Whether these institutions do have an annual program for the legal harmonization task is also relevant and so, too, whether there are set procedural rules in place governing the process.

#### *6.3.1. SADC*

Under article 9 of the SADC Treaty, the primary institution of SADC is the Summit of Heads of State and Government, and this is followed in that order, by the Organ on Politics, Defence and Security Co-operation, the Council of Ministers, the Sectoral and Cluster Ministerial Committees, the Standing Committee of Officials, the Secretariat, the Tribunal and the SADC National Committees. The Summit is responsible for the overall policy direction and control of the functions of SADC and is also responsible for the adoption of legal instruments for the implementation of the provisions of the treaty, though it reserves the power to delegate this authority to the Council or any other institution of SADC.[50] Hence, the Summit would be the one to adopt any legal harmonization instrument. Its decisions are by consensus and are binding.[51] The Council, consisting of one Minister from each Member State, preferably a Minister responsible for Foreign or External Affairs, is responsible to oversee the functioning and development of SADC and the implementation of policies and proper execution of its programs.[52] It shall also advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC.[53] It is in this latter role that it may, following a policy directive from the Summit regarding harmonization of laws, implement the policy through initiation and drafting of legal harmonization instruments and escalating them to the Summit for approval. However, as the Council is made up of ministers of foreign affairs, their capacity to execute this task may depend on recommendations from Sectoral or Cluster Ministerial Committees established under article 12. These include a Sectoral and Cluster Ministerial Committee on trade, industry, finance and investment and one of their duties is to provide policy advice to the Council.[54] The Sectoral and Cluster Ministerial Committees report to the Council through the Standing Committee which is comprised of one permanent secretary or an official of equivalent rank from each Member State.[55] Then there is the Secretariat, responsible for, among others,[56] strategic planning and management of programs of SADC, coordination and harmonization of policies and strategies of Member States and submission of harmonized policies and programs to the Council for consideration and approval. It is also

[50] Article 10(2) and (3) of the SADC Treaty.
[51] Article 10(9) of the SADC Treaty.
[52] Article 11(2)(a) and (b) of the SADC Treaty.
[53] Article 12(2)(c) of the SADC Treaty.
[54] Article 11(2)(c) of the SADC Treaty.
[55] Article 12(1) and (4) of the SADC Treaty.
[56] Article 14(1) of the SADC Treaty.

responsible for management of special programs and projects. One would imagine that the Secretariat would do the actual work on legal harmonization and pass the same on to the Sectoral and Cluster Ministerial Committees, who would then engage the Council before the harmonized laws are approved and adopted by the Summit.

The role of the SADC Tribunal[57] as an institution involved in the legal harmonization process will be discussed later when supranational courts in the RECs are studied.

SADC has no legislative assembly.

Though led by the Summit, the SADC scenario paints a picture of institutional uncertainty in the area of legal harmonization, and this originates from the initial failure by member states to expressly include the task of harmonization of laws under the treaty.[58] Following from this, apart from the Summit, no institution in the REC has been expressly tasked to conduct legal harmonization.[59] Only policy harmonization is mentioned, although the issue as to which policies are to be harmonized is left untouched. Over and above that, even if harmonization was to occur, no elaborate consultation procedures with member states have been provided for, neither have time frames for decision making and other steps been imposed.

### *6.3.2. The EAC*

Under article 9 of the Treaty Establishing the EAC, the EAC has the following organs: the Summit; the Council; the Coordination Committee; Sectoral Committees; the East African Court of Justice; the East African Legislative Assembly; the Secretariat, and any such other organs as may be established by the Summit.

The Summit is a body comprising heads of state and government.[60] It is there to, among other things, give general direction and impetus to the development and achievement of the objectives of the Community.[61]

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[57] Established under article 16 of the SADC Treaty.
[58] Shumba T, Harmonizing the Law of Sale in the Southern African Development Community SADC: An Analysis of Selected Models; Ph. D Dissertation, Stellenbosch University, 2014 p106-107.
[59] Ibid.
[60] Article 10(1) of the Treaty Establishing the EAC.
[61] Article 11 (1) of the Treaty Establishing the EAC.

The Council, comprising Ministers responsible for East African Community Affairs in each Partner State, any such other Minister as each Partner State may determine, as well as the Attorney Generals of each Partner State[62] is the policy organ of the EAC and shall promote, monitor and keep under constant review the implementation of the programs of the EAC and ensure the proper functioning and development of the community in accordance with the treaty. It is also tasked with initiating and submitting Bills to the East African Legislative Assembly. Further, it has the power to make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of the treaty.[63] It is also responsible for establishing from among its members, Sectoral Councils to deal with matters that arise under the treaty. Further than this, it has the power to establish Sectoral Committees.[64] From the above, it is evident that the executive arms of Partner States through the Summit and the Council undertake the harmonization agenda in the EAC with the East African Legislative Assembly and the East African Court of Justice also participating in the process.[65]

The Sectoral Council on Legal and Judicial Affairs, comprising Attorney Generals and Ministers of Justice, was established by the Council and quite apart from being tasked with overseeing the harmonization of laws, is also mandated to initiate Bills for enactment by the East African Legislative Assembly.[66] The Council, using its powers under article 14(3)(j) of the Treaty also established a Sub-Committee on the Harmonization of National Laws in the EAC. It is spearheaded by chairpersons of the Law Reform Commissions of the Partner States.[67] The Sub-Committee submits its reports to the Sectoral Council on Legal and Judicial Affairs.[68]

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[62] Article 13 of the Treaty Establishing the EAC.

[63] See also article 51 of the East African Community Common Market Protocol. The regulations, directions and decisions are binding on Partner States and institutions- See article 16 of the Treaty Establishing the EAC.

[64] Article 14 of the Treaty Establishing the EAC.

[65] Milej T, 'Legal Harmonization in the Regional Economic Communities − The Case of the European Union' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 141.

[66] *Calist Andrew Mwatela and Others v East African Community*, East African Court of Justice, Application Number 1 of 2005.

[67] Ndayikengurukiye M, 'Some Observations on Practical Aspects of the Harmonization of Economic Laws in the East African Community Context' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 3.

[68] Ibid.

The East African Legislative Assembly is the legislative organ of the Community[69] responsible for passing Acts of the Community[70] which become law when assented to by Heads of State.[71] It comprises nine members elected by each Partner State,[72] putting into question whether these represent the people or the Member States.[73]

Finally, there is the East African Court of Justice which, under article 23 of the Treaty Establishing the EAC, shall ensure adherence to law in the interpretation and application of and compliance with the treaty. The court shall be discussed in more detail below when the study engages in a comparative analysis of supranational courts in the RECs.

#### *6.3.3. COMESA*

According to article 7 of the COMESA Treaty, COMESA has the following organs: the Authority; the Council; the Court of Justice; the Committee of Governors of Central Banks; the Intergovernmental Committee; the Technical Committees; the Secretariat and the Consultative Committee.

The Authority, consisting Heads of State or Government of Member States is the supreme policy organ responsible for general policy direction and control of the performance of executive functions of the Common Market and the achievement of its aims and objectives.[74] This means it has the overall responsibility for the preambular aim of market integration and the attainment of the specific undertaking of harmonization of laws for the attainment of market integration. The Authority issues directions and decisions which are binding on all Member States and organs of COMESA except the Court of justice.[75] Its decisions are by consensus.[76]

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[69] Article 49(1) of the Treaty Establishing the EAC.
[70] Article 62 of the Treaty Establishing he EAC.
[71] Article 63 of the Treaty Establishing the EAC.
[72] Article 48(1)(a) of the Treaty Establishing the EAC.
[73] Milej T, 'Legal Harmonization in the Regional Economic Communities – The Case of the European Union' in Döveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 141.
[74] Article 8 of the COMESA Treaty.
[75] Article 8(3) of the COMESA Treaty.
[76] Article 8(7) of the COMESA Treaty.

The Council is comprised of such Ministers as are designated by each State.[77] It is, among other duties, responsible to monitor and keep under constant review the proper functioning and development of the Common Market and make recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Common Market.[78] It is also responsible for making regulations, issuing directives, taking decisions, making recommendations and giving opinions in accordance with the provisions of the Treaty.[79] Further, it may request advisory opinions from the Court.[80] These regulations, directives and decisions shall be binding on Member States and all on all subordinate organs of the Common Market other than the Court.[81] Its decisions are taken by consensus, failing which by two thirds majority of members of the Council.[82] It is with respect to the making of regulations and directives that the Council does engage in legal harmonization, with regulations acting as hard law instruments and directives soft law as these will depend on Member States effectuating their purpose through domestic legal instruments.[83]

In the making of regulations or directives to effect harmonization of laws, the Council may be assisted by the Intergovernmental Committee and, below that, Technical Committees. The Intergovernmental Committee comprises such Permanent or Principal Secretaries as may be designated by Member States and is responsible for the development of programs and action plans in all the sectors of co-operation except in the finance and monetary sector, monitors and keeps under constant review and ensures proper functioning and development of the Common Market and oversees the implementation of the provisions of the Treaty and for that purpose may request a Technical Committee to investigate a particular matter.[84] It submits reports and recommendations to the Council.[85]

Among the Technical Committees is one on Legal Affairs which may be directly involved in all issues dealing with harmonization of laws, perhaps in liaison with other

[77] Article 9(1) of the COMESA Treaty.
[78] Article 9(2)(a) and (b) of the COMESA Treaty.
[79] Article 9(2)(d) and article 10(1)of the COMESA Treaty.
[80] Article 9(2)(e) of the COMESA Treaty.
[81] Article 9(3) of the COMESA Treaty.
[82] Article 9(6) of the COMESA Treaty.
[83] Articles 10(2) and 10(3) of the COMESA Treaty.
[84] Article 14 of the COMESA Treaty.
[85] Ibid.

Technical Committees under whose aegis the particular laws to be harmonized would fall.[86] The Technical Committees are mandated to submit their reports and recommendations to the Intergovernmental Committee.[87] The Technical Committees are supported by the Secretariat.[88]

Among the functions of the Secretariat, headed by the Secretary General is the duty to keep the functioning of the Common Market under continuous examination and to act on any matter which merits examination, and to also undertake such work and studies and perform such services as relate to the aims of the Common Market and to the implementation of the provisions of the Treaty.[89] These functions are relevant to the harmonization of laws to attain market integration.

The Consultative Committee, comprised of business captains may be consulted and provide their input in any legal harmonization efforts.[90]

COMESA does not have a legislative assembly.

COMESA has a Court of Justice.[91] The COMESA Court of Justice and its role in the harmonization of laws process will be discussed in greater detail below.

#### *6.3.4. OHADA*

Created specifically for the harmonization of business laws,[92] OHADA has the institutional set up to match the daunting task.

To begin with, it leaves the execution of the task to an organization known as the Organization for the Harmonization of Business Law in Africa, headquartered in Cameroon.[93] Article 3 of the Treaty gives the institutional composition of OHADA. It shall comprise the Conference of Heads of State and Government; the Council of Ministers; the Common Court of Justice and Arbitration ('CCJA') and the Permanent Secretariat.

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[86] Article 15 of the COMESA Treaty.
[87] Article 16(d) of the COMESA Treaty.
[88] Article 16(c) of the COMESA Treaty.
[89] Article 17 of the COMESA Treaty.
[90] Article 19 of the COMESA Treaty.
[91] Chapter 5 of the COMESAT Treaty.
[92] Article 1 of the OHADA Treaty.
[93] Article 3 of the OHADA Treaty.

The OHADA Treaty then defines the product to be churned out: Uniform Acts.[94]

The Treaty then immediately goes into an outline of the procedures for the drafting, enactment and adoption of Uniform Acts, and what is remarkable is that it imposes time lines for each activity.

The general procedural framework is that the Permanent Secretariat must produce an annual program for the harmonization of business laws which is approved by the Council of Ministers.[95] Uniform Acts are drafted by the Permanent Secretariat in consultation with the Governments of State Parties. They are then debated and adopted by the Council of Ministers upon the opinion of the CCJA.[96]

The time frames for the production of Uniform Acts are that following the consultations leading to the drafting of the Uniform Acts, draft versions of the Uniform Acts are forwarded by the Permanent Secretariat to the Governments of State Parties who shall submit their written observations to the Permanent Secretariat within 90 days of receipt of the draft versions.[97] Following the expiry of the time limit, the draft Uniform Acts, including observations of the State Parties and a report from the Permanent Secretariat are forwarded immediately by the Permanent Secretariat to the CCJA for its opinion. The Court shall present its opinion within 30 days and upon expiry of this time limit, the Permanent Secretariat shall finalize the text of the draft Uniform Acts and propose that it be included in the agenda of the next meeting of the Council of Ministers.[98] Adoption of the Uniform Acts by the Council of Ministers shall be by a unanimous vote and the adoption shall not be valid unless at least two thirds of the State Parties are represented.[99] The Uniform Acts are then published in the OHADA Official Gazette within 60 days of adoption and come into force 90 days after such publication. The Uniform Acts shall also be published by State Parties in their official gazette or by any appropriate means but the formality shall not affect the coming into force of the Uniform Acts.[100]

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[94] Article 5 of the OHADA Treaty.
[95] Article 11 of the OHADA Treaty.
[96] Article 6 of the OHADA Treaty.
[97] The time limit may be extended on demand: Article 7 of the OHADA Treaty.
[98] Article 7 of the OHADA Treaty.
[99] Article 8 of the OHADA Treaty.
[100] Article 9 of the OHADA Treaty.

The Uniform Acts are directly applicable to and binding on the State Parties notwithstanding any previous or subsequent conflicting provisions of national law.[101]

OHADA has no legislative assembly.

OHADA has a supranational court, the CCJA. Its workings shall be discussed in more detail later in this chapter.

### *6.3.5. The EU*

According to article 13 of the Treaty on European Union, the Union's institutions are: the European Parliament; the European Council[102]; the Council; the European Commission; the Court of Justice of the European Union; the European Central Bank and the Court of Auditors. The European Parliament, the Council and the Commission are the ones that have direct involvement with the legislative process of harmonization or approximation of laws,[103] to which process the Court of Justice of the European Union plays a significant supporting role.[104] The European Parliament and the Council have the key legislative enactment roles,[105] whilst the Commission plays the supporting role of initiating the legislative proposals.[106]

The Council consists of a representative of each Member State of the European Union at ministerial level, who may commit the government of the Member State in question.[107] The Council may request the Commission, which, essentially is the Secretariat or administrative unit, to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it appropriate proposals.[108] Based on these recommendations or

[101] Article 10 of the OHADA Treaty.
[102] Contrasted from the Council, the European Council is composed of Heads of State and Government and the President of the Commission. It is responsible for political leadership and broader policy direction: Article 15 of the Treaty on the European Union.
[103] To which they are tasked under articles 26 and 114 of the TFEU.
[104] Milej T, 'Legal Harmonization in the Regional Economic Communities − The Case of the European Union' in DÖveling J, Majamba H, Oppong R, Wanitzek U, (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 141. This will be discussed in more detail below.
[105] Articles 14 and 16 of the Treaty on European Union.
[106] Article 17(2) of the Treaty on European Union.
[107] Article 16(2) of the Treaty on European Union.
[108] Article 241 of the TFEU.

proposals,[109] the Council adopts European Union legislative measures, be they regulations or directives, alone or in conjunction with the European Parliament.[110]

Unlike in the EAC, members of the European Parliament are voted for directly by nationals of member states each of whom also has a right to stand for election to the Parliament.[111]

### *6.3.6. Assessment*

OHADA as a special purpose vehicle seems the best primed for the task of legal harmonization, which it does according to specific annual programs set by the Permanent Secretariat, and the process has an elaborate consultation timeline involving member states, the CCJA and the Council. The fact that decisions adopting the Uniform Act will have to be by consensus ensures that the final product has the requisite 'buy into' by member states. The only issue with the institutional set up is that the CCJA is also involved in the consultation process, meaning the judicial arm, being interpreters of the law, are involved in law making as well, something that sounds anomalous to the concept of separation of powers. However, this consultation may speed up market integration in the sense that the finished product would already have been subjected to judicial review and oversight, meaning it is more polished than if the judicial body was not involved in its formulation in the first place, This reduces unnecessary and avoidable litigation on the final product.

Though OHADA does not have a legislative assembly, the final product is nonetheless called a Uniform Act. The absence of a legislative assembly creates an issue of democratic deficit as already seen, but perhaps that is for academics to worry about for as long as the final product is a workable law that has been accepted by all the member states.

Following OHADA, the EAC seems better equipped institutionally, through the facility of the standing Sub-Committee on the Harmonization of Laws which, comprised of Law Commissioners from partner states, is best suited for the task. The fact that the Sub-Committee operates on a timetable serves to improve delivery on its mandate. COMESA works through the

[109] Article 289 of the TFEU.
[110] Ibid.
[111] Article 22 of the TFEU; Article 14 of the Treaty on the European Union.

Technical Committee on Legal Affairs but this Committee does not have the exclusive mandate of legal harmonization but oversees so many other legal issues. Therein lies its weakness, as it may only engage in legal harmonization work when the Council through the Secretariat mandates it to, and this may account for the low output on legal harmonization. The EU institutional set up is also ideal with three institutions, to wit, the Commission, the Council and the Parliament coordinating to produce community laws. SADC ranks last due to the absence of legal harmonization as a treaty undertaking which entails that no institution has been specifically tasked with the job, except the Summit through Protocols.

The absence of a legislative assembly in COMESA means its harmonizing instruments do not include community Acts, something that the EAC produces. This may affect its throughput.

### 6.4. Legal Instruments Used In Harmonization Of REC Laws And Their Relationship To National Laws Of Member States

This part contains a discussion of the various types of legal instruments deployed by the RECs in the harmonization of laws. Focus will be on the nature and efficacy of the instruments as legal harmonization tools. Another issue of concern will be whether the instruments have direct legal applicability and direct effect in the member states of the REC. Direct applicability relates to whether the community legal instruments will become law in the national legal systems without the need for a domesticating legislative instrument, whereas direct effect relates to whether community laws create enforceable rights within national legal systems and individuals can invoke the community laws before their national courts. It is through the measure of direct effect that individuals are able to invoke community laws in national legal systems.[112] Whether the community laws have direct applicability will determine the pace of legal harmonization as it will override the need for local domestication, something some member states may be slow to undertake. So, too, direct effect, as true harmonization can only be realized where the community laws are invokable and enforceable in the member states as part of domestic laws. The ranking of community laws over national laws will also matter as

[112] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town, 2017 available at <http://hdl.handle.net/11427/25481.

subjugating them to national laws will stand in the way of legal harmonization at community level. Direct effect, direct applicability and supremacy of community laws can all be provided for in foundational treaties of RECs.[113]

### *6.4.1. SADC*

The best semblance of a harmonizing legal instrument in SADC is the Protocol. Under article 22(1) of the SADC Treaty member states shall conclude such protocols as may be necessary in each area of cooperation, which shall spell out the objectives, scope, and institutional mechanisms for cooperation and integration. The Protocols are subject to approval by the Summit on the recommendation of the Council,[114] shall be open to signature and ratification[115] and shall enter into force thirty days after the deposit of instruments of ratification by two thirds of the Member States.[116] Once a Protocol has entered into force, a member state may only become a party thereto by accession.[117] Protocols are binding only on such member states as are party to the Protocol in question.[118]

Considering that decisions of the Summit to approve any Protocol can only be by consensus[119] one struggles to find the rationale behind the requirement that a Protocol, once approved, needs to be acceded to by member states who would have been part and parcel of the protocol approval process in the first place. Note, too, that the formulation and approval of Protocols is an executive act, the Council being comprised of Ministers and the Summit of Heads of State and Government. There is therefore a democratic deficit in the formulation and approval process.

Though accession to a Protocol makes it binding on the member state that has acceded to it, there is no provision in the SADC Treaty, similar to article 288 of the TFEU, that makes the provisions of a Protocol to have direct effect in the member state that has acceded to it. There is also no provision regarding direct applicability. However, considering some jurisdictions may

[113] Ibid.
[114] Article 22(2) of the SADC Treaty.
[115] Article 22(3) of the SADC Treaty.
[116] Article 22(4) of the SADC Treaty.
[117] Article 22(5) of the SADC Treaty.
[118] Article 22(9) of the SADC Treaty.
[119] Article 10(9) of the SADC Treaty.

be monist and others dualist, for the latter, legislative action may be required in the member state prior to domestic effectiveness of the Protocol, though under recent treaty law jurisprudence member states may not, as against each other or individual applicants, plead their internal constitutional arrangements to avoid compliance with treaty obligations.[120]

The fact that the protocol has to be acceded to by member states makes its effectiveness as a REC-wide legal harmonizing instrument very weak, as some member states may choose not to accede to it. This relegates it to the status of a soft law harmonizing instrument. Further the SADC treaty does not contain a provision for the supremacy of community law over national law.[121]

### *6.4.2. The EAC*

Because the EAC also has a legislative assembly, the harmonizing instruments in this REC range from Acts of the community, passed through Bills initiated by the Council and approved by the Summit,[122] to regulations, directives, decisions, recommendations and opinions.[123] The regulations, directives and decisions of the Council taken or given in pursuance of the provisions of the treaty are binding on Partner States, on all organs and institutions of the community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may, under the treaty, be addressed.[124] Further, community laws shall take precedence over similar national ones on matters pertaining to the implementation of the treaty[125] with Partner States undertaking to confer upon the legislation, regulations and directives of the community and its institutions the force of law within its territory[126] and to make all the necessary legal instruments to confer precedence of community laws over similar

[120] Article 27 of the Vienna Convention on the Law of Treaties; See also *Polytol v Mauritius,* COMESA Court of Justice, First Instance Division, Reference Number 1 of 2012.
[121] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town, 2017 available at <http://hdl.handle.net/11427/25481.
[122] Article 14(3)(b) of the Treaty Establishing the EAC.
[123] Article 14(3)(d) of the Treaty Establishing the EAC.
[124] Article 16 of the Treaty Establishing the EAC.
[125] Article 8(4) of the Treaty Establishing the EAC; *Peter Anyang Nyong'o v Attorney General of the Republic of Kenya* [2008] 3 KLR 397.
[126] Article 8 (2) (b) of the Treaty Establishing the EAC.

national ones.[127] The principle of primacy of community laws over national laws has been reiterated in decisions of the East African Court of Justice.[128]

The fact that regulations, directives and decisions have equal binding power on EAC Partner States is paradoxical and makes one wonder why they go by different nomenclature if their legal effect is the same.

Within the EAC, protocols are merely agreements that supplement, amend or qualify the treaty,[129] are part of the treaty[130] and have no legal harmonization role to play. In SADC, however, protocols have been assigned the role of implementing the treaty including any amendment thereto[131] and hence may serve a harmonizing role.

The EAC has also reportedly formulated model laws in a few areas of commerce.[132]

The EAC sets itself apart for having treaty provisions that make the community laws binding and gives them primacy over national laws, apart from making it obligatory for member states to give the community laws direct effect and applicability in their jurisdictions. These facilities boost legal harmonization.

### *6.4.3. COMESA*

As it has no legislative assembly, there are no community Acts in COMESA. However, COMESA has and uses protocols as legal harmonizing instruments.[133] The Council also makes regulations, issues directives, takes decisions and gives opinions.[134] Article 9(3) of the COMESA Treaty provides that the regulations and directives given by the Council are binding on member states, on all subordinate organs of COMESA other than the Court in the exercise of its jurisdiction and on all those to whom they are addressed. The treaty does not provide that

[127] Article 8(5) of the Treaty Establishing the EAC.
[128] *Mohochi v Attorney General of Uganda,* EACJ Reference No.5 of 2011.
[129] Article 1 of the Treaty Establishing the EAC.
[130] Article 151(4) of the Treaty Establishing the EAC.
[131]Article 1 of the SADC Treaty.
[132] Ndayikengurukiye M, 'Some Observations on Practical Aspects of the Harmonization of Economic Laws in the East African Community Context' in Döveling J, Majamba H, Oppong R, Wanitzek U (eds) *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica 2018) 3.
[133] See, for example, the COMESA Protocol on Rules of Origin made under Article 48(2) of the COMESA Treaty.
[134] Article 9(2)(c) and article 10(1) of the COMESA Treaty.

the regulations and directive are directly applicable in the member states or that they have direct effect.

Unlike the EAC where all harmonizing instruments have equal binding legal force, in COMESA a regulation is binding on all member states in its entirety; a directive is binding upon each member state to which it is addressed as to the result to be achieved but not as to the means of achieving it; a decision is binding upon those to whom it is addressed, and a recommendation and an opinion do not have any binding force.[135] Hence, decisions may only have harmonizing force to the extent they are ordering a member state to fall in step with the rest of the member states, whilst recommendations and opinions play no harmonizing role.

The main instruments for the harmonization of laws are therefore the protocols and regulations as hard law instruments, with the directive as a softer law instrument in so far as it will require member states to enact local legislation implementing or domesticating it. Arguably, a failure to enact such local legislation would be a breach of the treaty and the sting of the directive would still be binding on the member state and hence actionable.[136]

The primacy of the treaty provisions and their direct applicability was emphasized in *Polytol v Mauritius.*[137] Though the regulations and directives are binding, with the treaty not providing for their direct applicability, it remains to be seen if *Polytol* will be applied by the COMESA Court of Justice to extend the concept of direct applicability to community law instruments other than the treaty provisions.

The Council is obliged to give reasons on which regulations, directives and decisions are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.[138] This requirement serves as a focusing or guiding compass on the Council's legislative powers and can provide a yardstick for measuring the rationality of any legislative provision, with any provisions that do not serve the purpose being liable to be

[135] Article 10(2)(3)(4) and (5) of the COMESA Treaty.
[136] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town, 2017 available at <http://hdl.handle.net/11427/25481.
[137] Ibid.
[138] Article 11 of the COMESA Treaty.

expunged through judicial review. The element of mandatory rationalization of regulations and directives is lacking in the EAC.

Notably, the law making under COMESA also suffers a democratic deficit in so far as the harmonizing instruments which directly become part of national law, are all a product of executive input with no participation in their formulation or adoption by any elected group of people.

#### *6.4.4. OHADA*

OHADA recognizes and uses one legal harmonization instrument: the Uniform Act.[139] These are adopted by the Council of Ministers by unanimous vote, and only when two thirds of the State Parties are present.[140] There is thus some democratic deficit in their formulation, too.

Under article 10 of the OHADA Treaty, the Uniform Acts are directly applicable to and binding on State Parties notwithstanding any previous or subsequent conflicting provisions in national law.

The Uniform Acts are thus hard law. Their binding effect, direct effect and direct applicability is not any different from the regulations, directions and decisions under the EAC treaty.

#### *6.4.5. The EU*

Article 288 of the TFEU provides that to exercise their competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states. A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form or methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force. This arrangement is similar to the one in COMESA with the exception that the EU one is

[139] Article 5 of the OHADA Treaty.
[140] Article 8 of the OHADA Treaty.

the product of the Commission and adopted by Parliament and the Council, whilst the COMESA one is the product of the Council only.

Whilst there is no treaty provision that EU law has primacy over national law in the areas in which the EU has competence, the European Court of Justice in *Flamino Costa v E.N.E.L.*[141] decided that this was the case[142] and this fosters the legal harmonization process. This is further supported by the principle of direct effect in article 288 cited above, which allows community regulations to be self-executing without the need for domestication.[143]

#### *6.4.6. Assessment*

From the above discussion, SADC Protocols are the weakest harmonizing instrument in view of the provision to opt out of them, and also of the fact that they only become effective and applicable in a member state on accession. COMESA regulations and directives suffer from the fact that the treaty makes no provision for their direct applicability in a member state and they are not expressly given any superior force over national laws. Though the *Polytol* case has given the treaty provisions direct applicability and superior force over national laws, it remains to be seen if the same force will be given to community laws. The EAC, OHADA and EU positioning of community laws over national laws and their direct applicability provisions are the most conducive to legal harmonization.

### 6.5. The Role Of Judicial Organs In Legal Harmonization

As indicated above, RECs are legal systems in their own right, and a legal system must of necessity have a judicial organ to interpret laws and compel compliance with them, otherwise it will not survive as such.[144] The presence of a community judicial organ to superintend aspects of the REC's legal system through dispute settlement is essential.[145] Community courts are the legal guardians of the economic integration process, enforcers of the benefits it brings, agents for deciding whether a breach has occurred and the remedy for it and arbiters of the institutional

[141] 1964 ECR 1-585.
[142] Gierczyck Y, The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2005) Vol. 12 ILSA Journal of International and Comparative Law 153.
[143] Ibid.
[144] Ibid.
[145] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 121.

tensions inherent in it.[146] They ensure member state's compliance with treaty and community law obligations.[147] They also ensure the uniform application of community law throughout the REC and avert the possibility of national courts rendering different interpretations of treaty laws, hence impeding legal harmonization and economic integration.[148]

Key to a REC court's ability to address the challenges of economic integration are its institutional set up and its jurisdiction. Because the supranational courts have a potential to restrict governmental discretion on domestic policy issues, their jurisdiction and institutional set up may be tampered with and this affects the extent of powers the courts get entrusted with under the RECs foundational treaties.[149] In the discussion that follows, the REC courts will be studied from the perspectives of institutional independence, jurisdiction, access to the courts and the powers of the courts to enforce their judgments among the member states. Though these are the key areas that have a direct impact on the delivery by the courts on their mandates and aiding the market integration process through harmonization of laws, it should also be understood that even in cases where the institutional design may be a perfect one, other factors such as socio-economic, political and cultural conditions have the ability to prevent courts from performing at optimal levels. Factors such as funding, political interference, litigation costs and a low litigation culture are but some of them. [150]

Each of the RECs under study has a supranational court. What follows is a study of each of the courts to determine how primed they are to deliver on the mandate of harmonization of laws and eventual market integration.

### *6.5.1. Institutional Independence Of The Courts*

The independence of any judicial body is key to ensuring that it delivers on its mandate to deliver impartial justice. How independent a community court is will speak to its ability to

[146] ibid, 120.
[147] ibid, 121.
[148] Gierczyck Y, The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2005) Vol. 12 ILSA Journal of International and Comparative Law 153.
[149] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 121.
[150] Ibid, 122.

perform effectively its role in contributing to market integration.[151] The independence of the judicial institutions may depend on factors such as the criteria for appointing the judicial officers,[152] the manner of appointment[153] and removal of judicial officers[154] as well as their financial security.[155] In the discussion that follows, the community courts will be studied to measure their independence using the above mentioned criteria.

#### *6.5.1.1. The SADC Tribunal*

The SADC Tribunal[156] was established to ensure the adherence to and the proper interpretation of the treaty and subsidiary instruments and to adjudicate on such disputes as may be referred to it. It only has one court, hence affording no right to appeal against its decisions. The composition and powers, functions and procedures of the tribunal are prescribed in a protocol.[157] The tribunal consists of not less than ten judges appointed from nationals of member states who possess the qualifications for appointment to the highest judicial offices in their respective member states or who are jurists of recognized competence or expertise in international law.[158] It is possible under this provision to appoint someone who has never held judicial office in their career. However, appointing sitting judges from member states courts may provide a link between national legal systems and the community legal system, and the appointment of jurists with experience in international law may further boost the jurisprudential output of the regional courts.[159] There are no integrity, probity or independence qualifications required, so that it is possible to nominate government sycophants and have them appointed to the high office. Each member state nominates not more than two names of its nationals and the Council selects from the list of candidates. The judges are then appointed by the Summit on the

[151] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 124
[152] Less qualified officers may pose a risk to institutional independence.
[153] Heavy involvement of political actors instead of fellow professionals in the appointment process may also lead to the selection of politically exposed individuals.
[154] Weak removal protocols or procedures that involve political actors only may create a fear of removal in sitting judges and tempt them to deliver politically correct decisions.
[155] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 126.
[156] Established under article 9 of the SADC Treaty.
[157] Article 22(1) and (2) of the SADC Treaty.
[158] Article 3 of the Protocol on the Tribunal in the Southern African Development Community.
[159] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 124.

recommendation of the Council.[160] A judge may be removed from office for permanent incapacitation or the commission of a serious breach of his or her duties or for a serious act of misconduct. This shall be after an *ad hoc* tribunal appointed by the Summit has heard the judge and made the recommendation for his removal.[161] Judges may not sit to hear matters involving the member state of which they are a national.[162] They are immune from legal proceedings for anything said or done in their legal capacity[163] and their terms and conditions of service are determined by the Council and shall not be altered to their disadvantage during the tenure of their office.[164]

The appointment is an entirely executive affair having been done by Ministers sitting in the Council and Heads of State and Government sitting in the Summit. This may raise independence concerns and, preferably, the appointment should be done by an independent committee following the nominations by member states.[165] The removal process appears insular as it involves the safeguard of an *ad hoc* tribunal though the fact that its appointing authority is the Summit may raise concerns that its members may feel obliged to rule in favour of the appointing authority. The protection of the judge's remuneration from being altered to their disadvantage fosters their independence. The fact they may not sit in disputes involving the member states from whence they hail is also a positive on the side of avoidance of conflict of interest.

#### *6.5.1.2. The East African Court Of Justice*

In the EAC, the East African Court of Justice was established to ensure adherence to law in the application and interpretation of and compliance with the treaty.[166] The judges are appointed by the Summit from among persons recommended by Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized

[160] Article 4 of the Protocol on the Tribunal in the Southern African Development Community.
[161] Article 11 of the Protocol on the Tribunal in the Southern African Development Community.
[162] Article 12(2) of the Protocol on the Tribunal in the Southern African Development Community.
[163] Article 13 of the Protocol on the Tribunal in the Southern African Development Community.
[164] Article 14 of the Protocol on the Tribunal in the Southern African Development Community.
[165] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 124.
[166] Article 23(1) of the Treaty Establishing the EAC.

competence in their partner states.[167] This makes it possible to appoint someone who has never held any judicial office in their career. The integrity, impartiality and independence qualification requirement is a positive step, although, in this case, the appointment is done directly by the Summit without the involvement of an independent body of professionals. Members of the Summit may potentially nominate those that will dance to their tune in the court chambers. This is a concern on the issue of independence from political influence. The Summit also appoints the President and Vice President of the Court. This may also affect the independence of the court. In other RECs, judges elect their President and deputy from among themselves.[168] The court has a first instance division and an appeal chamber,[169] and this makes for a more thorough treatment of issues. Fifteen judges in all populate the two chambers and their terms of office are staggered to ensure institutional memory preservation.[170]This is not the situation in SADC. Salaries of the East African Court of Justice judges are determined by the Summit on the recommendation of the Council and there is no assurance that these cannot be adjusted negatively during the tenure of a judge,[171] unlike the situation in SADC. Judges of the East African Court of Justice are removed from office by the Summit for incompetence or inability to perform the duties of their office due to infirmity of the body or mind. However, an *ad hoc* independent tribunal appointed by the Summit will have to recommend the removal.[172] This tribunal shall be comprised of three eminent judges drawn from among the Commonwealth.[173] Though the tribunal is appointed by the Summit, the fact that its composition is of three eminent judges means there is some assurance of impartiality. Judges of the East African Court of Justice that are directly or indirectly interested in matters before the court shall recuse themselves. Presumably, the fact that a matter involves the judge's country of origin would mean he is indirectly interested in it and would lead to a recusal, though this is not guaranteed. The SADC rendition of the provision is therefore a much better one.

#### *6.5.1.3. The COMESA Court Of Justice*

[167] Article 24(1) of the Treaty Establishing the EAC.
[168] See article 37 of the OHADA Treaty, and, for the European Court of Justice, see article 9a of the Statute of the European Court of Justice and article 254 of the TFEU.
[169] Article 24(2) of the Treaty Establishing the EAC.
[170] Ibid.
[171] Article 25(5) of the Treaty Establishing the EAC.
[172] Article 26(1)(a) of the Treaty Establishing the EAC.
[173] Article 26(3) of the Treaty Establishing the EAC.

Like the East African Court of Justice, the COMESA Court of Justice was established to ensure adherence to law in the interpretation and application of the treaty.[174] It has a first instance division and an appellate division much like the East African Cout of Justice.[175] It is composed of twelve judges chosen from among persons of impartiality and independence who fulfil the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognized competence.[176] Note the absence of mention of the requirement of integrity in the qualification criteria, unlike the situation in the EAC. It should be noted too, that persons that are not holding judicial office may sit in the courts by reason of the wording of article 20. Retired judges have sat, despite being challenged.[177] Their wealth of experience being an important asset, and the fact that they served to retirement being a mark of impartiality and independence. The judges are appointed by the Authority[178] which also appoints the President and the Vice President of the court[179] They are removable from office for stated misbehavior or inability to perform the duties of their office due to infirmity of mind or body or due any other specified cause.[180] The removal is directly by the Authority without the intervention of an *ad hoc* tribunal as is the case in the EAC, and this may affect judicial independence. Note, too, that although they are supposed to recuse themselves for having a direct or indirect interest in a case, the idea that they may have to recuse themselves if the case emanates from their country is not mentioned, and the court has held that this is not a situation warranting recusal.[181] It will be interesting to see if the EAC will be of a similar view. There is no mention of the protection of the judges salaries from being reviewed downwards during their tenure.

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[174] Article 19 of the COMESA Treaty.
[175] Ibid.
[176] Article 20 of the COMESA Treaty.
[177] *Malawi Government v Malawi Mobile Limited*, COMESA Court of Justice, Appellate Division, Appeal No. 1 of 2016. The matter involved retired Chief Justice of Zambia, Justice of Appeal Lombe Chibesakunda. The situation is different with the East African Court of Justice where only sitting judges get appointed: See Court Manual of the East African Court of Justice available at http://www.eacj.org accessed on September 23, 2023.
[178] Article 21(3) of the COMESA Treaty.
[179] Articles 20(4) and 20(5) of the COMESA Treaty.
[180] Article 22(1) of the COMESA Treaty.
[181] *Malawi Government v Malawi Mobile Limited*, COMESA Court of Justice, Appellate Division, Appeal No. 1 of 2016. Justice Dr. Michael Mtambo from Malawi was allowed to continue sitting on the case despite the appellant being his country of origin. The situation is the same in the European Union, where nationality of a judge is not a cause for recusal: See article 18 of the Statute of the Court of Justice of the European Union.

Overall, compared with the EAC scenario, COMESA has weaker protections against interference with judicial independence as the judges, and their President and Vice President are appointed by the Authority and the judges may be removed by the same body without the filter or safeguard of an investigative tribunal. The Summit may not have the time or the skills to do complicated factual investigations or render a quasi-judicial decision on the matter. The fact that their remuneration is not shielded from negative adjustment is also problematic. Judges sitting from cases emanating from their own member states also poses its own conflict of interest problems, and the absence of the integrity requirement in the appointment criteria also sits awkwardly when a similar situation in EAC is considered.

#### *6.5.1.4. The CCJA*

The OHADA CCJA is there to ensure the uniform interpretation and application of the treaty, its rules of enforcement as well as the Uniform Acts and decisions.[182] Its judges are elected by the Council of Ministers from a list nominated by State Parties.[183] The judges are chosen from: judicial and legal officers with at least fifteen years of professional experience, qualified to hold high judicial office in their countries; lawyers who are members of the bar of one of the State Partes with at least fifteen years of professional experience; lecturers of law with at least fifteen years of experience. Their tenures of office are staggered.[184] Members of the court are irremovable.[185] Though this is good for judicial independence, it does not cater for aberrant behavior or incapacity whilst in office, which are possibilities in the life of a human being. There is no provision relating to ensuring the judges remuneration is not eroded during their tenure of office. The judges elect the President and the Vice President from among themselves.[186]

#### *6.5.1.5. The European Court of Justice*

In the European Union, members of the General Court are chosen from persons whose independence is beyond doubt and who possess ability required for appointment to high judicial

[182] Article 14 of the OHADA Treaty.
[183] Article 32 of the OHADA Treaty.
[184] Article 31 and 38 of the OHADA Treaty.
[185] Article 36 of the OHADA Treaty.
[186] Article 37 of the OHADA Treaty.

office.[187] Note the missing prequalification relating to integrity though this can be implied in the requirement of ability to hold high judicial office. The judges are appointed by common accord of the governments of member states after consultation of a panel of seven former members of the Court of Justice which is set up and tasked to give an opinion on candidate suitability to perform the duties of judge and Advocate-General of the Court of Justice.[188] Their terms of office are staggered.[189] They are immune from legal proceedings.[190] Removal from office is after deliberations and a unanimous decision on the point by fellow judges and Advocates General.[191] It has two rungs, the Court of Justice and Court of First Instance [192] with the former court having review and appellate jurisdiction over the latter court.[193]

The appointment and removal processes, the former involving a panel of former judges and the latter involving fellow judicial officers and Advocates General are much more insular from politics unlike the situation in COMESA and EAC.

### *6.5.2. The Subject Matter Jurisdiction And Relationship Between Decisions Of The REC Courts And National Courts*

A community court's jurisdiction influences its ability to guide economic integration. The judgments of a community court will influence the process, and regard must be paid to how widely expressed the subject matter jurisdiction of the court is put, and whether this adequately covers the interpretation of not only the foundational treaty, but also the harmonizing legal instruments in the community.[194] A uniform interpretation of these will foster the legal harmonization process and promote certainty. Whether the decisions of the community courts enjoy precedence over decisions of national courts in member states is also important to legal harmonization, and so too, whether the jurisdiction is only original or whether it includes appellate jurisdiction. A two-tier adjudication process may aid the perception of better justice

[187] Article 253 of the TFEU and Article 223 of the Treaty on the European Union.
[188] Article 255 of the TFEU.
[189] Article 253 of the TFEU.
[190] Article 3 Protocol No. 3 on the Statute of the Court of Justice of the European Union.
[191] Article 6 Protocol No. 3 on the Statute of the Court of Justice of the European Union.
[192] Article 220 of the Treaty on the European Union.
[193] Article 225 of the Treaty on the European Union.
[194] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' ( Unpublished, LL.D Thesis, University of British Columbia 2009) 127.

delivery as this not only mimics the situation in national courts but also ensures that decisions on matters in issue in the litigation have been thoroughly considered.

#### *6.5.2.1. The SADC Tribunal*

The SADC Tribunal was established to ensure adherence to and the proper interpretation of the provisions of the treaty and subsidiary instruments and to adjudicate on such issues as may be referred to it.[195] The material jurisdiction extends to legal harmonization instruments such as the Treaty and the Protocols.[196] This jurisdiction does not appear to extend to a review of the actions of the institutions. The Tribunal does not have any jurisdiction relating to arbitration of disputes.

#### *6.5.2.2. The East African Court Of Justice*

The East African Court of Justice was established to ensure adherence to law in the interpretation and application of and compliance with the treaty.[197] This is a wider expression of material jurisdiction than is in the SADC. The jurisdictions covers areas such as failure to fulfil an obligation under the treaty or infringement of the provisions of the treaty, the legality of any Act, regulation, directive, decision or action. The review is on several grounds such as that it is ultra vires or unlawful or an infringement of the provisions of the treaty or any rule of law relating to its application or that it amounts to a misuse or abuse of power.[198] The jurisdiction also extends to human rights cases[199] arbitration[200] and to the adjudication of disputes between the Community and its employees.[201] The decisions of the East African Court of Justice shall have precedence over decisions of national courts on a similar matter.[202]

The material jurisdiction of the East African Court of Justice is therefore expressed in wider and more certain terms than the SADC one, and the provision that the decisions of the

[195] Article 16(1) of the SADC Treaty.
[196] Article 33 of the Protocol of the Tribunal in the Southern African Development Community 2014.
[197] Articles 23(1) and 27 of the EAC Treaty.
[198] Article 28(1 and (2) and article 30 of the EAC Treaty.
[199] Article 27(2) of the EAC Treaty.
[200] Article 32 of the EAC Treaty.
[201] Article 31 of the EAC Treaty.
[202] Article 33(2) of the EAC Treaty.

East African Court of Justice shall have precedence over those of national courts on a similar matter does greatly aid the legal harmonization process.

#### *6.5.2.3. The COMESA Court Of Justice*

In COMESA, the material jurisdiction of the COMESA Court of Justice relates to ensuring the adherence to law in the interpretation and application of the treaty.[203] The COMESA Court of Justice has jurisdiction to adjudicate upon all matters referred to it pursuant to the treaty,[204] and this includes a complaint that a member state has failed to fulfil an obligation under the treaty or has infringed a provision of the treaty[205] and a determination on the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of the treaty or any rule of law relating to its application or that it amounts to a misuse or abuse or power.[206] The court also has jurisdiction over disputes between the Common Market and its employees[207] and does hear arbitration disputes.[208] Decisions of the COMESA Court of Justice shall have precedence over those of national courts.[209]

To a large extent therefore, the material or subject matter jurisdiction of decisions of the COMESA Court of Justice and that of the East African Court of Justice is similar and so, too, the ranking of the decisions of the each of the two community courts with those of courts of relevant member states of each of the two RECs.

#### *6.5.2.4. The CCJA*

OHADA's CCJA's material jurisdiction is to ensure the uniform interpretation and application of the treaty, its rules of enforcement as well as Uniform Acts and decisions.[210] The OHADA Court may sit as an appellate court over decisions of national courts though it also has

[203] Article 19(1) of the COMESA Treaty.
[204] Article 23(1) of the COMESA Treaty.
[205] Article 24(1) and 25 of the COMESA Treaty.
[206] Article 24(2) of the COMESA Treaty.
[207] Article 27 of the COMESA Treaty.
[208] Article 28 of the COMESA Treaty.
[209] Article 29(2) of the COMESA Treaty.
[210] Article 14 of the OHADA Treaty.

original jurisdiction.[211] This makes its decisions to have precedence over decisions of national courts. The CCJA also has arbitral jurisdiction.[212]

#### *6.5.2.5. The European Court Of Justice*

The European Court of Justice has material jurisdiction over issues relating to: the interpretation of the treaty; the validity and interpretation of acts of the institutions of the Community and of the European Central Bank and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.[213] It also has jurisdiction over disputes between the Community and its servants[214] as well as in arbitration cases.[215] Disputes between member states in relation to the subject matter of the treaty submitted under a special agreement of the parties are within its jurisdiction.[216] The decisions of the European Court of Justice have precedence over those of national courts.[217]

The court's role in interpreting the treaty and the validity of acts of institutions, which includes the regulations and directives of the Council plays a key role in legal harmonization.

### *6.5.3. Access To The REC Courts*

The wider the range of actors to access a community court the better as this increases the number of persons that may bring cases to the courts hence prompt the courts to render decisions that are key to the harmonization of laws process and to market integration in general. It also overcomes the reluctance of member states to sue each other for reasons of political comity, preferring perhaps to resolve the issues through private arrangements. Wider access to the community courts hence limits the powers of governments of member states to decide which cases they should litigate on and which one they may not. It also acts as a tool in the hands of private individuals to check their government's compliance with community laws and treaty

[211] Article 13 of the OHADA Treaty.
[212] Title 4 of the OHADA Treaty.
[213] Article 234 of the Treaty on the European Union.
[214] Ibid, article 236.
[215] Article 238 of the Treaty on the European Union.
[216] Ibid, article 239.
[217] *Da Costa v Nederlandse Belastingadministratie* 1963 ECR 61.

laws that are to their benefit.[218] The *Polytol*[219] case is but one example of direct enforcement of treaty obligations at the behest of individuals. What conditions precede access to the community courts will also be an issue as the more stringent the conditions the less accessible the courts and therefore the more limited the role of the courts to make decisions that foster market integration. One of the conditions preceding access is the need for individuals to exhaust local remedies before proceeding to litigate in community courts.[220] Though this is seen as delaying access, it serves the purpose of creating a nexus between community courts and domestic courts, with the community courts pretty much serving as courts of appeal against the decisions of domestic courts.[221] Some treaties also impose a qualification that the individual must be a resident of a member state before they can bring litigation in a community court. This affects access rights, too, as not all that trade or invest in a particular regional economic community have residency status and keeping them away from the regional economic community courts may drive them away from placing their investments in the regional economic community. The ability of national courts to seek preliminary rulings before the community courts is also an aspect to look out for. This procedure serves to secure a common meaning for community law in all member states as it ensures the uniform interpretation of community law and therefore the coherence of community legal order. It also ensures access to justice at the community court level to litigants that would not otherwise have afforded such access.[222]

#### *6.5.3.1. The SADC Tribunal*

Through article 33 of the Protocol on the Tribunal of the Southern African Development Community, 2014 the jurisdiction of the court has been restricted to disputes between member states, and, by article 34 of that Protocol to the giving of advisory opinions on such matters as the Summit or the Council may refer to it. This has not always been the case as the year 2000 version of the Protocol had, under article 15 granted access to natural or legal persons in their

[218] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia, 2009) 130.
[219] Ibid.
[220] Article 26 of the COMESA Treaty.
[221] Oppong R, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (Unpublished, LL.D Thesis, University of British Columbia 2009) 131, 132.
[222] Gierczyk Y, The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2005) Vol. 12 ILSA Journal of International and Comparative Law 153.

disputes with member states and between natural and legal persons and the community.[223] What led to the repeal and re-enactment of the 2000 Protocol was the decision of the SADC Tribunal in *Mike Campbell (Pvt) Limited v Zimbabwe*[224] a matter challenging, from a human rights perspective, the forfeiture of land from non-indigenous Zimbabweans. The repeal and re-enactment exemplifies the ever present risk of tampering with the jurisdiction of community tribunals by member states for political reasons and in the pursuit of domestic policies.[225]

With access restricted to members states only who may not be ready or willing to sue each other for political reasons, the tribunal's role in market integration is greatly impaired. To make matters worse, member states are given the option to opt out of the Protocol on the Tribunal of the Southern Africa Development Community.[226]

There is no link between national courts and the SADC Tribunal as there is no provision under the Protocol for national courts to refer some matters under their consideration to the Tribunal for a preliminary rulings. Neither is there provision for the institutions or the Secretariat to refer a matter to the Tribunal for determination.[227] This limits the number of cases the court may handle hence affecting the speed of any legal harmonization process.

#### *6.5.3.2. The East African Court Of Justice*

Access to the East African Court of Justice is granted to Partner States;[228] the Secretary General with leave of the Council;[229] and to legal and natural persons to question the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the community for being unlawful or an infringement of the provisions of the treaty.[230] There is no requirement of exhaustion of domestic remedies before individuals, natural or legal are granted access rights. No residency qualifications are imposed either. Further, there is no requirement

[223] Article 18 of the Protocol on the Tribunal of the Southern African Development Community, 2000 (repealed)
[224] [2008] SADCT 2.
[225] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town 2017 available at <http://hdl.handle.net/11427/25481.
[226] Article 50 of the Protocol on the Tribunal of the Southern African Development Community.
[227] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town 2017 available at <http://hdl.handle.net/11427/25481.
[228] Article 28 of the Treaty Establishing the EAC.
[229] Article 29 of the Treaty Establishing the EAC.
[230] Article 30 of the Treaty Establishing the EAC.

that the legal or natural person must have a sufficient interest in the matter before they access the court, making it possible for public interest litigation to be conducted.[231] National courts also have the power to refer a matter involving the treaty or community law currently before them for a preliminary ruling by the East African Court of Justice.[232] The Summit, the Council or a Partner State may also request the Court to give an advisory opinion on a question of law arising from the treaty affecting the Community and the Partner State, the Secretary General or any other Partner State[233]

The array of access rights in the EAC regime is very impressive and progressive. Robust litigation in a community court can only serve to foster market integration.

#### *6.5.3.3. The COMESA Court Of Justice*

Access to this court is granted to member states complaining against another member state or the Council for failure to fulfil an obligation of the treaty or infringing any provision of the treaty. Member states may also question the legality of any act, regulation, directive or decision of the Council for being ultra vires or unlawful or for being an infringement of a provision of the treaty or any rule of law or for being an abuse or misuse of power[234] The Secretary General, too, has access rights against member states, but only with the leave of the Council.[235] Legal and natural persons may take to the court the Council or a member state but only upon the exhaustion of local remedies[236] and there is also a residency qualification they must fulfil.[237] Though there is no need for litigants to show that they have sufficient interest in the matter to acquire the right to bring a lawsuit to the court, the requirement for exhaustion of domestic remedies may mean that those member states that only grant access to justice in their domestic courts on demonstration of sufficient interest in a matter may make it difficult for local interest groups to access the COMESA Court of Justice. National courts may access the COMESA Court of Justice for preliminary rulings[238] and the Authority, the Council or a member

[231] *East African Law Society v Attorney General of Kenya* (2008) 1 East Afr L R 95
[232] Article 34 of the Treaty Establishing the EAC.
[233] Article 36 of the Treaty Establishing the EAC.
[234] Article 24 of the COMESA Treaty.
[235] Article 25 of the COMESA Treaty.
[236] *Republic of Kenya v Coastal Aquaculture,* COMESA Court of Justice, Reference No. 3 of 2001; (2003) 1 East Afr L R 271.
[237] Article 26 of the COMESA Treaty.
[238] Article 30 of the COMESA Treaty.

state may access the court for an advisory opinion.[239] But for the pre-qualification relating to the exhaustion of domestic remedies and residency, the access rights to the REC courts in COMESA and in the EAC are similar.

#### *6.5.3.4. The CCJA*

A State Party or the Council of Ministers may seek an advisory opinion of the court on disputes relating to the application of the Uniform Acts. National Courts, too, on disputes relating to the application of the Uniform Acts.[240] The court also sits as an appellate court from decisions of courts of appeal of state parties relating to Uniform Acts and rules provided for in the treaty.[241] This appeal provision is akin to the one requiring the exhaustion of domestic remedies found in the COMESA Treaty.

Evidently, the Permanent Secretariat does not have access to the court. Furthermore, actions of the institutions are outside the court's jurisdiction.

#### *6.5.3.5. The European Court Of Justice*[242]

Actions questioning the legality of acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank may be brought to the European Court of Justice by a member state, the European Parliament, the Council, or the Commission and be grounded on lack of competence, infringement of the treaty, infringement of an essential procedural requirement, or infringement of any rule of law relating to the treaty's application or misuse of powers. Natural or legal person are granted access to the European Court of Justice, too, but the decision complained of must be addressed to the person or must be of direct and individual concern to them.[243] The court may also be requested to give preliminary rulings by any court or tribunal of any member state relating to the interpretation of the treaty, the validity and interpretation of acts of the institutions of the community and of the European Central Bank, and the interpretation of the statutes of bodies established by an act of

[239] Article 32 of the COMESA Treaty.
[240] Article 14 of the OHADA Treaty.
[241] Ibid.
[242] The European Court of Justice has handled cases dealing with cross-border transaction avoidance. See for example, *Seagon v Deko Marty,* Case C-339/07 and *Vinyl Italia SpA v Mediterranea di Navigazione* SpA Case C-54/16 ECLI:EU:C:2017:433.
[243] Article 230 of the Treaty on the European Union.

the Council.[244] Member states may also bring disputes *inter se* relating to the subject matter of the treaty.[245]

The requirement of standing in the access provisions does leave out interest groups.

### *6.5.4. The Enforceability Of The REC Court's Decisions*

A proper legal system will provide for the enforcement of the decisions of its judicial organs. How a REC provides for the enforcement of its decisions is a factor that will affect the speed of legal harmonization or market integration. It will be an exercise in futility if the REC's judicial body's decisions interpreting the treaty and community laws are left unattended to by member states or member states face no or very trifling consequences for non-compliance. This section will therefore consider how the RECs under study provide for the enforcement of the decisions of the RECs judicial organs.

#### *6.5.4.1. The SADC*

Under article 44 of the Protocol on the Tribunal of the Southern Africa Development Community, member states shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal. A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and must be complied with. Any failure by a member state to comply with such a decision shall may be referred to the Tribunal by any member state affected by the decision. If the Tribunal establishes the existence of such failure, it shall report the findings to the Summit for the latter to take appropriate action.

There are a few problems with the above provisions. Firstly, the Tribunal decisions do not have binding effect on member states not parties to the decision. Secondly, in the event of breach, the failure is investigated by the Tribunal and if confirmed, is reported to the Summit for ' appropriate action'. The Summit is a political body and it may take action or chose not to.[246] It may also take such action as does not encourage compliance with future Tribunal decisions by other member states. The failure to define the meaning of ' appropriate action'

[244] Article 234 of the Treaty on the European Union.
[245] Article 239.
[246] Nyirongo R, 'The Role of Law in Deepening Regional Integration in Southern Africa- A Comparative Analysis of SADC and COMESA' Unpublished, LLM Thesis, University of Cape Town 2017 available at <http://hdl.handle.net/11427/25481.

affects predictability of sanctions and does not motivate compliance at all. It may also lead to inconsistent punishments depending on the political power wielded by the member state that is on the losing end of the Tribunal's decision, and may in the long run lead to feelings of favouritism and resentment and, in a worst case scenario, to the possible disintegration of the REC.

#### *6.5.4.2. The EAC And COMESA*

Any dispute concerning the interpretation or application of the treaty or any of the matters referred to the Court shall not be subjected to any method of settlement other than those provided for in the treaty. Where a dispute has been referred to the Council or the Court, Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute. A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the court.[247] The COMESA Treaty has an additional provision stating that the court may prescribe such sanctions as it shall consider necessary to be imposed against a party who defaults in implementing decisions of the court.[248] The court has powers to issue interim orders which have the same effect as *ad interim* decisions of the court.[249] The execution of a judgment of the Court which imposes a pecuniary obligation shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall be appended to the judgment of the court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favour execution is to take place, may proceed to execute the judgment.[250]

COMESA seems to be in a better place as its court is empowered to impose sanctions. It is not clear though as to the range of possible sanctions the court may impose nor which institution is responsible for seeing to it that the sanctions are implemented. No consequences of failure to comply with the sanctions are spelt out.

#### *6.5.4.3. OHADA*

[247] Article 38(1)(2) and (3) of the Treaty Establishing the EAC and article 34 (1)(2) and (3) of the COMESA Treaty.
[248] Article 34(4) of the COMESA Treaty.
[249] Article 39 of the Treaty Establishing the EAC and article 35 of the COMESA Treaty.
[250] Article 44 of the Treaty Establishing the EAC and article 40 of the COMESA Treaty.

Article 20 of the OHADA treaty provides that judgments of the CCJA are final and enforceable. They shall be enforceable in the State Parties in the same manner as decisions of national courts. Any decision which is contrary to a judgment of the CCJA delivered in respect of the same matter shall not be enforceable in the territory of the State Party. This latter provision is not available in the COMESA or EAC treaties. OHADA has no provision for sanctions the way COMESA has.

#### *6.5.4.4. The EU*

Article 260 of the TFEU provides that if the Court of Justice of the European Union finds that a member state has failed to fulfil an obligation under the treaties, the member state shall be required to take the necessary measures to comply with the judgment of the court. If the Commission considers that the member state concerned has not taken the necessary measures to comply with the judgment of the court, it may bring the case before the court after giving that state the opportunity to submit its observations. The Commission shall specify the amount of the lump sum or penalty payment to be paid by the member state concerned which it considers appropriate in the circumstances and if the court confirms non-compliance with its judgment, it may impose a lump sum or penalty payment on it. Regulations adopted by the European Parliament and the Commission, and the Council pursuant to the provisions of the treaty may give the court unlimited jurisdiction with regards to the penalties provided for in such regulation.[251] The court has the power to declare acts of institutions void.[252]

## 6.6. Suggestion For Reform To Improve COMESA's Institutional Capacity For The harmonization of laws

From the above comparative discussion, it is evident that COMESA is not the least prepared to undertake the harmonization of laws process and that it compares favourably with the EAC, and, arguably, the EU on several fronts although there are other aspects where it may wish to seriously consider amending its constitutive documents so as to be level with the rest.

Much as the power and mandate to harmonize laws is better expressed teleologically in COMESA than in the EAC, COMESA needs to borrow a leaf from OHADA and mention

[251] Article 261 of the TFEU.
[252] Article 264 of the TFEU.

specific areas of community laws that it will need to focus on for full market integration. Such a mention will create a sense of urgency of mandate. Leaving the areas to guesswork simply guided by the widely expressed imperative of full market integration does not help and does not give an impression of a well-focused REC. True, COMESA was not specifically formed for the harmonization of laws. However, at the same time, market integration shall remain an unrealized goal for as long as there are no harmonized business laws in the regional economic community.

In as far as institutions mandated to undertake legal harmonization are concerned, COMESA can do better to set up a specialized sub-committee under the Technical Committee on Legal Affairs to specifically undertake legal harmonization, the way the set-up is in the EAC. This will, of course entail budgetary implications. Further than setting up the specialized sub-committee, the sub-committee must be set up complete with an obligation to come up with annual programs of works. COMESA may wish to come up with a binding consultation protocol and schedule for the formulation and adoption of harmonized community laws the way it is done in OHADA. This study will not propose a legislative assembly for COMESA as this has budgetary implications and as the product from such legislative assemblies may not have legal force any different from regulations.

As for legal harmonization instruments, it is proposed that the COMESA treaty needs to be revisited to provide for the direct applicability and direct effect of regulations and directions and how these will relate to national legislation. The EAC already made provision for this.

For the COMESA Court of Justice, the appointment process needs to involve a committee of professionals who will vet the candidates prior to appointment, rather than leaving the entire process in the hands of the Summit. The judges must also be free to elect their President and Deputy. The removal process must also have the safeguard of an *ad hoc* tribunal and the judges' salaries must be protected from reduction or loss in value whilst they are in office. In relation to jurisdiction of the court COMESA and the EAC are at par, and there is no recommendation to make save the possibility of allowing for public interest litigation expressly. It is suggested that the pre-condition of exhaustion of local remedies needs to remain as this provides a link between national courts and the community courts, and also prevents the community court from being inundated with cases that national courts could as well have dealt with. On the issue of enforcement of court decisions, the facility of sanctions needs to be fine-

tuned to specifically mention the range of sanctions that may be meted out, as well as consequences for non-compliance. Like the EU court, COMESA may also wish to consider the imposition of fines and penalties as a remedy and the voidability of decisions of national courts that conflict with decisions of the community.

### 6.7. Conclusion

Overall, COMESA needs minimal amendments to its treaty in the manner specified above to provide a better platform for it to undertake harmonization of laws. Harmonization of laws is not a layman's endeavour or an activity for politicians. This is a serious cerebral activity best taken by experienced comparatists and law reformers. A special body or sub-committee needs to be formed to undertake the process and the formation of the sub-committee will be justified on the undertaking to harmonize community laws in article 4(6)(b) of the treaty. There must be special and elaborate rules, procedures and timetables set for the sub-committee. If this is not done, the treaty undertaking to harmonize laws will remain an unrealized dream. Beyond this, the next important exercise will be to mention, in the treaty, the business laws to be prioritized for harmonization. It will be difficult for anyone to push for a harmonization agenda over laws that are not yet identified by the body politic. Finally, there will be need to provide for direct applicability and direct effect of the community laws in COMESA member states as well as the need to enhance judicial independence by providing for the involvement of an *ad hoc* committee in the removal process for judicial officers of the COMESA Court of Justice.

In the next chapter, the study will make proposal on how transaction avoidance rules dealing with preferences, gifts and transactions at undervalue in the member states of COMESA can best be harmonized.

# CHAPTER 7

# A PROPOSAL FOR THE HARMONIZATION OF RULES RELATING TO PREFERENCES, GIFTS AND TRANSACTIONS AT UNDERVALUE IN COMESA

## 7.1. Introduction

### *7.1.1. Aims And Objectives of the Chapter*

This chapter aims to make proposals on how to harmonize the rules relating to the avoidance of preferences, gifts and transactions at undervalue in the insolvency laws of COMESA member states.

Any attempt at harmonization of transaction avoidance rules must be preceded by an inventory of the scope and details of the transaction avoidance provisions sought to be harmonized.[1] In the case of COMESA, the content of the rules for the avoidance of preferences, gifts and transactions at undervalue in over half the number of its member states have already been exposed in chapter four of this thesis. It was noted in that chapter, firstly, that there are different legal traditions within COMESA and that this has contributed to the diversity of avoidance rules in the insolvency laws of the regional economic body's member states. Secondly, it was observed that, apart from three sets of member states whose avoidance rules are similar,[2] even for member states within the same legal tradition, the content of their transaction avoidance rules was not wholly similar and has, over the years since independence from colonial rule, changed in various ways through, among other means, legal transplantation[3] as a consequence of efforts to modernize laws to meet new realities. Like in the case of the

[1] Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16.

[2] And not every member state in each one of the three sets comes from the same legal tradition, with the exception of member states in the set comprising Comoros and the Democratic Republic of Congo. Malawi, Mauritius and Seychelles have statutes whose avoidance rules are the same word for word; Democratic Republic of Congo and the Comoros belong to OHADA and they have a uniform insolvency law. The avoidance rules in Uganda and Rwanda are largely similar.

[3] Valderrama I, 'Legal Transplants and Comparative Law' (2004) International Law Journal 261; And see generally, Watson A, *Legal Transplants* (Scottish Academic Press Limited 1974).

European Union,[4] the elements of rules relating to preferences, gifts and transaction at undervalue differ considerably amongst the member states of COMESA.

That notwithstanding, these differences in the content of transaction avoidance rules among the member states of COMESA have not daunted, but rather, have served to inspire the study. As Casasola[5] notes, differences in transaction avoidance rules should not be an obstacle to harmonization but should serve as its logical pre-condition since the purpose of harmonization of laws is to bring uniformity where it is lacking. What is important to observe is that individual jurisdictions, faced with the same goals of insolvency laws, to wit, collectivity, efficiency, equality of treatment of creditors, maximization of the debtor's estate, transparency, predictability and the like, devised transaction avoidance rules to support those goals. The common insolvency goals resulting from common problems gave rise to common solutions in the form of, among others, the rules against preferences, gifts and transactions at undervalue. The only problem that exists now is that the common general solutions to the common problems differ in content among jurisdictions, including among members of the COMESA regional economic block. In a common market area, these divergences affect the predictability of the outcome of transaction avoidance disputes and may lead to forum shopping.[6] Depending on the dominant goal of the avoidance rules, the avoidance rules in a member state may reduce returns to creditors if their focus is on achieving contractual finality or predictability. However, if the overall slant of the avoidance rules is towards creditor return maximization, they may reduce the levels of investment into the economy.[7] Of course there are also those cases where it is difficult to discern any policy leaning of the avoidance rules in some of the member states. Hence the overall picture in the regional economic block is one of opacity with no common vision or goal being pursued by all the member states. This situation accentuates the need to

[4] De Weijs R, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-08 available at http://ssrn.com/abstract=1817663 accessed on November 26, 2023.

[5] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3.

[6] *Vinyls Italia SpA V Mediterranea di Navigazione SpA* Case C-54/16 ECLI:EU:C:2017:433.

[7] Brogi R and Santella P, 'Two New Measures of Bankruptcy Efficiency' paper presented at the 2003 Annual Conference of the European Association of Law and Economics, September, 2003; Consolo A, Malfa F, Pierluigi B, 'Insolvency Frameworks and Private Debt; An Empirical Investigation' European Central Bank, Working Papers Series, No. 2189/ October, 2018.

harmonize the transaction avoidance rules in the COMESA regional economic community.[8] The variety in the content of the rules in COMESA does, however, complicate their comparison and, so too, any ensuing proposal for their harmonization.

#### *7.1.2. Structure of the Chapter*

The chapter will comprise eight parts, labelled A through to H.

Part A of the chapter lays down the theoretical framework for the harmonization proposals that the chapter sets out to undertake. The aim will be to identify, from within the COMESA Treaty, the lodestar or the guiding objective to be achieved by the harmonization effort. Part B will be an assessment of academic literature proposing how to harmonize transaction avoidance rules in the European Union. The importance of the European detour lies in the fact that, although there has been no harmonization of transaction avoidance rules in the European Union, the idea has been mooted in academic circles in that regional economic block and the discourse from Europe can be adapted to inform the ultimate approach that this thesis will adopt. Part C will go on to synthesize the European academic discourse and make a proposal as to how COMESA must approach the harmonization of its transaction avoidance rules. Following this, Part D deals with choice of law and jurisdiction issues and also makes a proposal as to the ideal instrument to be used in harmonizing the rules. This will be followed by Part E which will propose the development of a common definition of insolvency or inability to pay debts in the common market as a condition precedent to the harmonization of transaction avoidance rules. Following upon that, Part F will make proposals on the content of harmonized rules relating to preferences, gifts and transactions at undervalue in COMESA, respectively and Part G will summarize the proposed harmonized avoidance rules before the conclusion is rendered in Part H.

### 7.2. Part A: The Theoretical Framework For The Proposal For The Harmonization Of Transaction Avoidance Rules In COMESA

#### *7.2.1. The Need To Anchor Harmonized Transaction Avoidance Rules To An Identified Objective Or Policy Goal*

[8] Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.

Insolvency laws are a product of multiple, and sometimes, conflicting objectives or visions. These various visions have been discussed in chapter two. Finch[9] has outlined these visions to include: (a) creditor wealth maximization and the creditors bargain;[10] (b) a broad based contractarian approach;[11] (c) a communitarian approach;[12] (d) a forum;[13] (d) an ethical approach;[14] and (e) multiple values/ eclectic visions.[15] All these issues would be dealt with differently in different jurisdictions so that adopting a common model at regional economic block level is difficult. Each of these visions has a different point of emphasis, whilst the multiple values/eclectic vision purports to be a universal vision that embraces all the other visions without placing undue emphasis on the prioritization of any one of them, and therein lies its weakness. The fact that the Cork Committee Report[16] outlined a plethora of aims of insolvency law without rating their importance does not help matters either. As insolvency law impacts many fields, it is important that the development of insolvency law proceeds with a sense of purpose.[17] This observation does not spare transaction avoidance rules, for as Keay[18] observed, of primary importance in the quest to develop harmonized transaction avoidance rules is an articulation of their objective, as this will inform their content and percolate into the rules for internal coherence. Absent an identified core objective, insolvency laws will be marked by inconsistences of reasoning and policy. Clarity concerning the measures of insolvency law brings clarity concerning the values that can be involved in justifying such laws. The rightness

[9] Finch V, 'The Measures of Insolvency Law' (1997) Vol. 17, No. 2 (Summer, 1997) Oxford Journal of Legal Studies 227.
[10] Baird D and Jackson T, 'Corporate Reorganization and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) U Chi L Rev 97, 100-101.
[11] Korobkin D, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541.
[12] Gross K, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash U L Q 1031, 1032.
[13] Flessner A, 'Philosophies of Business Bankruptcy Law: An International Overview' in Ziegel J,(Ed) *Current Developments in International and Comparative Insolvency Law* (Clarendon Press, Oxford 1994).
[14] Shuchman P, 'An Attempt at a Philosophy of Bankruptcy' (1973) 21 UCLA L Rev 403.
[15] Warren E, 'Bankruptcy Policy' (1987) 57 U Chi L Rev 775,777,778 .
[16] *The Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558)(1982).
[17] Finch V, 'The Measures of Insolvency Law' (1997) Vol. 17, No. 2 (Summer, 1997) Oxford Journal of Legal Studies) 227.
[18] Keay A, 'Harmonization of Avoidance Rules in European Union Insolvencies: The Critical Elements in Formulating a Scheme' (2018) 69(2) NILQ 85.

or wrongness of particular trade-offs can only be argued by giving weightings or priorities to the protection of different interests, informed by the various visions on the table.[19]

How then, in a multi-national or regional marketplace scenario, would one proceed to identify the anchoring vision or objective on which to tether harmonized transaction avoidance rules? Finch posits that one has to engage in a quest for mandates that give clear directions on the vision to be pursued.[20] She states that where a clear mandate exists this provides a very compelling yardstick for measuring an insolvency decision or process. In a situation where a clear mandate has been identified, one will then claim to simply be effecting the will of the legislative body and a high degree of legitimacy will imbue the process. The process becomes complicated where clear mandates are lacking.

### 7.2.2. *Identifying The Vision Or Core Objective Of Transaction Avoidance Rules In The COMESA Regional Economic Block*

In the COMESA jurisdictions studied, except in the case of Ethiopia where article 588(4) of the Commercial Code provides that the objective of bankruptcy proceedings is to' timely, efficiently and effectively organize the liquidation of the debtor's business… in order to maximize the value of the assets available for recovery by creditors',[21] most, if not all of the insolvency statutes of members states do not indicate any statement of principle or objectives on which insolvency laws or transaction avoidance rules are grounded, leaving this to be implied from the legislative scheme. In this scenario therefore, where insolvency statutes of all the jurisdictions of a regional economic body are gathered together to discern if they have any express mention of the goals of their individual insolvency laws or transactions avoidance rules, and only one or two member states have express objectives included in their legislation, conducting a harmonization exercise for transaction avoidance rules using Keay's objective approach will be nothing more than guess work.

[19] Finch V, 'The Measures of Insolvency Law' (1997) Vol. 17, No. 2 (Summer, 1997) Oxford Journal of Legal Studies 227.
[20] Ibid.
[21] Among other objectives.

This paucity of guidance from individual insolvency statutes of member states forces us to delve into the constitutive document of the regional economic body to see if it can yield any useful clues.

The preamble to the COMESA Treaty aspires for full market integration for sustainable growth and development. Under article 3(c) of the COMESA Treaty, one of aims and objectives of the common market is to co-operate in the creation of an enabling environment for foreign, cross-border and domestic investment. Article 159(1)(c) of the Treaty provides that in order to encourage and facilitate private investment flows into the common market, member states shall create and maintain a predictable, transparent and secure investment climate in the member states. With the above goals and objectives of the Treaty in mind, article 4(6)(b) of the Treaty then mandates member states to harmonize or approximate their laws to the extent required for the proper functioning of the Common Market.

From the above provisions of the COMESA Treaty, one can make out an anchoring vision or objective for insolvency laws and transaction avoidance rules. Any harmonization of transaction avoidance rules in COMESA must be undertaken with the aim of forging a regime of avoidance rules that creates an enabling environment for foreign and cross-border investment and which will give birth to and maintain a predictable, transparent and secure investment climate that will facilitate private investment inflows. Therefore further changes to the laws of COMESA member states to attain the treaty objectives are needed.

#### *7.2.3. Characteristics Of Transaction Avoidance Rules That Promote The Objective Of Predictability And Certainty In The Market Place So As To Attract Investment Inflows*

Investors are, essentially, creditors, and in all likelihood could be creditors of an insolvent debtor. Since one of objectives of the common market as identified above is the attraction of investment into the common market, the laws in member states, including insolvency laws and transaction avoidance rules within them, must be aligned to the objective of attracting investors. They must, in other words, be creditor-friendly. The COMESA Treaty underscores this when, under article 159(1)(c) of the Treaty it is provided that member states shall create and maintain a predictable, transparent and secure investment climate in the member states.

To promote or attract investment, insolvency laws generally, and transaction avoidance rules in particular must protect the rights of creditors adequately so as to give them incentives to supply credit at low cost, among other things.[22] Studies have shown that banks increase the supply of credit subsequent to legal changes that strengthen creditor rights[23] and the presence of a legal environment which protects creditors favours the development of capital markets.[24]

Transaction avoidance rules have been broadly categorized as being in some way aligned to the competing tensions of facilitation of the maximization of creditor returns or to the promotion of contractual certainty and predictability on the market.[25] Whether they are one or the other reflects policy objectives. Transaction avoidance rules that seek to facilitate contractual certainty and predictability adopt a restrained approach to depriving creditors of the benefits of their diligence and are perceived to facilitate the extension of credit. Avoidance measures that seek to maximize or to bulk up or augment the debtor's estate pending *pari passu* distribution, on the other hand, adopt a more liberal approach to clawing back assets into the insolvent estate. They are seen to be more supportive of rescue and restructuring.[26] In a nutshell, avoidance rules that seek to promote contractual certainty and predictability, and hence to promote or facilitate investment, do make it difficult for the insolvency practitioner to set aside transactions. This is achieved through, among others, use of shorter suspect periods or the imposition of the need to prove subjective elements which are difficult to prove and therefore act as a disincentive to wanton filing of avoidance proceedings. More predictability enables lawyers to advise lenders that it is unlikely that their security would be invalid in the event of insolvency. On the other hand, avoidance rules that aim at bulking up the debtor's estate make it a lot easier to avoid transactions through, among others, reliance on objective and easy to prove avoidance criteria and longer suspect periods.[27] There will be less certainty and predictability on the lending

[22] Mc Gowan M and Andrews D, 'Insolvency Regimes and Productivity Growth: a Framework for Analysis' Organization for Economic Co-operation and Development, Economics Department Working Papers, Number 1309 (ECO/WKP (2016) 33.
[23] Kliatskova T and Savatier L, 'Insolvency Regimes and Economic Outcomes' (2019) DW Roundup: Politik im Fokus No. 133, Deutsche Institut fur Wirtschaftforshum (DIW) available at <http://hdl.handle.net/10419/202433> accessed on January 6th, 2024.
[24] Consolo A, Malfa F, Pierluigi B, 'Insolvency Frameworks and Private Debt; An Empirical Investigation' European Central Bank, Working Papers Series, No. 2189/ October, 2018.
[25] See chapters 2 and 4, supra.
[26] Anderson H, 'The Nature and Purpose of Transaction Avoidance' (2014) 2 Nottingham Insolvency and Business Law e-Journal 2.
[27] Woods P, 'Principles of International Insolvency (Part II)' (1995) Vol. 4 International Insolvency Review 109.

market if avoidance rules make it very easy to avoid transactions, and so, too, contractual finality will be compromised. Creditors, being risk averse, will desist from giving loans in such an environment or, if they do, will price the loans very high. This will work as a disincentive to lending and investment[28] which COMESA as a regional economic block aims to achieve as discussed above.

In reality, however, it is unusual to have insolvency laws that only promote a singular vision. Usually, multiple visions will be pursued though prominence may have to be given to one. Hence, one may not have avoidance rules that are one-hundred percent for the promotion of contractual finality or predictability. Such avoidance rules would not exist as the concept of being totally in favour of contractual certainty is antipodean to that of transaction avoidance in the first place. It is not possible to design avoidance rules which completely overlook debtor interests in the form of bulking up the insolvent estate with the aim of aiding rescue and reorganization efforts. It is all a question of balance, which balance may be adjusted from time to suit changing economic conditions and social attitudes.[29] In the COMESA regional economic block, the balancing exercise must tilt the rules in favour of avoidance rules that, while serving to bulk up the debtor's estate, are leaning more towards aiding the treaty objectives of certainty and predictability on the market for the sake of attracting investment in-flows. Note that the concept of contractual certainty and predictability does inure to aid both investment inflows from creditors and also transactional certainty from other counterparties. Where there is transactional certainty, there is likely to be more robust trade as counterparties, who are by human nature risk averse, will readily engage in trading activities without unduly fearing that the transactions will be set aside as being at undervalue. This will benefit the economy the same way the economy will benefit from some measure of certainty where donations are made by enterprises under the banner of corporate social responsibility.

#### *7.2.4. Effectiveness And Efficiency Concerns In The Formulation And Assessment Of Avoidance Rules*

[28] Stasziewicz P and Morawska S, 'The Efficiency of Bankruptcy Law: Evidence of Creditor Protection in Poland' (2019) European Journal of Law and Economics 365.
[29] Anderson H, 'The Nature and Purpose of Transaction Avoidance' (2014) 2 Nottingham Insolvency and Business Law e-Journal 2.

It has been said that from a general point of view, effectiveness refers to the achievement of the objectives of the system, whereas efficiency is determined by the relationship between inputs and outputs.[30] Effectiveness is the measure of the extent to which a system, for example an insolvency system, achieves its objectives. Efficiency is the measure of the extent to which the insolvency system achieves those objectives with the minimum use of resources.[31] Effectiveness focuses on the achievement of objectives irrespective of the amount of resources used. Efficiency, in contrast, can be defined as the input/output ratio, the greater the output of a given input, or the lower the input of a given output, the more efficient the activity is.[32] To measure the effectiveness of a given insolvency procedure, one begins with establishing the desired objectives, or outcomes of the insolvency system. Generally, the primary outcome or objective of an insolvency system is the allocation of risk among participants in a market economy in a predictable, equitable and transparent manner. The achievement of the outcome plays a critical role in providing confidence in the credit system and fostering economic growth for the benefit of all participants.[33] A close second is the protection and maximization of value for the benefit of all interested persons and the economy in general. This does not rule out other objectives defined by political circumstances, though. Determining the effectiveness of an insolvency system requires both qualitative and quantitative evaluation work.[34]

The meaning of efficiency and effectiveness in insolvency law will vary depending on the jurisprudential goal(s) or aim(s) identified and the economic methodology for its evaluation chosen.[35] It was observed in chapters two and four of this work, however, that though leading standard-setters in the field of insolvency law like the World Bank, the International Monetary Fund and UNCITRAL have used the word ‘ efficiency’ as a desired goal in insolvency laws, they have not come up with any clear definition of the term, and neither did the Cork Report, with various meanings implied in the texts which included speed, cost-effectiveness,

[30] Garrido J, Bergthaler W, De Long C, Johnson J, Rashek A, Rosha A and Stetsenko N , ‘The Use of Data in Assessing and Designing Insolvency Systems’ (2018) IMF Working Paper WP/19/27.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Lee R, ‘How is ‘Efficiency’ Determined in the Insolvency Context? Clarifying the Meaning of Efficiency with the Conjunction of Insolvency Jurisprudence and Economic Methodology’ Ph. D Thesis, University of Queensland, TC Berne School of Law 2012.

profitability and the like.[36] This lack of clarity can affect the quality of legislative output as the differences in meaning of the term efficiency will entail different prescriptions.[37] Because of these problems in meaning surrounding the term efficiency, and the fact that there is a quantitative aspect to its measurement, coupled with the fact that this thesis solely deploys qualitative methodological devices, its thrust will be on the effectiveness of any proposed harmonized transaction avoidance rules *vis a vis* identified treaty goals. Efficiency questions surrounding the proposed rules are beyond the scope of this work.

## 7.3. Part B: A Survey Of Discourses On Approaches To Harmonization Of Avoidance Rules In The European Union

### *7.3.1. The Lack Of An Internationally Standardized Content For Avoidance Rules*

Observably, despite being touted as 'a distillation of international best practices on design aspects of insolvency regimes,' the World Bank Principles for Effective Insolvency and Creditor/ Debtor Regimes[38] contain no specific or firm 'best practice' rules on preferences and transactions at undervalue, contenting themselves with proposing that the rules must contain provisions against preferences, and so on, and discussing aspects of a suspect period in a very broad manner.[39] The UNCITRAL Legislative Guide on Insolvency Law[40] fares no better and actually acknowledges that there is no universal solution to the design of insolvency laws[41] and, in its discussion of avoidance rules, does not offer any prescriptive guide on what the best contents of any rules relating to preferences or transactions at undervalue are,[42] preferring to give a broad overview of the contents of preferences and transactions at undervalue.[43] This is not surprising because neither UNCITRAL nor the World Bank aimed at promoting inter-state or cross-jurisdictional harmonization of the avoidance rules at all, or harmonizing the rules of multiple states focusing on a single or any identifiable vision or objective in mind. Rather, they both focused on the drafting of the rules at national level and each sovereign state has a choice

[36] Ibid.
[37] Ibid.
[38] The World Bank , *Principles for Effective Insolvency Creditor/ Debtor Regimes* (The World Bank Group 2021) 1.
[39] Ibid, 24.
[40] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* (United Nations, New York 2005).
[41] Ibid, 15.
[42] Ibid, 135*ff.*
[43] Ibid, 152.

as to the policy objective(s) of insolvency laws or transaction avoidance rules to give priority to.

### *7.3.2. Harmonization Of Avoidance Rules At OHADA And European Union Levels*

Harmonization of transaction avoidance rules has occurred in OHADA though, and this could have been an easier task for its members to undertake due to the common francophone and civil law background of its member states, meaning the jurisdictions must have set out on the harmonization task with a common vision of insolvency law and transaction avoidance rules coming as they do from the same legal cultural or traditional background. This situation is not prevalent in COMESA or the EU. The OHADA harmonized rules on preferences, gifts and transactions at undervalue will be discussed in more detail in the next section.

Transaction avoidance rules have not been harmonized in Europe although there are plans for the task, driven by the need for reforms in the capital markets sector aimed at encouraging cross border finance.[44] There is a 2022 proposal in draft form for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law, and these include harmonization of preference rules and rules relating to gifts and transactions at undervalue, among others.[45] Apart from this effort at European Union level, various academic writers have made proposals on how the European Union can go about harmonizing the transaction avoidance rules of its member states, and their proposed approaches are discussed below.

### *7.3.3. Proposed Approaches To Harmonization Of Avoidance Rules At European Union Level By Selected Academicians*

[44] Casasola O, The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3.

[45] Under Article 6 of the proposed directive, the suspect period for preferences is 3 months and the transaction must have occurred when the debtor is unable to pay his debts. The creditor must have had knowledge of the debtor's insolvency and this will be presumed where the creditor is a related party. There are also defences relating to payment of consideration. For transactions at no or at a manifestly inadequate consideration under Article 7 of the proposed directive, the suspect period is one year and no defences are offered. The Proposed Directive envisions a situation where the harmonized rules only apply for cross-border transactions, with member states free to have internal/ domestic rules on transaction avoidance. See https://eur-lex.europa.eu/legal-content/EU/TXT/?uri=CELEX:52022PC0702 ; See also Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16.

Casasola[46] proposes partially harmonized transaction avoidance rules to apply in cross-border scenarios only, with member states providing transaction avoidance rules to be applied in domestic cases. This will entail private international law rules modulating when the harmonized rules will apply. This will firstly require defining when a transaction can be termed a cross-border transaction, and may also entail disapplying choice of law clauses in contracts thereby creating mandatory choice of law rules that rule out party autonomy. It will be a two-step process that involves drafting private international law rules and then harmonized substantive law rules. She proposes the use of a regulation as opposed to a directive to achieve the objective. The substantive rules to be harmonized will, apart from defining insolvency, define the targeted legal acts or transactions and formulate the content of the rules which will seek to balance the integrity of the insolvency estate with principles of legal certainty. They will also deal with the consequences of a successful avoidance action. For transactions at undervalue, she proposes a relatively short suspect period, disregard for subjective criteria but so long as there are included defences by counterparties that include subjective elements. For preferences, she proposes attacking transactions that place the creditor in a better position than his counterparts. She also proposes removal of subjective criteria for entirely objective ones. The transactions to be avoided must only be those that occurred when the debtor was insolvent. She proposes a suspect period of six months increased to one year in the case of related parties. The related parties must be defined.

Casasola's proposals are clearly grounded on ease of proof and reduction of the length of avoidance trials. For preferences, she disregards the fact that subjective elements serve as a deterrent for unnecessary avoidance actions and also render transactions more certain and predictable because of the difficulty of proof. Apart from concerns with speed of avoidance proceedings through easing proof of the avoidance criteria, her proposals appear not to be grounded in any economic analysis.

Keay[47] proposes total harmonization of transaction avoidance rules. He aims at identifying primary matters that are contained in legislative regimes of member states that need

[46] Casasola O, 'The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3.
[47] Keay A, 'Harmonization of Avoidance Rules in European Union Insolvencies: The Critical Elements in Formulating a Scheme' (2018) 69(2) NILQ 85.

to be considered and addressed in the formulation of a harmonized transaction avoidance law scheme and ascertain the problems that these matters may cause in coming up with such a scheme. He acknowledges that it is not an easy task to draft provisions which provide a system that is fair, effective, workable and respected in all parts of the EU as current rules in member states have developed to address particular concerns in the social setting of those member states. This is further complicated by the fact that no standard theory has really developed in Europe as the reason for the existence of avoidance rules though there are clear policies that underpin them such as fair and rateable distribution of the debtor's property among equally situated creditors, promotion of collectivism, debtor estate's optimization and the like. He notes that harmonization will be important for predictability. The regimes in Europe are categorized into: one where there is one broad rule, for example, transactions that cause detriment to creditors; and the other where there are separate longer and more detailed rules. How harmonized avoidance rules are drafted will depend on the policy behind the avoidance, the existing rules in member states and the breadth of such rules. Critical in the drafting policies for harmonized rules will be; (a) an articulation of the objective for inclusion of such rules. This is because the objective will determine what the rule should be. Consensus much be reached on the fundamental principles that should be implemented in laying down the rule. This is important for coherence and internal consistency; (b) placing primacy on the need to have rules that will avoid actions or transactions that took place only when the debtor was insolvent. This will involve the need for adopting a common definition of insolvency; (c) having regard to the mix between subjective and objective elements in each rule bearing in mind the relative advantages and disadvantages of each. Keay favours objective rules so as to protect the collective scheme. To offset the impact of the objective rules, subjective defences can be provided. If subjective rules are opted for, consider who to impose the burden of proof of the elements on (whether on the debtor or counterparty). Keay suggests placing it on the counterparty and not on the debtor, the counterparties being beneficiaries who need not suffer detriment if, for example, they acted in good faith; (d) having regard to the role of presumptions. It is necessary to consider what matters need to be presumed; (e) considering who can bring avoidance actions to court; (f) in transactions at undervalue, considering how to express the quantum of value; (g) considering the length of the suspect period; (h) considering the issue of related parties (i) bearing in mind what consequential orders the court will make when a transaction is avoided; and (j) considering

time limitations as to when an avoidance action may be commenced. Keay succeeds in identifying the key issues to bear in mind when embarking on harmonizing transaction avoidance rules, but he falls short of pronouncing the ideal elements of the rules or any elements rooted in a functionalistic ideal or goal like the efficiency of the market place.

De Weijs[48] advocates for the use of objective criteria only in harmonized transaction avoidance rules in the EU, with the aim of reducing the time it takes for judges to rule over avoidance actions, increasing the certainty of outcomes and to avoid the moral reproach that attaches on the counterparty and the debtor through the use of subjective rules. The approach is clearly aimed at maximizing the value of the debtor's estate and cares little about creditor or investor interests like contractual finality, certainty and predictability and the efficiency of the market place.

Bork and Veder[49] advocate an approach to harmonization of transaction avoidance rules tethered on principles, with the first step being to elaborate the underlying principles, then identification of issues by listing subjects which must be regulated according to the principle-based point of view and finally resolving the issues by determining what seems to be the most appropriate solution according to the principles. This must also involve balancing competing interests. They justify the approach by saying that legal rules look back to principles as the principles are the fundamental or basic standards or building blocks underlying rules in any field of law.[50] They divide principles which inform transaction avoidance rules into procedural and substantial. The procedural ones include collectivity, efficiency, creditor autonomy, transparency, predictability or legal certainty, procedural justice and procedural privity.[51] The substantive ones are: the equal treatment of creditors; optimization of the debtor's estate; best possible satisfaction of creditors' claims; protection of debtor's rights; protection of trust; social protection; fixation and proportionality. Observably, the identified principles are too numerous to inform a coherent harmonization exercise that gives due or equal weight or value to each one

[48] De Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-08 available at http://ssrn.com/abstract=1817663 accessed on November 26, 2023.
[49] Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022)16,17.
[50] Ibid, 26, 27.
[51] Ibid, 64*ff.*

of the principles. They make the exercise extremely complex it could have been better if the authors had identified core principles among the lot and worked using them. While the authors also identify efficiency as a procedural principle, they do not go further to analyze the concept and how it can be used to determine the balance between subjective and objective elements in their scheme of proposed harmonized rules. The end result is that it is difficult to analyze their choice of the proposed harmonized avoidance rules from an efficiency or economic view point. The question whether the proposed rules make the common market that is the EU a more efficient market place receives no clear answer from their seminal work. The authors also avoided basing their proposed avoidance rules on any of the member states' existing laws.

Common among the above-mentioned authors' preferences is the use of objective as opposed to subjective elements in the transaction avoidance rules, primarily to save on the time needed to dispose of avoidance actions and also to improve the certainty of outcomes of avoidance litigation. The identification of core objectives or principles to inform the harmonized rules is mentioned by Casasola, Keay and Bork and Veder. Casasola is the only one that proposes having the harmonized rules apply to cross-border insolvency cases only with member states using their local avoidance rules for wholly local avoidance actions. Keay, while proposing the use of objective elements, proposes that subjective elements can come in the form of defences, the burden of proof of which should be cast on the counterparty so that he is not prejudiced where he can show that he acted without any moral blameworthiness. Each of the propositions by each of the authors studied above has an element or two in it that COMESA can borrow in the formulation of its harmonized avoidance rules.

## 7.4. Part C: A Proposed General Approach To The Harmonization Of Transaction Avoidance Rules By COMESA

### *7.4.1. The Proposal*

Parting ways with Casasola, De Weijs and Keay, all of whom, for some reason or the other, prefer objective avoidance rules which in essence focus on the maximization of returns to creditors by bulking up the debtor's estate, it is proposed that COMESA should aim for an approach to transaction avoidance whose focus is on attaining contractual certainty and predictability . The proposed avoidance rules will mainly rely on subjective criteria to be proven by the creditor or the counterparty as a defence to an avoidance action. The aim will be to

encourage contractual certainty and predictability by making the creditor or counterparty the master of the fate of the transaction so that it is only transactions which he entered into with some subjective fault on his part that get avoided. The proposal here does not focus much on debtor (mis) conduct but on creditor or counterparty's acts or omissions. Following Keay's observation, creditors who deal in good faith and without knowledge of the insolvency status of the debtor will be more certain that whatever contracts they have entered into with the debtor will not be easily avoided. This will promote trade and investment in the common market compared to an avoidance rules system that relies wholly or solely on objective criteria where there is relative ease of proof. Placing an undue emphasis on objective criteria as suggested by De Weijs, which of course have the advantage of maximizing the debtor's estate and encouraging or supporting reorganization efforts, may compromise certainty and predictability of transactions, since there is always the risk that, without any fault of the creditor's or counterparty's, the transaction may easily be avoided. Besides, debtor estate optimization as a primary aim does not help unsecured creditors that much since in each member state's insolvency legislation there are set statutory priorities most of which place unsecured creditors last on sometimes a very sizeable list of prioritized groups. The fewer the transactions avoided, the more certainty there is on the market place and the better the climate for investment. A very heavy reliance on objective avoidance criteria as well as other features such as long lookback periods which create a potentially wide scope for avoidance is a disincentive to investment which COMESA needs at a large scale for the economic uplift of member state's economies. The other reason for choosing subjective elements, especially as elements in defences, is to avoid disadvantaging counterparties who have dealt entirely in good faith and without notice or knowledge of any insolvency or of anything wrong with the transaction. The mechanistic approach brought about through use of objective elements is devoid of the human element and is also contrary to human expectations in a world where one usually gets to face a disadvantage only when they are in the wrong. Objective elements bring a sense of injustice on the creditor or counterparty if used exclusively. This is not to say there will be no use of objective elements. A balance will have to be struck.

Having set out the policy objective of the proposed harmonized transaction avoidance rules, a few things will have to be borne in mind. Firstly, the need to make the rules apply to

avoid transactions that occurred only when the debtor was insolvent.[52] Hence there will be need for a common definition of insolvency. Secondly, there will be a need to decide when to deploy presumptions within the rules. Thirdly, what proper mix of subjective and objective rules to deploy will also matter and this will be done with the policy objective of preserving contractual finality in mind, counter-balanced with the need to maximize the debtor's estate; Fourthly, the length of the suspect period will be considered, and finally the issue of the treatment of related parties. All these issues will be considered with the objective of the rules in the background.

In the formulation of the proposed harmonized rules on preferences and transactions at undervalue, data on what position has been taken by how many member states in relation to which avoidance rules regime will also matter, but only to the extent that a rule will be easier to propose where most member states have already taken the position and a departure will have to be justified where few member states are using the position being proposed. The formulation of the proposal will, however, not be unduly straight-jacketed by such concordance data as using it as a mandatory guide may lead to sub-optimal rules based on the mere fact of agreement and not functional utility in modern times. The comparative law methodology deployed in this study is not a mere search for consensus for its own sake, but a quest for better and effective law that suits the identified objectives under the Treaty.

### *7.4.2. Limitations To The Proposed Approach*

There is a limitation to the proposed approach. Within COMESA not all the rules relating to preferences, gifts and transactions at undervalue are formulated the same way. Egypt, Ethiopia, Comoros and the Democratic Republic of Congo formulate their rules in a manner different from the majority of the countries under study. These jurisdictions historically derive from civil law. In these jurisdictions, one has two categories of transactions, to wit; (a) those that are voidable mandatorily if they took place between the date of cessation of payments and before issuance of the bankruptcy declaration. These are gifts or donations, broadly speaking,

[52] Casasola O, The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3; Keay A, 'Harmonization of Avoidance Rules in European Union Insolvencies: The Critical Elements in Formulating a Scheme' (2018) 69(2) NILQ 85.

and settlements of debts not due or in a manner not usual.[53] The formulation involves preferences (debts not due) and gifts or donations; and, (b) those transactions avoidable at the discretion of the insolvency practitioner. These are avoidable where harm is caused to creditors and the counterparty knew about the cessation of payments.[54] The first group involve mandatory avoidance or invalidation and for the later it is optional. There is no defence to the first group of acts but there is both an objective (harm to creditors) and subjective (knowledge of cessation of payments) defence for the latter group. This dichotomous approach to invalidation is unlike in the rest of the countries of COMESA under study where there is direct mention of preferences and gifts and transactions at undervalue and these are defined and given separate treatment. There is nothing like a mandatory invalidation either. All invalidation appears optional. This is the problem that was mentioned earlier in the study when it was observed that the legal culture or tradition may dictate differential approaches to invalidation or avoidance. Such differentiated structural approach poses a challenge to the formulation of a harmonization proposal.

However, this notwithstanding, there is a mosaic of similarity in the majority of the countries studied in the sense that even for the civil law jurisdictions, one can make out preferences (concepts relating to debts paid before due date or in an unusual manner, and the mention of harm to creditors), gifts or transactions at undervalue, and the fact that the transaction avoidance rules come into play on the cessation of payments, being the equivalent of insolvency. The rules also provide defences related to knowledge of insolvency or knowledge of cessation of payments. Hence, in reality, one becomes aware that they are dealing with the same subject matter generally and broadly similar solutions, except that there are differences in approaches.

As law is not immutable, changes and improvements to it can be suggested, especially if the changes are targeted at meeting regional economic policy goals. This realization imparts vim and fortitude to the present endeavour.

[53] Articles 598 of the Commercial Code of Egypt; Article 671 of the Commercial Code of Ethiopia and article 68 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.
[54] Article 69 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts; Article 672 of the Commercial Code of Ethiopia and article 599 of the Commercial Code of Egypt.

## 7.5. Part D: Choice Of Law And Jurisdiction And Choice Of Harmonizing Instrument

### *7.5.1. Choice Of Law And Jurisdiction*

Before engaging in the quest for the harmonization of laws, however, two preliminary issues need to be confronted. These are: choice of law and jurisdiction issues and issues to do with what legal instruments shall best be deployed in the harmonization process. The first problem is brought about by the COMESA member states' membership in multiple RECs. Most REC treaties provide that community laws are directly applicable and have superiority over national laws.[55] Considering that most member states of COMESA are also members of other RECs, the question then becomes: how will any COMESA harmonized rules sit or relate with the national laws in the member states, as well as with their received harmonized community laws from RECs other than COMESA? One has in mind here a situation like that in Comoros where the domestic avoidance rules are those from the OHADA uniform law. How will the uniform law relate to any harmonized COMESA avoidance rules? If the East African Community also enact their own harmonized avoidance rules, how will these in Uganda, Kenya, Rwanda and the Democratic Republic of Congo interact with any proposed COMESA harmonized avoidance rules? For this problem, it is proposed, following in the footsteps of Casasola,[56] that a unified private international law rule governing jurisdiction and choice of law in cross-border insolvencies that involve companies located in COMESA member states only[57] should be enacted. The suggestion is for a rule where the proposed COMESA harmonized transaction avoidance rules will be exclusively applicable in cross-border insolvencies in cases where both the debtor and the creditor or counterparty have their respective centers of main interest located within the COMESA regional economic block. In such a case both parties will, by reason of their residency in a member state of COMESA expect that COMESA harmonized transaction avoidance rules shall apply exclusively to cross-border insolvencies and this will entail that domestic transaction avoidance rules of either party or received avoidance rules from their membership of other RECs will be disapplied. Of course there will then remain the problem

[55] *Mohochi v Uganda* EACJ Reference No. 5 of 2011.
[56] Casasola O, The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3.
[57] ibid.

where the debtor and creditor belong to the same two or more different RECs as is the case where Kenya, Uganda and Rwanda do belong to both the EAC and to COMESA. In such a scenario if both EAC and COMESA have harmonized avoidance rules and the case involves corporations with centers of main interest in the countries which are both in EAC and COMESA party autonomy may have to be given a role to play enabling the parties to make a choice as to which REC's avoidance rules will apply to their transaction. On the issue of jurisdiction, it is proposed that a provision in the COMESA Treaty where member states will be obliged to adopt and enact the UNCITRAL Model Law on Cross Border Insolvency would be a starting point for private international law unification. This will not be a very difficult task as eight of the nineteen COMESA member states already adopted the Model Law,[58] and under the COMESA Treaty there are provisions where member states have undertaken to ratify some specific international conventions[59] and international conventions dealing with specific subject areas.[60]

### *7.5.2. Choice Of Harmonization Instrument*

The thesis does not propose a model law as these are not covered under the COMESA Treaty.

The choice would therefore ideally be between a regulation and a directive. Notably, under clause 10(2) of the COMESA Treaty, a regulation is binding on all member states. A regulation, being a hard law binding instrument, may be difficult to enact[61] given the range of differences in the contents of rules against preferences and transactions at undervalue within COMESA and the fact that a regulation will inevitably require or entail agreement on its common wording. Experience at international treaty or convention making shows that a lot of time is spent by member states trying to agree to a common wording of provisions, in multiple languages, even where the principles are already agreed upon.[62] As shown in chapters two and four, the variegated approaches in the formulation of the rules on preferences, gifts and transactions at undervalue by COMESA member states will mean that any attempt at a

[58] http:www.uncitral.org.
[59] Article 162 of the COMESA Treaty relating to the International Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965.
[60] Article 109 of the COMESA Treaty dealing with energy issues.
[61] Ogus A, 'Competition Between National Legal Systems: A Contribution to the Economic Analysis to Comparative Law' (1999) 48 International and Comparative Law Quarterly 405.
[62] ibid.

regulation, which entails common wording, will be a formidable task. The study therefore proposes deploying a directive addressed to all member states. Under article 10(3) a directive is binding on each member state to whom it is addressed as to the result to be achieved and not as to the means of achieving it. A directive will give member states a lot more flexibility and the added feeling that they still have a choice to make on the matter (sovereign pride is less affected thereby). The directive may require member states to enact laws in their jurisdictions dealing with preferences, gifts and transactions at undervalue but affecting only cross-border transactions or disputes between companies, creditors and counterparties both or all of which are domiciled in a COMESA member state. Obviously this will require a definition of what a cross-border transaction or dispute is.

What this latter proposition for the making of a directive instead of a regulation entails is that the proposal for harmonized preference, gifts and transactions at undervalue rules will not include any draft text of any pre-framed or proposed rules as such, but will contain a mere a guide as to the content of the proposed harmonized rules to be enacted by member states. Anything beyond this will veer towards a regulation which requires common wording. Moreover this study undertook to focus on how to undertake legal harmonization of transaction avoidance rules in the insolvency laws of COMESA, and did not propose to draft the actual directive harmonizing the rules.

## 7.6. Part E: The Primary Need For A Common Definition Of Insolvency

### *7.6.1. The Necessity For A Common Definition Of Insolvency*

Prior to presenting definitive proposals for harmonized COMESA transaction avoidance rules covering preferences, gifts and transactions at undervalue, there is need to come up with a common definition of insolvency within COMESA as, observably, all the transaction avoidance rules do target transactions entered into when the debtor was unable to pay his debts or, as is the terminology used in civil law countries, during the period of cessation of payments, which, roughly, means the same thing as during inability to pay debts. Arguably, though, inability to pay debts and cessation of payments may not cover the same ground or period in time and if

that disparity is allowed to continue, there will be an element of uncertainty in the market place, something which the COMESA Treaty abhors.[63]

The necessity to come up with a harmonized definition of inability to pay debts also arises because quite apart from the fact that the voidable transactions are those that occur when the debtor becomes insolvent, knowledge of the (in)solvency status of the debtor is one of the subjective elements that features heavily as a defence to most avoidance actions. It is an element that serves to protect creditors who dealt in good faith with the debtor. Since, therefore, knowledge of inability to pay debts is a critical defence factor in avoidance actions, there must be a common meaning to the term to cater for certainty in the common market.

### *7.6.2. Disparities In The Definition Of Insolvency In The Insolvency Laws In COMESA*

Notably, within COMESA there is no uniform definition of this concept. Malawi,[64] Mauritius[65] and Seychelles[66] prefer direct proof of such inability as well as place a presumption based on: (a) failure to comply with a statutory demand; (b) an execution not being satisfied; (c) a receiver being appointed to recover all or a substantial part of the debtor's assets; and, (d) a proposed arrangement with creditors being voted down. Observably, there is no express provision for defining inability to pay debts with respect to the relationship between assets and liabilities in the accounts books of the company, that is to say, balance sheet insolvency, although a provision that the presumptions do not preclude proof of inability to pay debts by any other means must be taken to imply that inability to pay debts can also be established using balance sheet criteria.[67] For Comoros and Democratic Republic of Congo,[68] inability to pay debts evidences itself through a suspension of payments, and so, too, for Egypt[69] and Ethiopia.[70] There is no balance sheet insolvency recognized in these countries, too. For Zimbabwe, an

[63] S. 159(1)(c) of the COMESA Treaty.
[64] Ss. 182 and 183 of the Insolvency Act of Malawi.
[65] S. 178 and 179 of the Insolvency Act of Mauritius
[66] S. 97 and 179 of the Insolvency Act of Seychelles.
[67] See, for example, s. 183(2) of the Insolvency Act of Malawi. A similar provision exists for Mauritius and Seychelles.
[68] Article 25 and article 33 of the OHADA Uniform Law Organizing Collective Proceedings for Clearing of Debts; Uganda.
[69] Article 699 of the Commercial Code.
[70] Article 590 of the Commercial Code.

inability to pay debts can be proved directly or be presumed through failure to meet a statutory demand and execution returning with a *nulla bona* report. There is however, mention of balance sheet insolvency. Uganda[71] relies on presumed inability to pay debts through the same elements as Malawi, Mauritius and Seychelles and like them, makes no mention of balance sheet insolvency. Kenya[72] talks of inability to pay debts as well as balance sheet insolvency. Eswatini[73] defines inability to pay debts as coming through direct proof and is presumed only through failure to meet a statutory demand. There is no balance sheet insolvency mentioned.

### *7.6.3. Proposal For A Common Definition Of Insolvency In COMESA*

It is proposed that throughout COMESA, an inability to pay debts must be capable of both direct proof and proof through presumptive criteria, which should include: (a) failure to comply with a statutory demand; (b) execution not being satisfied; (c) a receiver being appointed to recover all or a substantial part of the debtor's assets; and, (d) proposed arrangement with creditors being voted down. The presumptions must also include time-related ones like those mentioned in Malawi,[74] Seychelles,[75] Mauritius,[76] Uganda[77] and Rwanda[78] where transactions entered into six months prior to commencement of winding up proceedings or a debtor's adjudication of bankruptcy are presumed have been made during a period of inability to pay debts, as obviously, save in very rare instances of individual corporate or systemic catastrophe, insolvency is not an event but a gradual process.[79] Balance sheet criteria, that is liabilities exceeding assets, must also expressly form part of the definition of insolvency. Harmonizing the definition of insolvency and aspects of its proof will help bring certainty to the meaning of the term. A common market that is serious about attracting investors can ill-afford insolvency laws with a skewed meaning of a very important and anchor term as insolvency itself.

The proposal above essentially means that civil law jurisdictions that only talk about cessation of payments as the sole indicator of insolvency will, in the new harmonized rules set

[71] S. 3 of the Insolvency Act
[72] S. 384 of the Insolvency Act.
[73] S. 288 of the Insolvency Act.
[74] S. 282(4) of Insolvency Act.
[75] S. 324 of the Insolvency Act.
[76] S. 313 of the Insolvency Act.
[77] S. 15 of the Insolvency Act
[78] Article 215 of the Insolvency Act.
[79] Argenti J, 'Corporate Planning and Corporate Collapse' (1976) 9 Long Range Planning 12-17.

up, at least for intra-COMESA cross-border insolvency transactions, have to expand the definition of insolvency to a more elaborate one that goes beyond cessation of payments and includes other means of defining the phenomenon including both time-related and other presumptive criteria that show inability to pay debts through an indicator other than cessation of payments. This is because, in reality, insolvency is a multi-dimensional phenomenon that can manifest itself in ways other than mere cessation of payments. After all, civil law jurisdictions are reputed for legislating to minute detail, hence an opportunity arises here for them to improve on the ante. Similarly, those common law jurisdictions that have not been exhaustive in the treatment of the subject matter of insolvency (in terms of meaning), will need to adopt a more elaborate definition that covers all bases. A uniform meaning of insolvency will improve certainty and predictability of outcomes for creditors in the common market.

## 7.7. Part F: The Proposed Harmonized Transaction Avoidance Rules

### 7.7.1. Proposed Harmonized Rules on Preferences

#### *7.7.1.1.Meaning Of Preferences And The Reason For Avoiding Them*

To recap, rules against preferences target situations where the insolvent company does something or suffers something to be done which has the effect of putting one or more of its creditors in a better position than that which he or they would be in during a distribution in an insolvent liquidation.[80] The rules against preferences help preserve creditor entitlements by enabling the avoidance of acts taken or suffered by the debtor which have the effect of improving the position of a single or a few creditors, or the debtors' sureties or guarantors in the insolvent distribution of the debtor's assets.[81] Preferences are made subject to avoidance if they took place within a specified 'suspect period'[82] prior to the commencement of formal insolvency proceedings, involved a transfer of money, rights or other assets to a creditor or the creation of an encumbrance over the debtor's property to settle or secure an antecedent debt and, as a result of the transaction, the creditor received a larger percentage of his claim than he would if he was

[80] Anderson H, 'The Nature and Purpose of Transaction Avoidance' (2014) 2 Nottingham Insolvency and Business Law e-Journal 2.
[81] Parry R and Shivji S, 'Preferences (Insolvency Act 1986, s.s 239 and 340)' in Parry, R, Ayliffe, J, Shivji, S and Oliff-Cooper, G *Transaction Avoidance in Insolvencies* (3rd Edition, Oxford University Press 2018) 151.
[82] In the case of related parties, the suspect period is always shorter than in transactions between unrelated parties.

to be paid rateably together with the rest of the creditors.[83] In short, a preference is a transaction conducted during a debtor's insolvency, which favours one creditor over others.[84] Its avoidance serves to bulk the insolvent debtor's estate, and this to aid either rescue and reorganization efforts or for the benefit of creditors as a group. The rule serves multiple visions of insolvency law.

The primary task in a proposal for harmonizing rules relating to preferences will be to define the meaning of a preference as well as the range of transactions that can be included to qualify as preferences.[85] This has been done in a number of jurisdictions including Malawi and Zambia, and it will be a question of seeking the broadest definition and categories of transactions sought to be covered.

The contents of statutory provisions on preferences in COMESA exhibit a wide variety of formulations. Broadly speaking, however, the general picture that emerges when the rules from various jurisdictions across the world are compared is one where some jurisdictions, for example in the United States of America,[86] having defined what a preference is, in terms of the effect of the transaction on the counterparty, do not require proof of an intention to prefer on the part of the debtor, but grant the creditor or counterparty several defences, which in some jurisdictions could be entirely objective[87] but which, in other jurisdictions, may be a mixture of subjective ones like good faith, absence of reasonable suspicion that debtor was, or would become unable to pay debts following the payment or transfer and objective ones like ordinary course of business, payment of value or alteration of position in exchange for the act or transaction, and the like.[88] These are 'effects-based' preference provisions. They are in the

[83] Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' ECFR 2/2011, 235.
[84] Tabb C, *The Law of Bankruptcy* (2nd edn, Foundation Press Thomson Reuters 1997) 486.
[85] As commercial transactions are evolving, a definition of such transactions must use the formula of giving a core meaning, in this case what it means for a transaction to have a preferential effect, and then give a list of transactions that need to be included as falling into the definition. That way the core definition remains as a guide, and the stated list of transactions will be mere exemplars that do not shut out any future commercial innovations that may fall into the meaning of preferences. For the meaning of the word ' include' see *Dilworth v Commissioner of Stamps* [1899] AC 99, at 105-106 per Lord Watson; *Portsmouth Corporation v Smith* (1883) 12 QBD 184 at 195; *R v MacLeod* 1950 CanLii 409; and *AB LLC and BD Holdings LLC v The Commissioner of the South African Revenue Service*, Case No. 13276; [2015] SATC 2.
[86] S. 547 United States Bankruptcy Code.
[87] Ibid.
[88] Malawi, S. 292 of Insolvency Act; Mauritius, S. 323 of Insolvency Act; Seychelles, S. 334 of Insolvency Act; Comoros and Democratic Republic of Congo, article 69 of the OHADA Uniform Law Organizing Collective

majority of the COMESA member states studied. Other jurisdiction like the United Kingdom[89] will require proof of the debtor's intention to prefer, but also confer some defences on the part of the creditor or counterparty. This is the case for Zambia,[90] Zimbabwe[91] and Rwanda.[92]

For Egypt preferences are effects based, meaning there is no need for an intention to prefer but there is the defence of lack of knowledge, by the counterparty, of the cessation of payment.[93]

In Kenya,[94] there is a presumption of an intention to prefer where the counterparty is a related party.

Coming to defences for preferences, Uganda,[95] Rwanda[96] and Kenya[97] only avail them to persons that have not transacted directly with the debtor. The immediate counterparty that dealt with the creditor is left without a defence.

*7.7.1.2.Proposed Harmonized Rules On Preferences*

There are, therefore, decisions that need to be made relating to the type of preference model COMESA needs to adopt. Should it be an effects-based model or one that requires proof of an intention to prefer? And should the defences be subjective, objective or a mixture of the two? These questions are being posed bearing in mind the contractual certainty and predictability posture of transaction avoidance rules that this thesis has advocated for above as being in keeping with the investment focused aims and objectives of the COMESA Treaty.

Arguably, the requirement to prove the intention of the debtor to prefer a creditor or creditors may, because of the practical difficulties surrounding proof of intent, dissuade insolvency practitioners from commencing avoidance proceedings, and therefore may indirectly

Proceedings for Clearing of Debts; Uganda, S. 19 of the Insolvency Act; Eswatini, S. 29 of the Insolvency Act; Ethiopia, article 672 of the Commercial Code 2010.

[89] S. 239 of the Insolvency Act, 1986 of the United Kingdom.

[90] S. 48 of the Bankruptcy Act.

[91] S. 26 of the Insolvency Act.

[92] Article 215 of the Insolvency Act.

[93] Article 599 of the Commercial Code.

[94] S. 683 of the Insolvency Act.

[95] S. 19 of the Insolvency Act.

[96] Article 220 of the Insolvency Act.

[97] S. 685 of the Insolvency Act.

contribute to the finality of a transaction. This makes such a requirement appear to be a creditor or investor-friendly device. However, whether or not the debtor intended to prefer a creditor may not change the effect of the transaction as a preference in the eyes of the rest of the creditors. Further, requiring an insolvency practitioner to prove an intention to prefer and giving the creditor no defences leaves the creditor vulnerable to the insolvency practitioner's and/or the debtor's (in)competence in court, to prove or disprove the necessary intent. Such a scenario does not cater for contractual certainty as the creditor will have to be mindful that whether a transaction holds or not will basically depend on the debtor showing that they did not intend to prefer the creditor over the rest of the creditors, or the insolvency practitioner proving that they did. Even if the creditor may have dealt in good faith and with no knowledge of insolvency, they are rendered a vulnerable lot.

To counter this set-back, it is proposed that the requirement of an intention to prefer must not be imposed in the harmonized transaction avoidance rules in COMESA, but that the creditor, who will suffer detriment through disgorgement if a transaction is avoided, must have a key role to play in saving the transaction that had a preferential effect, and if the transaction is to be avoided, it must only be avoided through his fault or failure to establish the defences available to him.[98] This suggested approach puts the creditor in focus and takes away debtor foibles. Proof of whether the debtor intended to prefer the creditor may be difficult to establish and would be a time consuming affair, unless presumptions are deployed. On the other hand, doing away with the need to prove an intention to prefer, but requiring the counterparty to establish the defences may lead to speedier court proceedings. This will be by reason of the fact that the insolvency practitioner only needs to prove the preferential effect of the transaction by establishing its nature leaving the creditor to establish the defences, and the speed of such rebuttal will be under the control of the creditor concerned. Improving speed will improve the efficiency of the preference rules regime.

Having defined preferential acts (and the definition of such acts must be a broad one) the onus to save the transaction must fall on the creditor affected who must prove the various subjective and objective defence elements, which must all be proved cumulatively. These

[98] Keay, 'Harmonization of Avoidance Rules in European Union Insolvencies: The Critical Elements in Formulating a Scheme' (2018) 69(2) NILQ 85.

include good faith (subjective), payment of consideration or alteration of position (objective), lack of knowledge of insolvency status of the debtor (subjective), and ordinary course of business (objective).[99] It is proposed that a defence of ordinary course of business must be defeated through, among others, proof of payment of a debt before its due date or payment in a form other than the ordinary or agreed format.

Eswatini[100] has placed on the creditor, as a defence, the fact that the creditor did not know that the act or payment was not intended to prefer. This thesis would not advocate for such an approach. For as long as the intention to prefer is not that of the creditor, it may not be proper to ask the creditor to prove or disprove an intention that was not its own. Further, the provision is more like a reverse-onus provision in practice, and would foster uncertainty and hardship on the creditor concerned.

Quite apart from defining transactions as preferences merely by reference to their effect, there should be a presumption of a preference for related or connected parties, which category of persons with respect to directors of corporate insolvent debtors must be well- defined to take into account the gamut of African sanguine relationships which is not nuclear.[101] However, though that is the case, as there will be need for certainty, a line may perhaps have to be drawn with first cousins as the outer limits of related parties that may be caught by the harmonized avoidance rules. This is because, in Africa, related parties may include a broader and difficult to delimit category of consanguineous individuals than in Europe due to cultural factors. For corporate bodies, the targeted group of related parties could be similar to those in the European setting. The connected parties also need to be availed the range of defences that non-related counterparties enjoy.

It is further proposed that the defences must be made available not only to those who did not deal directly with the debtor, like guarantors or sureties but also to those that did. Proof of the defences should exonerate either category regardless of direct contact with the debtor. Of

[99] Payments for debts not due and in a form other than the agreed or ordinary form will defeat the defence of ordinary course of business. See for example, s. 26 Insolvency Act of Zimbabwe, and it is proposed that this definition of this concept (ordinary course of business) needs to apply in the harmonized rules.
[100] S. 20 Insolvency Act.
[101] Russell M, 'Are Urban Black Families Nuclear? A Comparative Study of Black and White South African Family Norms' (2003) 29 (2) Social Dynamics 153.

course, arguably, those that did not deal with the debtor directly may find it much easier to satisfy the knowledge and good faith defences, but this does not mean those that dealt with the debtor should be excluded. These are the primary creditors of the insolvent debtor, and arguably, the investors. They are the targets of the rules against preferences and are the ones with respect to whom the whole talk of contractual certainty and finality is addressed.

Coming to the length of the suspect period, there is merit in having two. For connected parties (who must be well-defined) it must be a longer one, and for unconnected creditors a short one. Some countries have two years for unconnected parties, but this is a long period of time in business. Others like Zimbabwe, even have three. The thesis proposes, for the sake of certainty and finality of contractual dealings, a suspect period of one year for unconnected parties, with two years for connected parties. Shorter suspect periods contribute to contractual finality and certainty.

In conclusion, for preferences, it is proposed that: (a) the law must target only those transactions that occurred during the debtor's insolvency; (b) acts that are to be presumed to constitute preferential acts must be properly defined and the definition must be as broad as possible; (c) payments to or transactions with related or connected parties must be presumed to be preferences; (d) related parties must be well defined to take into account the idiosyncratic nature of African blood relations; (e) the intention to prefer must not constitute an element of preferences, meaning all acts that have a preferential effect will be deemed to be avoidable; (f) once a preferential act is proved or presumed, it must be for the counterparty to prove defences and here is where the subjective and objective defences are going to be placed and these must be proved cumulatively. These will include good faith, lack of knowledge of the insolvent state of the debtor, ordinary course of business and payment of consideration or suffering a detriment; (g) the defence of ordinary course of business must be defeated through proof of payment of a debt before its due date or payment in a form other than the ordinary or agreed format; (h) the defences must apply to all and not only to persons that did not deal directly with the debtor; and, (i) for transaction between related or connected parties the suspect period must be longer than for transactions between unconnected parties.

### 7.7.2. Proposed Harmonized Avoidance Rules Dealing With Gifts

*7.7.2.1.Justification For The Avoidance Of Gifts*

In Germany, the recipient having provided no or insufficient consideration for the transaction is said to be undeserving of legal protection. In England, the motivation for the avoiding of gifts might be the need to avoid the improper reduction of the debtor's estate, in the interest of the general body of creditors, and this could also be linked to the principle of unjust enrichment[102] on the basis of the maxim that 'equity is suspicious of gifts'[103] or, indeed, the resulting trust and the reluctance of equity to assist a volunteer.[104] In reality, gratuitous transfers of money or property made while the debtor is unable to pay debts deplete the estate of the insolvent debtor available for distribution to creditors, and being made without any consideration, are a proper candidate for avoidance action.

*7.7.2.2.The Variety Of Avoidance Rules Relating To Gifts In COMESA*

Almost all but three COMESA jurisdictions abhor and avoid gifts made by an insolvent debtor within the period of inability to pay debts. Zambia has no provisions on gifts or transactions at undervalue, but for preferences only. Uganda and Rwanda, too, only have provisions for voidable preferences and transactions at undervalue. Since transactions at undervalue are targeted in Rwanda and Uganda, a case can easily be made to target gratuitous transactions as well because in transactions at undervalue, at least some consideration will have changed hands, and it defeats reason for a jurisdiction to only target for avoidance transactions where some value, albeit inadequate has moved, and leave untouched those where none has. It should also not be too difficult for Zambia to be persuaded to enact a rule avoiding gifts.

Malawi,[105] Mauritius[106] and Seychelles[107] have provisions for voidable gifts where gifts made by debtors to other people within two years before adjudication of insolvency or commencement of winding up proceedings may be avoided if the debtor was unable to pay his due debts immediately after making the gift. A gift made within 6 months before the date of the debtor's adjudication of insolvency or commencement of winding up proceedings is presumed to have been made, unless the contrary is proved, when the debtor was unable to pay his debts.

[102] Bork R and Veder M, 'The Project' in Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* (Intersentia 2022) 16
[103] *Stock v Dowden* [2007] UKHL 17 [60].
[104] *Pennington v Waine* [2002] EWCA 227 [52].
[105] S. 289 of the Insolvency Act.
[106] S. 320 of the Insolvency Act.
[107] S. 331 of the Insolvency Act.

It is a defence for the counterparty or recipient of the gift to prove that he acted in good faith, that a reasonable person in his position would not have suspected that the debtor was, or would become, unable to pay his debts, and that he gave value for the property in the reasonably held belief that the transfer of the property to him was valid and would not be set aside.[108]

In Zimbabwe, dispositions for no value may be avoided within two years before application for liquidation or within three years, if disposition was to an associate. Hence, whereas Malawi, Seychelles and Mauritius do not have an extended time limit for gifts to associates , Zimbabwe does have.[109] There is a defence in Zimbabwe that relates to the value of the gift in relation to the value of the debtor's assets.[110] There is also a good faith defence, and payment of value defence for those that did not take from the debtor.[111]

In Kenya, gifts are a species of transactions at undervalue.[112] There are defences if it can be shown the transaction was carried out in good faith and for the purpose of carrying on business and that at the time the gift was made there were reasonable grounds for believing that the transaction would benefit the company.[113] The suspect period for gifts is two years immediately preceding the onset of insolvency. This is the time the company is unable to pay its debts or becomes unable to pay its debts in consequence of the transaction.[114] Persons that did not acquire from the debtor and acquired in good faith and for value are spared the order.[115] Notice of surrounding circumstances, and a connection with the company vitiate the defence of good faith.[116]

The situation in Eswatini is similar in the sense that dispositions at no value made more than two years before the sequestration of the debtor's estate, when the liabilities of the debtor exceeded his assets, will be avoided.[117] Such gratuitous dispositions are also avoidable if made less than two years before the sequestration of the debtor's estate if the recipient is unable to

[108] S. 292 Insolvency Act of Malawi; S. 323 of the Insolvency Act of Mauritius and s. 334 of the Insolvency Act of Seychelles.
[109] S. 24 of the Insolvency Act, Zimbabwe.
[110] Ibid.
[111] S. 30 Insolvency Act. Zimbabwe.
[112] S. 682(5)(a) of the Insolvency Act, Kenya.
[113] S. 682(6) of the Insolvency Act, Kenya.
[114] S. 684 of the Insolvency Act, Kenya.
[115] Ibid.
[116] Ibid.
[117] S. 26 of the Insolvency Act, Eswatini.

prove that immediately after the disposition, the assets of the debtor exceeded his liabilities.[118] The recipient has as a defence that he parted with any property or security which he held, or lost his rights against another person, and that he acted in good faith.[119] The more than three years suspect period is rather too open ended and affects certainty and predictability.

For Comoros and Democratic Republic of Congo, both of whom are members of OHADA, during the period of suspicion, gratuitous transfers are non- binding on the body of creditors[120] and they may be non-binding where they have caused loss to creditors if made within six months preceding the period of suspicion.[121] Gratuitous transfers have no effect where not executed. The same with gratuitous sub-transfers even where the sub- transferee acted in good faith.[122] Gratuitous sub-transferees for valuable consideration with no knowledge of insolvency of the debtor can keep the property[123] but the principal transferee shall be required to make a refund.

In Ethiopia, gratuitous transfers face mandatory invalidation during the suspect period[124] but they do face optional invalidation where the creditor knew or should have known about the cessation of payments and the act was detrimental to the estate or the payment was made in preference to other creditors.[125]

Under the Egyptian Commercial Code, there is mandatory invalidation of donations.[126] There is optional invalidation of gratuitous donations which are harmful to creditors where the party disposed to was aware of the bankrupt's discontinuance of payments.

A few points emerge from the above narrative. The first is that, discounting the case of Ethiopia where the suspect period cannot exceed eighteen months, the average suspect period for the avoidance of gifts is around two years. Of course there are also cases like Eswatini where the suspect period can go beyond two years, and Zimbabwe where it extends to three years in

[118] Ibid.
[119] S. 33 of the Insolvency Act, Eswatini.
[120] Article 68 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.
[121] Ibid, article 69.
[122] Ibid, article 71.
[123] Ibid.
[124] Article 671 of the Ethiopian Commercial Code.
[125] Ibid, article 672.
[126] Article 598 of the Commercial Code of Egypt.

the case of related parties. The second point is that none of the jurisdictions require proof of an intention to make the gift. Then there is the fact that Zambia, Uganda and Rwanda do not appear to have provisions relating to gifts, although Rwanda and Uganda have provisions relating to transactions at undervalue meaning that it would not be difficult to motivate a case for including gratuitous donations within the fabric of their avoidance rules. In any event, Kenya, like the United Kingdom[127] does lump gifts and donations together with transaction at undervalue meaning jurisdictions with provisions for transactions at undervalue can give gifts the same treatment as transactions at undervalue.

There is also a similarity in all the jurisdictions in that they target donations that occurred when the debtor was insolvent or where it became insolvent immediately after the gratuitous donation was made.

The range of defences is also the same although some countries have more defences than others. The defences include good faith; that a reasonable person would not have expected that the debtor was or would become unable to pay its debts as a result of the transaction or that the recipient gave value or altered his or her position in exchange for the donation (in a sense denying the allegation that it was a gratuitous donation). Apart from the consideration defence, which is objective, the other defences are subjective.

There are some differences, though, in the sense that in some jurisdictions, persons that take from the debtor are not availed any defences and the defences are there for sub-transferees only. This is the case in Kenya. There too, the defence of good faith is vitiated where the recipient is related to the donor and it is also defeated by knowledge of insolvency.

*7.7.2.3.Proposed Avoidance Rules Relating To Gifts*

With these similarities and differences in approach in mind, a proposal has to be made to harmonize the avoidance rules related to gifts in the COMESA regional economic block. Beneficiaries of gifts are not creditors of the company in the first place but the general body of creditors will benefit from the avoidance of gifts through the bulking up of the insolvent debtor's estate. There are no arguments for contractual finality that can be made for the avoidance of gifts as they do not emanate from binding or enforceable contracts in the first place. Still, beyond

[127] S. 339(3)(a) of the Insolvency Act 1986 of the United Kingdom.

the avoidance of gifts being an act beneficial to the body of creditors, focus can be put on certainty and predictability as targeted objectives, by ensuring that only such transactions as involve an element of fault on the side of the counterparty are avoided, and those that do not are spared.

Firstly, it is proposed that in all COMESA jurisdictions, gifts or gratuitous donations should be subject to avoidance on the same theoretical basis as transactions at undervalue. They can be abused by directors to divest the company of assets at a time when they know it is unable to pay its due debts. This reduces the size of the insolvent debtor's estate available for distribution to creditors.

The second proposal is that the avoidance of gifts should only apply to gifts made when the company is unable to settle its due debts or becomes unable to settle its due debts after making the gratuitous donation. This will infuse an element of fault on the part of both the debtor and the recipient of the gift if they have knowledge of such inability to pay debts.

Thirdly, the suspect period. As it appears that most jurisdictions have opted for two years, it is proposed that this should be the suspect period. However, it is also proposed that where the gift is to a related party, the suspect period be extended to three years prior to commencement of winding up proceedings or adjudication of insolvency. Note the difference between the recommended time here and that made above in relation to preferences. The lack of a contractual relationship between the donor and donee of a gift will call for more circumspection and where the parties are related, increasing the suspect period to three years will capture all gifts that the debtor, who has better knowledge of its financial data or debt situation than anyone else, may have made in bad faith to its relations.

Fourthly, the range of defences for the counterparty must remain wide to include a mix of subjective and objective factors. These must relate to good faith, a lack of knowledge that the debtor was insolvent at the time of making the gift or became so in consequence thereof, and the fact that the counterparty gave value. On this one, however, the value given should not be significantly less than the value of the gift, otherwise this will contradict the avoidance rule relating to transactions at undervalue. Alteration of the donee's position as a result of the gift should not qualify as a defence as most significant donations will do that in any event.

The fifth proposal is that there should not be any difference in treatment between the person that took the gift from the debtor and the one that took it from a person other than the debtor. The defences should apply to both sets of recipients.

### 7.7.3. Proposed Harmonized Rules Dealing With Transactions At Undervalue

#### *7.7.3.1.Rationale For The Avoidance Of Transactions At Undervalue*

As was discussed in chapter two of this thesis, Armour postulates that there could be various rationales for the avoidance of transactions at an undervalue, and these could include: (a) the avoidance of fraud and the prevention of prejudice to creditors, essentially a pursuit of corrective justice. The fraud avoidance rationale could explain the differential treatment in some rules between transactions with related parties and with unrelated counterparties; (b) the reversal of unjust enrichment; (c) support for the *pari passu* or fairness principle; and (d) the amelioration of perverse incentives experienced by debtors facing financial distress,[128] where, even though the debtor may not have any intent to defraud or disadvantage any creditor, faced with a cash squeeze, they decide to sell property at a price below its market value in order to obtain a quick sale and raise funds for the company.[129] Beyond these justifications, the quest to avoid a diminution in the quantum of the property available to creditors ranks high on the motivations for this rule[130] and unlike with preferences, this is attained through deterring debtor, and not creditor misbehavior.[131]

#### *7.7.3.2.The Range Or Variety Of Elements Of Rules Relating To Transactions At Undervalue In COMESA*

[128] Armour J, 'Transactions at an Undervalue' in Armour, J and Bennet H, *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) 44.
[129] Westbrook J, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (2006-2007) 42 Texas International Law Journal 899.
[130] Cuming R, 'Transactions at Undervalue and Preferences Under the Bankruptcy and Insolvency Act: Rethinking Outdated Approaches' (2002) 37 Canadian Business Law Journal 5.
[131] Keay A, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55.

In Malawi,[132] Seychelles[133] and Mauritius,[134] where, within the specified period, a debtor has disposed of a business or property, provided a guarantee or services, or in the case of a debtor that is a company, has issued shares, for the benefit of a related party[135]the Official Receiver or the liquidator may recover from the person, relative, company or related company, as the case may be, any amount by which the value of the business, property or services or the value of shares at the time of the disposition, provision or issue exceeded the value of any consideration received by the debtor. The relevant suspect period is two years before the date of adjudication or commencement of the winding up and the value of a business or property includes the value of any goodwill attaching to the business or property. There is no defence to transactions at undervalue. The issue whether the transaction occurred when the debtor was unable to pay debts is also not covered. Most importantly, there is no quantum threshold relating to the difference in value that may trigger avoidance proceedings. The provision would therefore render vulnerable any transaction between related parties that has a value difference, regardless of the size and is thus bad for contractual finality. The failure to cover transaction at undervalue between unconnected parties is also problematic from the point of view of the goal of insolvency law to bulk up the debtor's estate.

Under article 216 of the Insolvency Act of Rwanda, a transaction at undervalue entered into by a company or individual is voidable on the application of the insolvency practitioner to the court if: (a) it was entered into within the year preceding the commencement of the insolvency proceedings; (b) the value of the consideration received by the company or individual was significantly less than the value of the consideration provided by the company or individual; (c) when the transaction was entered into, the company or individual was unable to pay their due debts, engaged or was about to engage in transactions for which their financial

[132] S. 293(2) and 293(3) Insolvency Act, Malawi
[133] S. 335(2) and 335(3) of the Insolvency Act, Seychelles.
[134] S. 324(2 and 324(3) of the Insolvency Act, Mauritius.
[135] These range from (a) a person who was, at the time of the disposition, provision or issue a nominee or relative of or a trustee for, or a trustee for a relative of the debtor, or, in the case of a company, a director of the company; (b) in the case of a debtor that is a company, a person or a relative of a person who, at the time of the disposition, provision or issue, had control of the company; (c) in the case of the debtor that is a company, another company that was, at the time of the disposition, provision or issue, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of a director of the company; or (d ) in the case of a debtor that is a company, another company that, at the time of the disposition, provision or issue, was a related company.

resources were unreasonably small or incurred the obligation knowing that the company or individual would not be able to perform the obligation when required to do so; or (d) the company or individual became unable to pay their due debts as a result of the transaction. Under article 220 persons that acquire property from a person other than the debtor have a defence if they acquired the property for value and without knowledge that the person acquired the property from the debtor. Recovery from the person that acquired from the debtor may be denied by the court if the person received the property in good faith in the reasonably held belief that the transfer or payment was made validly and would not be set aside, and also if the court is of the view that it would be inequitable to order partial or full recovery.[136] Uganda's provisions on transactions at undervalue[137] are similar, word for word, with Rwanda's.

In Kenya transactions at undervalue may be avoided by the courts.[138] A company enters into a transaction with a person at undervalue if: (a) the company makes a gift to the person or otherwise enters into a transaction with the person on terms that provide for the company to receive no consideration; or (b) the company enters into a transaction with the person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.[139] The court may not make an order invalidating a transaction at an undervalue if it is satisfied that the company that entered into the transaction did so in good faith and for the purpose of carrying on its business, and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company.[140] The suspect period is two years, provided the debtor is unable to pay debts or becomes unable to pay debts as a result of the transaction. Where the parties are connected, the inability to pay debts within the two year suspect period is presumed.[141] In making an order invalidating a transaction at undervalue, the court shall ensure that the order does not detrimentally affect an interest in property that was acquired from a person other than the company, and was acquired in good faith and for value or detrimentally affect any interest that is derived from such an interest; and does not require a person who

[136] S. 220 of the Insolvency Act of Rwanda.
[137] S. 16 and s. 19 of the Insolvency Act of Uganda.
[138] S. 682(4) of the Insolvency Act, Kenya.
[139] S. 682(5) of the Insolvency Act, Kenya.
[140] S. 682(6) of the Insolvency Act, Kenya. Similar in wording to s. 238(5) of the Insolvency Act 1986, of the United Kingdom.
[141] S. 684 of the Insolvency Act, Kenya.

received a benefit from the transaction in good faith and for value to pay an amount to the relevant office holder, unless the person was party to the transaction. If a person has acquired an interest in property from a person other than the relevant company, or has received a benefit from the transaction and, at the time of the acquisition or receipt, the person had notice of the relevant surrounding circumstances and of the relevant proceedings; or was connected with or was an associate of, either the relevant company or the person with whom that company entered into the transaction the interest is presumed to have been acquired, or the benefit to have been received otherwise than in good faith. The relevant surrounding circumstances, in relation to the company, include the fact that the company entered into the transaction at an undervalue.[142]

Eswatini has no provision for the avoidance of transactions at undervalue, and is content to only deal with transactions at no value.[143] Zimbabwe, and Egypt, too. The Bankruptcy Act of Zambia deals with neither of the two, and only covers preferences.

In Comoros and Democratic Republic of Congo[144] all commutative contracts in which the debtor's obligation significantly exceeds that of the other party shall as of right be non-binding on the body of creditors if and when they are done during the period of suspicion, which runs from the date of suspension of payments to the date of decision to open proceedings.[145] There is no defence for action to avoid a transaction at undervalue. Observably, the debtor's obligation must significantly exceed that of the other party.

Under article 671 of the Commercial Code of Ethiopia, at the request of the supervisor in reorganization, the court shall invalidate the transfer of assets to other persons for a price that is manifestly undervalued if performed by the debtor during the suspect period.[146] There is no defence availed to the counterparty.

#### *7.7.3.3.Proposed Content Of Harmonized Avoidance Rules Dealing With Transactions At Undervalue*

[142] S. 685 of the Insolvency Act, Kenya.
[143] S. 26 of the Insolvency Acy, Eswatini.
[144] Article 68 of the OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts.
[145] Ibid, article 67.
[146] The suspect period may be extended but so as not to exceed 18 months: article 578 of the Commercial Code.

A critical look at the provisions from the view point of facilitating investments into the region through certainty and finality of transactions reveals that there will be need to have robust provisions on transactions at undervalue in COMESA that cater for these goals. Transactions at undervalue cannot be ignored as they deplete the debtor's estate, and for the same reason that gifts are targeted, these must also be avoided. Hence there must be a COMESA wide uniform rule targeting transactions at undervalue.

As for the components of the harmonized rule, the primary aim must be to target transactions entered into during the period of insolvency as a result of which the debtor became unable to pay his debts. The targeted transactions must be such as were significantly or manifestly lower in value than the value of the consideration the debtor gave. This quantification of value disparities is already manifested in almost all the avoidance rules relating to transactions at undervalue in those COMESA member states that have provisions dealing with transactions at undervalue. In this case, the position in Malawi, Mauritius and Seychelles, where no value threshold is placed, is faulted. It would not make sense to target each and every transaction however miniscule its value. What is significantly lower value would be up to the court to decide and this is the position in most jurisdictions.

The suspect period will be defined in terms of months or years or could be presumed when the transaction occurs very close to the adjudication of insolvency or commencement of winding up proceedings, say within six months . It appears, from the data, that the suspect period ranges from one year to two years. This thesis proposes a one year suspect period that coincides with the debtor's inability to pay debts or where, as a result of the transaction, the debtor became unable to pay debts. This reduced period will cater for contractual certainty and finality. For connected parties, the suspect period can be increased to two years. The range of connected parties must be well-defined, however. These could range from blood relations of directors or shareholders or of persons in control of the debtor or connected corporate or related enterprises up to first cousin level.

This thesis does not advocate for the approach in Malawi, Mauritius and Seychelles which only targets for avoidance related party transactions and leaves the rest untouched. Much as this is good for finality of transactions for unrelated parties, the paper perceives it to be a narrow approach that may defeat the insolvency aim of creditor estate maximization. Actually,

it makes no sense for the rules on gifts, where no consideration changes hands, to target both related and unrelated parties, and for transactions at undervalue, where some consideration was given, to target only related parties. Further, if the mischief relates only to giving consideration of no significant value, the same rule can be extended to cover unrelated parties. An unrelated party could also have transacted on insignificant value, and it makes no sense why its transaction should be spared avoidance and that where the counterparty is a related party gets flagged. The sole focus with regards to the dragnet should be on value and not on relations. The issue of relatedness can come into play in relation to other aspects like the adjustment of the suspect period.

Then there is the issue of defences. The position in Malawi, Mauritius and Seychelles where no defence is provided for is evidently very strict. But perhaps this is because the rules in these country only target related parties. The moment the rules bring in unrelated parties, the issue of defences comes to the fore as these need only be prejudiced on a finding of fault on their part. Hence it is proposed that the rules on transactions at undervalue must cover both related and unrelated parties and both categories of parties must be availed defences.

Notably, in in the United Kingdom and in Kenya, the insolvent debtor has defences to proffer, and these are subjective. The court may not make an order under invalidating a transaction at an undervalue if it is satisfied that the debtor that entered into the transaction did so in good faith and for the purpose of carrying on its business, and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the debtor company.[147] It is proposed that these defences should be included in a harmonized COMESA insolvency rule on transaction avoidance as they serve to encourage the conduct of genuine business transactions by a genuine debtor aimed at saving its business. Another proposal on the defences is to go further than this and also offer defences to the debtor's counterparties, like is the case in Rwanda and Uganda, where recovery from the person that acquired from the debtor may be denied by the court if the person received the property in good faith in the reasonably held belief that the transfer or payment was made validly and would not be set aside, and also if the court is of the view that it would be inequitable to order partial or full recovery. This serves

[147] S. 682(6) of the Insolvency Act, Kenya. Similar in wording to s. 238(5) of the Insolvency Act 1986, of the United Kingdom.

to reassure traders that barring bad faith the transaction will not be avoided and is a factor for certainty and predictability which encourages and facilitates trading activities in the common market thereby helping meet the development goals in the regional economic block. Those that take from persons other than the debtor's immediate counterparty also need to be availed defences if they acquired the property in good faith and for significant value.

## 7.8. Part G: A Summary Of The Proposed Avoidance Rules On Preferences, Gifts And Transactions At Undervalue

The chapter has made recommendations for the content of avoidance rules against preferences, gifts and transactions at undervalue. These are summarized below.

### *7.8.1. Preferences*

For preferences, it has been recommended that there be adopted an effects based definition of preferences. This will be supported by a list of transactions that will be included within the meaning of a preference or that will be deemed to have a preferential effect. There will be no need for the insolvency practitioner to give proof of the debtor's intention to prefer. There will be a presumption of a preference in relation to connected parties but these should be availed defences which would also be available to unrelated parties. A suspect of period of one year is suggested, with the period extending to two years for related parties. Thereafter the rules on preferences should specify defences available to the counterparty, and the range must be populated with both subjective ones, like good faith and lack of knowledge at the time of the transaction of the insolvency status of the debtor, as well as objective ones like the furnishing of consideration and that the transaction was in the ordinary course of business. It has further been suggested that the defences should be available to all including those that took directly from the debtor.

The proposals above cater for certainty and predictability in so far as they deal with having a common definition of preferences and of transactions having a preferential effect. The removal of the intention to prefer will remove estate vulnerability to an insolvency practitioner's failure to gather evidence of this element or debtor clumsiness in failing to absolve itself of this aspect, both of which introduce an element of uncertainty. Certainty and speed will be enhanced with the utilization of the device of the preferential effect coupled with the need to place on the

creditor the burden of proving his defences which will be both objective and subjective. At least transactions will only be avoided on creditor's blameworthiness and not debtor's clumsiness or insolvency practitioner's ineptitude. The differentiated suspect periods will give due regard to related party influence in preferences.

#### *7.8.2. Gifts*

With regards to gifts, the proposal is for all member states to have an avoidance rule that deals with gifts. This is because a few do not. There is a proposed suspect period of three years for related parties and two for unrelated parties. There is also a proposal for both subjective and objective defences like good faith, lack of knowledge of the insolvency status of the debtor, and the giving of value. Alteration of position as a result of the gift is not recommended as a defence. The defences should apply regardless of whether one took directly from the debtor.

The proposals above are mostly aimed at certainty and predictability, and the avoidance of only those transactions where the recipient was at fault or did not deal in good faith.

#### *7.8.3. Transactions At Undervalue*

As for transactions at undervalue, whilst it has been observed that all jurisdictions have this category of avoidance rules, it is proposed that the qualifying threshold of avoidable transactions at undervalue should remain at those that are significantly or manifestly at undervalue leaving it to the tribunal to make its own judgment if the threshold has been met. The rules must cover both related and unrelated parties. A suspect period of one year is proposed for unrelated parties and two for unrelated ones. The rules must also contain the same mix of subjective and objective defences as with gifts and must also cover parties that did not take from the debtor.

Here again, contractual certainty and predictability are emphasized, and the fact that transactions can only be avoided where the creditor is unable to prove the set defences which relate to fault means creditors pretty much have matters in their own hands when it comes to having transactions avoided or upheld.

### 7.9.Part H: Conclusion

The variety of approaches to the formulation of elements of avoidance rules within COMESA is intimidating. But that range not only reflects the rich diversity of legal cultural and traditional backgrounds of the member states of the regional economic block but also the different levels of economic development and pace of law reform in the member states, quite apart from the fact that the law reforms are led by different change agents. The variety also reflects the inevitable lack of a common vision or objective tethering for the avoidance rules, though they all are informed, presumably, by the common goals of insolvency laws. As the goals or visions of insolvency law are many, and not arranged in any particular order of importance, the variety in formulations of avoidance rules by the member states should not come as a surprise. This is also due to the fact that there is no internationally prescribed preferred combination of elements of each of the avoidance rules that is recommended for use by individual countries and each jurisdiction uses its discretion in putting together elements of each rule, hopefully conscious of a vision or visions they seek to pursue, but most probably oblivious to the pursuit of any particular or selected ones.

The chapter proposes that the starting point in the harmonization exercise will be to have a common understanding of the goals of the common market, which as it has been noted, deal with attracting investment through the fostering of contractual certainty and predictability in the common market which will ease or promote trade to attain sustainable development. These ideals should give direction to the common objective COMESA member states must pursue in the harmonization of their transaction avoidance rules in the regional economic block. The goals will inform the adoption of common avoidance rules that are aimed at fostering contractual certainty and predictability, which will make it difficult to avoid a transactions except where the creditor is at fault. The proposed avoidance rules will therefore avail the counterparty or creditor a wide range of defences so that only those transactions as are tainted with fault on his part should be avoided. This will cater for certainty and predictability. Keeping an eye on debtor estate maximization, some objective elements are also suggested to be included or maintained in the proposed harmonized avoidance rules regime for preferences, gifts and transactions at undervalue.

Further, it is proposed that there must be enacted a private international law rule to have the harmonized rules apply to transactions between companies with centers of main interest in

the COMESA regional economic block, and that local avoidance rules may apply only in local insolvency proceedings with no cross-border flavour. The instrument of choice for the harmonization proposal is the directive. Under such, all member states will be directed to enact legislation to give effect to the harmonized COMESA rules on preferences, gifts and transactions at under value. The directive will contain the suggested minimum content of each of the avoidance rules under study. The choice of the local legislative instrument to effect the harmonized cross-border transaction avoidance rules will lie with each member state. This way sovereign pride will be propitiated and this will serve as a catalyst for member states' adoption of the directive.

Beyond this, the chapter has proposed the substantive content of the rules and given rationales for each suggested rule. It is hoped that the enactment of a directive capturing the proposed content of the avoidance rules relating to preferences, gifts and transactions at undervalue will be a step forward in making COMESA realize its goal of attracting investors into the common market.

The chapter that follows will conclude the thesis by giving a summative assessment of whether, and if so, how the research exercise has managed to answer the research questions that the study set out to investigate. It will also propose an agenda for further research.

# CHAPTER 8
# CONCLUSION

## 8.1. Introduction

The aim of this chapter is to sum up the findings of the study, reflect on their importance, and propose the way forward in terms of suggesting areas for further research with respect to the harmonization of transaction avoidance rules in COMESA and in other regional economic blocks. To achieve these aims it will, firstly, recapture the questions that the study set out to investigate. It will then reflect on the importance of the questions before presenting a summary of the key findings of the research indicating their significance. There will then follow a discussion of the strengths and weaknesses or limitations of the study before the chapter concludes with a discussion of recommendations for future research drawing from lessons and insights that have been uncovered by this study.

## 8.2. A Reflection On The Importance Of Harmonizing Transaction Avoidance Rules In The COMESA Regional Economic Block

The study had tasked itself to discuss if the transaction avoidance rules in the COMESA regional economic block can be harmonized, and if so, how this harmonization can be proceeded with. Realizing that COMESA is a creature of a constitutive document in the form of a treaty, the study also felt it necessary to inquire whether the regional economic block's constitutive instrument is comparatively well structured to undertake harmonization of laws, and if not what improvements need to be made to the same. These two questions had to be tackled together on the understanding that it would be an exercise in futility to discuss and propose the harmonization of laws in a regional economic body that was not suitably primed for the exercise.

The study was motivated by the fact that there had not been any comprehensive study, hitherto, on the need to harmonize the transaction avoidance rules in the insolvency laws of member states of COMESA. Again, there was a dearth of literature on the institutional readiness of COMESA, compared to other regional economic bodies, to undertake legal harmonization. Nor were there many studies on harmonization of transaction avoidance rules in regional economic blocks outside of the EU.

Being a facility within insolvency law, transaction avoidance rules could only have been provided for within the fabric of such laws if they supported the goals of an effective and efficient insolvency law regime in a national setting. The study has observed that avoidance provisions primarily serve to bulk up the debtor's estate for distribution to creditors.[1] They also act as a disincentive to individual debt collection efforts which dismember the debtor's estate at the expense of the whole body of creditors. Individual debt collection efforts run contrary to the collective nature of insolvency proceedings. Most importantly, they render difficult the implementation of a *pari passu* distribution of the debtor's estate among equally situated creditors, an arrangement that lies at the root of insolvency law.[2] By acting as a disincentive to the dismemberment of the debtor's estate by individual creditors, and by bulking up the debtor's estate, avoidance rules are also well aligned to rescue and reorganization efforts, which are among some of the aims of insolvency law.

Avoidance rules are not uniformly cast in all mature insolvency law regimes, and less so in emerging ones. This is primarily because the identified visions or goals of insolvency law are several in number and do sometimes conflict. Secondly, these goals are not arranged in any discernible order of importance.[3] Thirdly and consequently, transaction avoidance provisions are designed in different ways in various countries to serve the different national insolvency law policy goals that are not uniformly arranged across all countries in order of importance. Hence their elements across jurisdictions are not similar. The variety in content of avoidance rules among jurisdictions not only reflects national policy choices but is also informed by a country's legal cultural or traditional history, the pace of legal modernization[4] as well as by the change agents responsible for a country's legal modernization.[5] What this entails is that unless the member states of a regional economic body are homogenous in more than one way, say in terms of language, legal culture and history, the pace of legal modernization as well as the identity of the change agent responsible for the legal modernization of its insolvency laws, there is likely to be a plethora of insolvency law visions served by different member states in the regional

[1] Chapters One and Two, *supra.*
[2] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8552.
[3] Finch V, 'The Measures of Insolvency Law' (1997) Vol. 17, No. 2 (Summer, 1997) Oxford Journal of Legal Studies 227.
[4] Botezatu V, 'Comparative Law and Legal Transition' (2016) Vol.6 No. 2 Journal of Danubian Studies and Research 189.
[5] See Chapter Three, *supra*.

economic block, and, consequently, a multiplicity of formulations of the contents of their avoidance rules. And yet, at the same time, the member countries of the regional economic body will be bound by a singular or unified economic vision(s) for their common market. The variety in formulations of elements of avoidance rules will make the attainment of the singular economic vision for all the member states of a regional economic community difficult to attain.

Quite apart from creating a chaotic picture of which insolvency goals are being pursued by the collective set of transaction avoidance rules in a particular regional economic body and whether these are aligned to the economic vision of the regional economic community, the diversity in avoidance rules will impact on the certainty and predictability of legal outcomes in cross-border transaction avoidance litigation in the regional economic body. Hence, there are going to arise choice of jurisdiction[6] and choice of law[7] issues with respect to cross-border transaction avoidance proceedings.[8] There may also be issues relating to which country is entitled to the proceeds of avoidance proceedings.[9] Such issues do create the need for a set of harmonized rules within the regional economic block so that multinational insolvencies are dealt with in a manner that is predictable and economical and ensures fairness to creditors and to the debtor's counterparties.[10]

### 8.3. The Case For Harmonizing Transaction Avoidance Rules In COMESA

The study took note of the fact that legal harmonization of avoidance rules in a regional economic block would yield several benefits including: reducing conflicts and diverges, and bringing uniformity and consistency, which, in turn, would enhance the development of the internal market; facilitating credit because it increases the predictability of the outcomes of legal disputes; fostering equality among creditors; overcoming peculiarities of individual national systems that allow avoidance claims in limited circumstances, and finally, increasing procedural efficiencies in terms of time and costs. The insolvency practitioner would need to know only

[6] For example, which Member State has the right to open and conduct the transaction avoidance proceedings?
[7] For example, which country's laws will be used to determine whether the transaction is vulnerable and can be avoided? Is it home country law of the multinational or local law in the country where the avoidance proceedings have been commenced?
[8] Parry R, et al, *Transaction Avoidance in Insolvencies* ( 3rd edn, Oxford University Press 2018) 500.
[9] ibid.
[10] ibid.

one set of rules to challenge any transaction regardless of the law applicable to the transaction, and this may end up preventing forum shopping[11]

Hence, to the research question as to whether there is a compelling case for the harmonization of transaction avoidance rules in the corporate insolvency laws of COMESA member states, the study has advanced three arguments supporting an affirmative answer: firstly, the advantages that will flow from harmonized avoidance rules as indicated above; secondly and on the other side of the coin, the negativities or disadvantages to the attainment of the economic goals of the regional economic body that the continued existence of unharmonized avoidance rules amongst its member states do entail, and these include the rules not being in sync with the vision of the regional economic body; and thirdly, and most importantly the fact that the COMESA Treaty itself compels its member states to harmonize their laws for the better functioning of the common market, coupled with the fact that harmonization of avoidance rules will help in the attainment of this goal.

The COMESA Treaty provides in article 159(c) that in order to encourage and facilitate private investment flows into the common market, member states shall create and maintain a predictable and secure investment climate in the member states. Enhancing the predictability, certainty and finality of contractual transactions for creditors and counterparties will aid the promotion of a predictable and secure investment climate conducive to the attraction of private investment inflows into the common market, and the harmonization of avoidance rules will be one of the ways to achieve that predictability and certainty that will facilitate investment inflows.

In sum therefore, the study has found that there is a compelling case for the harmonization of avoidance rules among member states of the COMESA regional economic block.

### 8.4. The Harmonization Proposal

#### *8.4.1. The Institutional Readiness of COMESA to Undertake Legal Harmonization*

[11] Keay A, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79.

Having established a case for harmonization of avoidance rules in COMESA, the first issue that the study dealt with was whether COMESA was well primed to undertake the process. There ensued a multi-regional economic block comparative study using functional elements conducive to harmonization of laws. The comparison involved SADC, the EAC, COMESA, OHADA and the EU. It was observed and concluded that COMESA was relatively well-suited for the process of legal harmonization in the sense that, firstly, the treaty gave it the express mandate to undertake the process. Secondly, the treaty identifies specific institutions mandated with the task. The task is left to the Council with the assistance of the Technical Committee on Legal Affairs. Thirdly, COMESA also has a supranational court to resolve disputes involving not only treaty interpretation but also the interpretation of community laws, of which the harmonized avoidance rules would form a part. The presence of community courts enhances legal harmonization through greater potential for uniformity of legal interpretation of the harmonized rules. The fact that access to the court is also granted to individuals was deemed to be an additional positive factor as that would enhance robust engagement with the court for legal interpretation which would deliver a higher number of decisions interpreting the harmonized community rules than would be the situation where individuals did not have access to the regional economic community's court, thus entrenching the legal harmonization process.

The absence of a parliament in COMESA was not thought to be a debilitating situation to COMESA's institutional capacity to conduct legal harmonization as OHADA does not have a parliament but it is able to enact an enviable number of uniform laws. Further, the facility of regulations and directives would play the same role as that of community legislative acts from a parliamentary body. Besides, not all regional economic body parliaments are democratically elected, and the fact that some community laws, for example directives, would need national legislative instruments to bring them to life would make a community parliament's importance in the democratic equation redundant.

The study observed, however, that there is room to improve some aspects of the COMESA set up to better equip it for the harmonization of laws. These aspects include: the creation of a body within the Technical Committee of Legal Affairs that would be solely responsible for the harmonization of laws, as is the case in the East African Community; and, the creation of an *ad hoc* committee to deal with disciplinary issues involving judicial officers

of the COMESA Court of Justice, in order to enhance the independence of the court. There will also be need to amend the treaty to provide for direct applicability and direct effect of the community laws in COMESA member states.

### *8.4.2. Private International Law Issues Around the Legal Harmonization Initiative*

Beyond these institutional issues, the study took a look at private international law aspects of the harmonization endeavour. The study noted that COMESA member states belong to other regional economic groupings and that some of those regional economic groupings, like OHADA, provide for the exclusive applicability of their community laws in intra-regional economic community commercial transactions. Further, there is the concern that some member states may, out of sovereign pride, be unwilling to replace their domestic insolvency laws and transaction avoidance rules with community based harmonized avoidance rules. To avert these problems, the study has proposed that the harmonized avoidance rules should only be made to apply to cross-border avoidance proceedings relating to businesses that have a center of main interest located exclusively within COMESA member states and must not be made to apply to wholly domestic avoidance proceedings[12] or avoidance proceedings affecting non-COMESA domiciliaries.[13] Where the parties to avoidance proceedings have centers of main interest located in countries that are member states of another regional economic block apart from COMESA in a case where the other regional economic blocks also have harmonized avoidance rules, party autonomy must have a role to play in the choice of which regional economic block's harmonized avoidance rules should apply.

### *8.4.3. The Instrument Of Choice In The Harmonization Process For Avoidance Rules*

The study has gone further to propose that the legal instrument of choice in the harmonization process is the directive and not the regulation, as regulations usually serve a uniformization process and, through their need for a common wording, may prove difficult to

[12] Casasola O, makes a similar proposal for harmonized avoidance rules in the EU: See Casasola, O, ' The Harmonization of Transaction Avoidance in the European Union: A Compromise Solution' (2020) Volume 295) Norton Journal of Bankruptcy Law and Practice, Article 3.
[13] Chapter Seven, *supra.*

formulate and get enacted.[14] They may take a lot of time and involve huge costs, and the level of effort may be worse in a regional community block with differences in national languages and legal traditions and cultures that COMESA is. The directive, being a Council instrument, may take less time and effort. The directive will propose a mandatory minimum content of the avoidance rules in question leaving it to member states to choose the domestic legal instrument to enact it as well as its wording hence allowing member states some flexibility.

### *8.4.4. The Identification Of The Treaty Goal To Be Pursued In Fashioning The Substantive Content Of The Harmonized Avoidance Rules In COMESA*

Flowing from the above, the study has concluded, following Keay[15] and Bork and Veder[16] that any harmonization effort relating to avoidance rules must be guided by some identified principles or objectives. As the insolvency statutes of member states of COMESA do not have any express statement of indicative principles or objectives being pursued by their national insolvency laws or by the transaction avoidance rules within them, the study has proposed looking to the treaty itself to find the legitimation objective for the proposed harmonized avoidance rules. Emanating from the expressed desire by member states, contained in the preamble and in article 159(1)(c) of the COMESA Treaty to attract investment inflows through the creation of a predictable, secure and transparent investment climate in member states, the study has proposed[17] that the harmonized avoidance rules for COMESA member states must be geared towards enhancing the attraction and sustenance of investment inflows into the common market, and that one way of doing this is through enhancing certainty and predictability in the common market through avoidance rules that promote contractual certainty and predictability for creditors and counterparties. Investors will be attracted to invest in a regional economic block where transactions are not easily set aside or if they are to be set aside, that should only happen where the creditor or counterparty displayed some deficient conduct,

[14] See Chapter Five, *supra.*

[15] Keay A, 'Harmonization of Avoidance Rules in European Union Insolvencies: The Critical Elements in Formulating a Scheme' (2018) 69(2) NILQ 85.

[16] Bork R and Veder M, *Harmonization of Transaction Avoidance Rules* ( Intersentia 2022) 16.

[17] Chapter Seven, *supra.*

for example, bad faith, failure to give adequate consideration, knowledge of the insolvency status of the debtor or where the transaction did not occur in the ordinary course of business.

### *8.4.5. The Proposed Substantive Content Of Rules Relating To Preferences, Gifts And Transactions At Undervalue In COMESA*

The study has then gone on to propose that the best way of promoting contractual finality, certainty and predictability in the avoidance rules relating to preferences, gifts and transactions at undervalue in the insolvency laws of member states in such a way as to boost investment inflows is to create rules where the creditor's or counterparty's (mis) conduct takes center stage so that it is, by and large, the architect of its own destiny and has no one but itself to blame if the transaction gets avoided.[18] The transaction should only be avoided where the creditor or counterparty did something that compromised the transaction's integrity, for example through the fact that it knew of the insolvency status of the debtor when entering into the transaction, or did not enter into it in good faith , or the transaction was not made in the ordinary course of business or no or inadequate consideration exchanged hands.

For preferences it has been proposed that the transactions need to be avoided for having a preferential effect only with no need to prove the debtor's intention to prefer as this has no materiality or relevance to the preferential effect and as proof of an intention to prefer is outside the control of the affected creditor or counterparty. The absence of the requirement to prefer would enhance certainty and predictability due to the difficulty of establishing the debtor's subjective intent to prefer. Once the transaction has been shown to have preferential effect, it will then behoove the creditor or the counter-party to prove the available defences like good faith, payment of consideration or lack of knowledge of the insolvency status of the debtor. That the transaction occurred in the ordinary course of business should also afford a defence. The proposed suspect period should be a uniformly shortened one of one year but extended to two in the case of related parties.

For gifts, to cater for transactional certainty, the counterparty must be allowed to establish the defences that are allowed under preferences.

[18] Ibid.

For fairness, transactions at undervalue must not only be avoided when they involve related parties. Even transactions with unrelated parties should be targeted, but the counterparty should be allowed to establish the same range of defences, as with preferences.

The result will be a counterparty or creditor focused avoidance regime and where a transaction only stands to be avoided when the counterparty has failed to establish the relevant defences. This will mean that where a counterparty or creditor has given all due diligence before entering into a transaction and has acted in good faith, it can rest assured that the transaction will not be avoided, hence enhancing certainty, finality and predictability of outcomes.

The study has not proposed a text with agreed wording for the harmonized avoidance rules. This is because this was not within the scope of the study. However, this will form the subject of future research. This two- stage approach will also enable the author or whoever undertakes to progress this study further to benefit from feedback from the current research.

## 8.5. The Study's Contribution To Knowledge

As indicated above, the study bestraddles three fields of law, to wit, insolvency law, community law and private international law.

### *8.5.1. Contribution Towards Community Law And Insolvency Law*

For insolvency law as it relates to and interacts with community law, the study has given emphasis on identifying the muse within the treaty founding a regional economic body that will inform and inspire the formulation of elements of harmonized transaction avoidance rules in the regional economic body. Such harmonized transaction avoidance rules must, quite apart from paying tribute to the overarching goals or visions of insolvency law, be fashioned in such a manner that they assist in the attainment of treaty identified objectives. In the case of COMESA, any harmonization of transaction avoidance rules will have to occur around the central idea of enhancing certainty and predictability in the market place with the aim of attracting investment inflows. The quest for the best transaction avoidance rules for COMESA in this comparative law research study has therefore been inspired by this expressed treaty aspiration. Using this approach, it is possible to attain both

insolvency law goals and community law treaty objectives in the proposed harmonized avoidance rules.[19]

### *8.5.2. Contribution Towards Private International Law*

Private international law is said to be less about knowing the content of a particular substantive law but more about the attainment of certainty and predictability as to which of several laws applicable in a few countries will apply in what circumstances.

What of the conflict of laws between the proposed harmonized avoidance rules of COMESA, the domestic laws of each member state of COMESA and the community laws of any other regional economic bodies to which a COMESA member state may also belong? The study's contribution has focused on the need to strike a careful balance in the relationship or interaction between the domestic transaction avoidance rules in each COMESA member state with the harmonized COMESA transaction avoidance rules on the one hand, and between the harmonized avoidance rules at COMESA level with the avoidance rules of any other regional economic body or group to which each member state may belong, on the other hand. The study has proposed[20] that the harmonized COMESA transaction avoidance rules should be made to be effective among the members of COMESA only in cross-border cases where each of the debtor, the creditor or the counterparty has a center of main interest in a COMESA territory. The COMESA harmonized transaction avoidance rules should not apply to purely domestic avoidance proceedings or to avoidance proceedings where one of the actors has a center of main interest in a country that is not a member state of COMESA. That said, in terms of cross-border dealings among corporate actors that have centers of main interest in COMESA member states the harmonized rules will not play second fiddle to the domestic laws of each member state or to the community laws of any other regional economic community to which any member state of COMESA belongs.

### *8.5.3. Contribution To Community Law*

[19] Chapter Seven, *supra*.
[20] Ibid.

With regard to community law, the study's importance and contribution to learning lies in the fact that it is the first one to undertake a comprehensive review, from a comparative angle, of COMESA's readiness to undertake legal harmonization, and it has succeeded in identifying some weak areas in COMESA's institutional edifice that will have to be patched up or overhauled so as to make the regional economic body better able to conduct legal harmonization initiatives that its treaty mandates member states to tackle so as to better kit the regional economic body for the attraction of investment inflows.[21]

### 8.6. Limitations Of The Study

The study has faced a few limitations. The first was a linguistic one. COMESA has quite a number of official languages and the author of this study is only competent in English. Hence, he has not been able to access and analyze the avoidance rules of COMESA member states that are expressed in a language other than English, except the few whose English translations were available on the internet. However, that said, the study has discussed the avoidance rules of more than half the member states of COMESA and from both the civil law and common law traditions which are the dominant legal traditions in the regional body. In any event, even if all the laws of all the member states had been accessed and understood, the study could only have focused on a select few representing each legal cultural grouping as dealing with all of them would have been an impossible task that would not have fitted into the length limitations of the study. The second limitation was the lack of authoritative comparative material on community transaction avoidance rules. With the exception of OHADA which is a largely homogenous community in terms of legal cultural and linguistic background and could not, for those reasons, therefore, serve as a model for a COMESA legal harmonization initiative, there are no other regional economic groupings that have enacted harmonized avoidance rules that would have served as exemplars on the approach to be taken by COMESA, seeing as the EU is still working towards the possible harmonization of its avoidance rules. However, the academic literature on how to go about harmonizing avoidance rules in the EU served a useful guiding purpose. Thirdly, there were issues with internet access and cost, the study being conducted at-distance. The above said,

[21] Chapter Six, *supra.*

however, the ample literature that was accessed has provided enough insights to make possible the present rendition.

The study could not cover the full range of transaction avoidance rules because of, among others, space limitations, and due to the difficulty of gathering and understanding all the property laws of member states which would have informed an understanding of the topic of fraudulent conveyances.

### 8.7. Recommendations For Future Research

The current study has focused on preferences, gifts and transactions at undervalue in COMESA and has made proposals for their harmonization both in terms of priming the institution, identification of the instrument to be used, the handling of related conflict of laws issues, identification of the treaty objective to be attained in the harmonization process and the substantive content of the avoidance rules under study. There is scope for further research in this area to cover fraudulent conveyances, although, observably and understandably, the plethora in variety of property laws among COMESA member states will pose a challenge to the researcher. Such research will nevertheless have to be dared as avoidance rules cannot be harmonized partially. The full gamut must be covered.

There is also scope for further research relating to the harmonization of avoidance rules in the other regional economic groupings on the African continent. Beyond the other regional economic bodies on the African continent research there could also be research on inter-regional economic community harmonization of avoidance rules and leading to, eventually, the harmonization of avoidance rules in the African Continental Free Trade Area as the separate regional economic groupings on the African continent are the foundational pillars and building blocks of the African Continental Free Trade Area[22] which was formed to create a single market of goods and services on the African continent.[23] As a single market, the African Continent Free Trade Area will need harmonized transaction avoidance rules for the same reason that a single market place will perform better with a single set of harmonized rules.

[22] See article 5(b) of the Agreement Establishing the African Continental Free Trade Area available at https://www.au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf accessed on 11 February, 2024.
[23] Article 3(a) of the Agreement Establishing the African Continental Free Trade Area.

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