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ORIGINAL PAPER

Fragmentation Versus Convergence of Consumer Law Within One Legal System and Across Legal Systems: An African Perspective

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Abstract
The theme of fragmentation versus convergence of consumer law has relevance for Africa, inter alia because the African Continental Free Trade Area is foreseen to become a single continental market. Fragmentation of consumer law within one legal system and across legal systems is inevitable. Several types of hyper-vulnerable consumers require special protection. Drafters and interpreters of consumer legislation should remember that the majority of African consumers are hyper-vulnerable. Consumer legislation attuned to this reality needs special reference to the needs of such consumers. More resources should be allocated to the protection of hyper-vulnerable consumers, including through proactive enforcement. The informal economy may require some special rules, but the rules on quality of products should mostly remain the same. More resources should be targeted at enforcing safety standards and rooting out counterfeit goods and creative ways found to bring consumers in the informal economy under the protection of consumer law. Fragmentation of sources of consumer law in Africa and at the level of enforcement agencies is also considered. Even if rules are harmonized across legal systems, fragmentation is inevitable, inter alia due to different interpretations by local agencies. An attempt at some convergence has benefits, but cogent arguments against harmonization exist. Some realities in the Global South militate against harmonization. There is greater potential for some level of harmonization where there is a real cross-border interest, such as in e-commerce, travel, and tourism. When convergence is considered, the reasons behind current divergence should be researched to establish the potential for convergence.

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Introduction

This paper will firstly address fragmentation versus convergence within one legal system and secondly, fragmentation versus convergence (or harmonization) across legal systems. It will attempt to bring an African perspective to bear on these issues, with particular focus on South Africa.

The topic of fragmentation versus convergence has relevance for Africa. An agreement establishing the African Continental Free Trade Area was concluded in 2018, and 54 of the 55 African Union countries have signed it (Tralac 2019). Consumer law and policy is not mentioned in this agreement and is not on the agenda of negotiators at this stage (it is foreseen that competition law will be tackled shortly). Because the agreement foresees a single continental market for goods and services, with free movement of business persons and investments, it is possible that some convergence of consumer law may be considered in the future, as happened in the European Union (EU). This article has a bearing on the extent to which the African Continental Free Trade Area (or smaller regional groupings in Africa) could aim for convergence of consumer law. However, it also considers the extent to which convergence could be aimed at more generally (globally or regionally), and thus the extent to which fragmentation may be inevitable.

As far as past experience with convergence in Africa is concerned, SADC (the Southern African Development Community) adopted a Declaration on Regional Co-operation in Competition and Consumer Policies in 2009, and one goal set out therein is the encouragement of convergence of laws. However, no model rules have been published. The South African Consumer Protection Act 68 of 2008 has influenced the consumer legislation of a few other countries in SADC and beyond, but no country has copied it out completely (Naude 2018). A Model Law for Consumer Protection in Africa was drafted in 1996 under the auspices of Consumers International, which was inter alia influenced by the Zimbabwean Consumer Contracts Act 6 of 1994. However, this model law has not been very influential – for example, it was not copied out at all in the South African Consumer Protection Act. OHADA (the Organization for the Harmonization of Business Law in Africa, mostly consisting of Francophone African states) may have considered embarking on a project to draft a Uniform Act on Consumer Law (Temple 2003), but no draft text is available online and this project may have been jettisoned.

The first part of the article, on fragmentation versus convergence within one legal system, will show that some fragmentation within national contexts is inevitable and that this may have implications for international initiatives. The second part will consider other policy considerations militating against convergence across legal systems, but also point out benefits of some level of convergence, after which conclusions will be drawn. The theme of fragmentation versus convergence will also be applied to fragmentation of sources of consumer law and with respect to enforcement bodies within one legal system, as such fragmentation is particularly pronounced in some African countries.

Fragmentation Versus Convergence Within One Legal System

Fragmentation versus convergence in this context will aim to address the hypothesis that having a one size fits all approach to consumer law within one country may be unacceptable as it may increase the wealth gap between the relatively wealthy consumers who can access consumer law and those with low incomes who do not have the knowledge and resources to access consumer law, and also increase the gap between the formal economy in which the wealthy participate and the informal economy where many participants on both the supplier and consumer sides have a low income. The hypothesis would then be that there may have to be different rules for the formal economy and the informal economy, and different rules for hyper-vulnerable consumers such as consumers with a low income and low levels of literacy. It will be argued that in some instances, special rules that only apply to hyper-vulnerable consumers are required. Given that in African countries, the vast majority of consumers are hyper-vulnerable due to various factors such as a very low income, it will be argued that such consumers' hyper-vulnerability and special needs should always be kept in mind when drafting the generally applicable rules. The difficulty of defining say the exact level of income below which consumers become hyper-vulnerable and the fact that the vast majority of African consumers have a very low income anyway means that it is often not necessary to create rules that only apply to certain consumers, rather arbitrarily delineated, and not to more privileged consumers as well. Instead, the prevalence of hyper-vulnerability should rather inform legislative drafting generally. Such hyper-vulnerability should also be kept in mind when interpreting, applying, and enforcing the generally applicable rules, and the legislation should specifically require interpretation that is sensitive to the purpose of protecting listed categories of hyper-vulnerable consumers.

Should There Be Separate Rules for Hyper-vulnerable Consumers?

Although behavioural economics lead to the insight that all consumers are vulnerable as they are all subject to the biases identified by scholars in this field, some consumers are hyper-vulnerable due to "social, demographic, behavioural, personal, and market environment factors," such as age, illiteracy, and economic status, which increase the imbalance between suppliers and consumers (UNCTAD 2017, p. 8). In some instances, it is necessary to make special rules for the protection of hyper-vulnerable consumers (United Nations Guidelines for Consumer Protection 2015, p. 7). Examples of situations where rules that apply only to categories of hyper-vulnerable consumers are needed will be given next.

Categories of Hyper-vulnerable Consumers Requiring Special Rules

An example is the protection of minor children. Rules aimed at children do not create difficulties of delineating who are vulnerable in this category, as the age of majority is set with certainty. For example, it is appropriate to make rules that specifically protect minors against dangers created by the use of mobile phones, such as adult sites and rash, unaffordable purchases, or incurring of charges (OECD 2008, p. 10). The ICC's Code on Advertising and Marketing Communication Practice has further rules regulating advertising to children (Article 18 ICC Code), as do various jurisdictions (e.g., Durovic and Micklitz 2017, p. 38–39).

It is also important that public utilities such as water, electricity, and sewage disposal be available to hyper-vulnerable consumers who may not be able to pay for these (e.g., recognized by the United Nations in respect of water and sanitation in The Dublin Statement and Report of the Conference on Water and the Environment (1992)). Some countries and regions have laudable provisions on the protection of low-income consumers and consumers who would be endangered if their electricity were cut off due to health issues, disability, or age and the like (Durovic and Micklitz, p. 56–57, e.g., with reference to legislation in the EU and New Zealand). For example, Nigeria has privatized electricity supply and has rules prohibiting disconnection where the electricity company "is aware that a life support machine is in use" or where "the customer has applied for assistance from the Power Consumer Assistance Fund or some other customer welfare mechanism recognised by the [Nigerian Electricity Regulatory] Commission" (Connection and Disconnection Procedures for Electricity Services 2007, reg 10 and reg 12). A trend in some African countries which have not privatized electricity supply is the recognition of rights of access to some public utilities (services of general economic interest) against the state in legislation or policy, but incomplete realization thereof in practice. In South Africa, where the state in the form of local authorities provide basic services such as water, electricity, and sewage disposal (which are therefore not privatized), low-income consumers may apply for rebates on local authority property rates and the aforementioned services (e.g., City of Cape Town 2018a, 2018b). The Constitution of the Republic of South Africa 1996 also creates a fundamental right to "sufficient food and water" and provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights" (s 27; see also s 3 of the Water Services Act 108 of 1997).[1] Despite these laudable principles, 14 of the poorest municipalities in South Africa have not even managed to give over 50% of their population access to basic sanitation (Socio-Economic Rights Institute of South Africa 2016). Similarly, despite the efforts of the Cape Town City Council to assist low-income consumers of basic services, residents of shacks in the informal settlements around Cape Town access water from communal taps and use portable, shared toilets outside of their dwellings. Moreover, in a number of African countries, there is an even lower access to electricity and piped water to dwellings (e.g., an average of 42.8% of people in Sub-Saharan African countries had access to electricity in 2016, including, e.g., only 11% in Malawi, as contrasted with South Africa at 82.4% (World Bank 2018)). Privatization in Africa has not been successful everywhere in guaranteeing affordable electricity supply. For example, Nigeria has frequent power outages and consumer rights against electricity companies are not enforced effectively (Amadi 2017, p. 31). It may be argued that where provision of public utilities is not privatized or supplied by state-owned companies, consumer law is not at stake, but rather fundamental rights against the state. In South Africa, the state is bound as a supplier under the Consumer Protection Act, but only where it provides goods or services (including electricity, water, and sanitation) "for consideration" (counter-performance). In any event, the reality in some of the least developed African countries probably require that a right to access other services of general interest apart from water, such as electricity and telecommunications, should merely oblige the government to progressively realize access to these services.

[1] Other socioeconomic rights protected by the Constitution include the right to adequate housing, healthcare, social security and education, and children's rights for example to basic nutrition and shelter (ss 26, 27, 28, and 29). Electricity is not mentioned.

Despite the difficulties of delineating the threshold for hyper-vulnerability due to a low income, hyper-vulnerability due to a low income may have to be taken into account in drafting consumer credit legislation. A recent amendment to the National Credit Act 34 of 2005 provides for a debt intervention procedure for consumers who earn below R7,500 per month.[2] (National Credit Amendment Act 7 of 2019). The Act provides that the National Consumer Tribunal may inter alia suspend all credit agreements of consumers referred to it for an initial period of 12 months and eventually declare the whole or part of the debt extinguished. As can be expected, this legislation is controversial for fear that credit providers would be less likely to extend credit to such hyper-vulnerable consumers, thereby driving them to obtain credit from "loan sharks" in the informal sector who do not comply with credit legislation.

In addition, there may be a need for specific reference to factors creating hyper-vulnerability in a provision on unfair advantage taking in consumer legislation. So, for example, the South African CPA has a provision on unfair advantage taking, namely of consumers who suffer from "physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor" (s 40, which only applies where a supplier "knowingly" takes advantage of such a situation and the consumer must have been "substantially unable to protect" their interests as a result of such factors).

Hyper-vulnerability Should Be Taken into Account in Drafting Generally Applicable Rules

Apart from instances where special rules for hyper-vulnerable consumers are needed, drafters of consumer legislation for African countries and interpreters of the legislation should keep in mind that the majority of African consumers are hyper-vulnerable due to factors such as a low income and low literacy. UNESCO estimates that 38% of African adults are illiterate (UNESCO 2018). Even in South Africa, with one of the highest GDPs in Africa, there is a high unemployment rate and low levels of income. Thus, for example, 40.7% of black African South African residents, 29.1% of coloured residents, 14.9% of Indians/Asians, and 8.5% of whites were unemployed in 2017 (Statistics South Africa 2017).[3] Sixty percent of black African South African workers had an income of below the working poor line of R4,125 per month in 2016,[4] and the same is true for 56% of coloured workers, 37% of Asian/Indian workers, and 22% of white workers (Gilaad 2016)).

Therefore, hyper-vulnerability in the particular context should be taken into account when drafting the generally applicable rules and in the interpretation, application, and enforcement of the generally applicable rules. Given the difficulties of delineating bright-line criteria for when consumers are hyper-vulnerable and that most African consumers have a very low income and many have low levels of literacy or are not fluent in the dominant language in which agreements may be couched anyway, it is a good solution for Africa to gear the generally applicable rules to address the issues faced by hyper-vulnerable consumers. Consumer legislation should be drafted to make adequate provision for types of transactions that may be concluded by hyper-vulnerable consumers, e.g., with a low income, that are not typically concluded by more affluent consumers, without only making the relevant rules applicable to hyper-vulnerable consumers. Lay-buy transactions fall into this category (where the supplier agrees to sell particular goods to a consumer, to accept payment for those goods in

[2] €468 at 7 December 2018.

[3] These racial categories, dating from the apartheid era, are still used in the democratic South Africa to establish socioeconomic realities.

[4] €254 at 18 December 2018.

periodic instalments, and to hold those goods until the consumer has paid the full price for the goods). Most middle-class consumers will not conclude such transactions, but many low-income consumers in South Africa do and so the South African Consumer Protection Act (CPA) rightfully protects against known abuses by suppliers concluding these agreements (s 62). It is not necessary nor appropriate to make this protection available only to those with an income below a certain level, as there is no need to exclude those middle-class consumers wishing to transact in this way from this protection.

Similarly, drafters of consumer legislation should take into account particular cultural norms of a sub-set of the population that may create additional vulnerability, even though the resulting rules could be generally applicable and not limited to a particular sub-set of consumers. A South African example is the great importance of burials in the culture of many black African South Africans that make them susceptible to abuses by funeral parlours, exacerbated by other vulnerabilities such as a low income, low literacy, and inability to understand the language of the agreement. This may require special rules on the conduct of funeral parlours, perhaps in a binding industry code of conduct and/or insurance legislation where regular payments by consumers to funeral parlours in anticipation of future funeral services may amount to insurance agreements. However, these rules should apply in favour of all consumers, as to limit them to a particular race or class of consumers who are particularly vulnerable would be unthinkable, especially given South Africa's odious apartheid history based on racial discrimination and the resultant importance of the fundamental right to equality in the Bill of Rights (Constitution of the Republic of South Africa 1996, s 9). It is also recognized in other parts of the world that consumers contracting with suppliers of funeral services are vulnerable. For example, in the United States of America (USA), customers and potential customers of such services must be supplied with a full price list (Durovic and Micklitz 2017, p. 50 with reference to Federal Trade Commission Funeral Rules). Thus, consumer law must be sensitive to the need for sector-specific legislation to address particular vulnerabilities in a particular sector. Another example would be protection against distance-selling or doorstep-selling suppliers (e.g., in Art 9 of the EU Consumer Rights Directive).

A South African court has recently set aside a regulation in consumer credit regulations for not showing sensitivity to the realities of many self-employed or informally employed consumers with a low income that do not have bank accounts (*Truworths Ltd and Others v Minister of Trade and Industry and Another* (2018); the court mentioned that possibly about 20% of the South African population does not have a bank account). The court set aside a consumer credit regulation requiring the submission of three months' bank statements or the latest financial statements by a self-employed or informally employed potential credit consumer for the purpose of an affordability assessment, as this requirement constituted unfair discrimination against "a section of the population that represents the less privileged, and probably also many previously disadvantaged persons" in contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. Again, this reality does not necessarily require special rules applicable only to consumers without bank accounts or financial statements, but the generally applicable rules must be sensitive to the realities of low-income and self-employed and informally employed consumers.

An example of an African reality that should influence consumer policy and law is multilingualism and the resultant inability of some consumers to understand a dominant language in which consumer agreements are normally couched (such as English). South Africa has 11 official languages, for example, with many consumers not fluent in English, and Tanzania has 125 vernacular languages (although most Tanzanians are able to understand

Kiswahili). The South African National Credit Act 34 of 2005 (NCA) has a provision on the languages in which a consumer contract must be made available (s 63), namely that a consumer has a right to receive documents (such as a credit agreement) "in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicability, expense, regional circumstances and needs, and preferences of the population ordinarily served by the person required to deliver that document." The NCA also requires that documents such as contracts be in plain and understandable language (s 64). In *Standard Bank v Dlamini*,[5] the court held that Mr. Dlamini had validly cancelled the contract of sale on instalments that he entered into with the bank when he returned the defective vehicle to the dealer, despite the contract prescribing a different route for termination of the contract. The fact that he was functionally illiterate and did not understand English played a role in the decision. The court held that

> "strictly interpreted neither s 63 nor s 64 assists an illiterate consumer. Purposively interpreted they embody the right of the consumer to be informed by reasonable means of the material terms of the document he signs. What is reasonable and material depending [sic] on the circumstances of each case."

The court held that "purposively interpreted, the credit provider bears the onus that it took reasonable measures to inform the consumer of the material terms." As this contract was concluded in a province where isiZulu is the predominant African language, "the bank should have had better measures in place to ensure that its historically disadvantaged customers are aware of their rights and responsibilities." The court concluded that the bank should have let the salesman at the dealer interpret the material terms of the agreement when it sold the vehicle or at the latest when the consumer returned the vehicle to the dealer.

The South African CPA, promulgated after the NCA, does not have a provision on the languages in which a consumer agreement must be available (although initially such a provision was included in a draft Bill). The plain language requirement in the CPA requires that due regard be given to the target audience when drafting the agreement, which means that if hyper-vulnerable consumers are targeted, the language of the agreement must be such that "an ordinary member of the class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the… document… without undue effort" (s 22).

Specific Reference to Hyper-vulnerability Needed in Interpretation Provision

Furthermore, hyper-vulnerability should be taken into account in the interpretation and application of consumer law. In African countries, this requires specific reference to such interpretation and application in the legislation. The South African CPA requires interpretation of the Act in the light of its purposes (s 2) and one of the purposes is "to promote and advance the social and economic welfare of consumers in South Africa by…reducing and ameliorating any disadvantages experiences in accessing any supply of goods or services by consumers (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors

[5] 2013 (1) SA 219 (KZD).

or other similarly vulnerable consumers; or (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented" (s 3).

Hyper-vulnerability Should Be Taken into Account in Enforcement

Hyper-vulnerability should also be taken into account in the enforcement of consumer law and in awareness campaigns. Where resources of enforcement agencies are limited, such as in most African countries, proactive enforcement to prevent consumer abuse should be prioritized and awareness campaigns should be aimed particularly at low-income and rural consumers.

More Privileged Consumers Should Still Be Protected in Accordance with Generally Accepted Standards

On a more general level, the need to protect hyper-vulnerable consumers should not mean that more privileged consumers should rather not be protected in accordance with generally accepted international standards in order to prevent an increase in the wealth gap. However, prioritization of resources should occur with a focus on enforcing consumer law proactively in favour of the most vulnerable and of educating them on their rights.

As noted above, behavioural economics lead to the insight that all consumers are vulnerable as they are all subject to the biases identified by scholars in this field. This is particularly true of consumers who are natural persons, including sole proprietors who buy goods or services for the purpose of their business or profession. That sole proprietors are vulnerable enough to be protected by consumer law is particularly clear in developing countries such as African countries, where the majority of natural persons have a very low income and face social exclusion, including because of limited access to the internet and other communication media.[6] As juristic persons contract through natural persons, they often suffer from the same vulnerabilities and biases suffered by natural persons who buy products, namely where the juristic person does not buy the goods to commercialize them and the value of the transaction is low (De Stadler 2016). Thus, consumer protection legislation should generally apply to all buyers who are natural persons. Consumer legislation as it relates to the sale of goods should also apply in favour of buyers who are juristic persons, except if the transaction value is below a prescribed threshold or products are bought for resale or for transformation into a product for resale or where the bought product will be used up or transformed in the course of repairing or treating other goods or fixtures on land (De Stadler 2016). However, the burden of proof on whether a buyer as juristic person is a consumer should be on the buyer, and to alleviate the compliance burden on suppliers, a voluntary positive statement by a buyer that it is purchasing a product for resale or manufacturing purposes (for example by ticking a box) may be relied upon by the supplier (De Stadler 2016).

[6] For example, in Zambia, only 47.8% of the population had mobile internet access and 0.22% fixed internet access in 2017 (Zambia Information and Communications Technology Authority 2017). In South Africa, one of the most affluent sub-Saharan African countries, 65% of consumers above 16 years old can access the internet from home, which is still well below the global average of 82% (Bizcommunity 2017).

Different Rules for the Formal Economy and the Informal Economy?

There is a large wealth gap in African countries, and very much so in South Africa, so that it could be appropriate to speak of two economies and two societies. Can we have one and the same consumer law for both economies? The difference between the formal economy and the informal economy comes into play here. In some African countries, the informal market is estimated to make up approximately 80% of the economy (Dowuona-Hammond 2018, p. 336).

Some African scholars report that their markets are flooded with dangerous, sub-standard, and counterfeit goods, many sold in the informal economy (Dowuona-Hammond 2018, p. 341–343; Mwenegoha 2018, p. 435–436; Zeija 2018, p. 457; Rizzi 2018, p. 404). It is generally not an appropriate policy to have different rules for the informal economy that are less protective of consumers, although there are exceptions, such as not requiring hawkers to provide sales records to consumers, whereas suppliers in the formal economy should be required to provide sales records.[7] Rather, more resources should be prioritized for the development and proactive enforcement of safety standards and consumer law generally, so that there is less chance of unsafe goods being sold to consumers in the informal or formal market. In Nigeria, it appears that much progress has been made in this regard, but in other African countries, the problem persists (Monye 2018, p. 381; see African authors cited in this paragraph above). Monye points out that the Standards Organization of Nigeria (SON), established by legislation from 2015, has prescribed numerous safety standards and their voluntary product certification scheme is popular with manufacturers (Monye 2018, p. 379). In addition, mandatory certification schemes aimed at exports of locally produced goods as well as imports into Nigeria, seem to be functioning reasonably well. Monye refers to research showing that the destruction of sub-standard imported goods has reduced because of introduction of a system of evaluation at the country of shipment (Monye 2018, p. 379). She notes that almost all products produced and sold in Nigeria bear a logo showing compliance with the aforementioned certification schemes (Monye 2018, p. 380).

In South Africa, the food safety regime, in respect of both the informal and formal economy, is sorely lacking. The legislation is outdated and there is a "critical shortage of regulators, inspectors, laboratory personnel, scientists and auditors" to enforce safety standards (Korsten 2018; see also Naude 2018, p. 416). For example, the first reported outbreak of listeriosis was in January 2017, but the source was only identified in March 2018 (Korsten 2018). One hundred eighty deaths resultant in the meantime and close to a thousand people became ill (Korsten 2018). Self-regulation has been implemented by the industry because of the absence of an effective regulatory system, particularly at the level of enforcement. Establishment of a national food safety authority may better address the problem (Korsten 2018).

The difficulties of protecting African consumers against abuses by informal traders also extend to the protection of credit consumers against so-called loan sharks operating in the informal economies of Africa. Rules on reckless credit and on over-indebtedness drive some low-income consumers away from formal credit providers to such loan sharks, who often use illegal ways to obtain payment and charge exorbitant interest

[7] A "hawker" is defined in the South African legislation making this exception as "a natural person lawfully engaged, solely for his or her own benefit, in the selling of goods on the street or in public places or spaces in respect of which all members of the public enjoy unrestricted and unconditional access subject only to law" (Notice at the end of the Consumer Protection Act Regulations 2011).

rates. Allowing mobile phone operators, who operate in the formal economy, to make financial services available to consumers will assist in bringing more low-income consumers under the fold of the credit law protection (in Africa, mobile banking services are increasing and there is a high level of mobile phone penetration, including amongst low-income consumers in rural areas (e.g., Malala 2018, p. 363–365; Mwenegoha 2018, p. 444–445; Stebek 2018, p. 324–325).

Fragmentation of Sources of Law

Some scholars from Anglophone African countries point out the fragmentation in their consumer laws and recognize the need for more integrated, focused legislation on consumer protection, without which it is difficult to advise consumers (Dowuona-Hammond 2018, p. 335, 352–353 regarding Ghana; Monye 2018, p. 374, 392 regarding Nigeria; Mwenegoha 2018, p. 443 regarding lack of provisions on product liability in Tanzania; Zeija 2018, p. 456 regarding Uganda).

There is already a recent trend in some Anglophone African countries from fragmentation of rules across various statutes and the uncodified common law towards a more centralized and focused consumer protection statute, that sets out at least basic rules on first-generation consumer law (e.g., Kenya[8]; Seychelles[9]; South Africa[10]; Nigeria[11]; a draft Consumer Protection Bill is being considered in Ghana (Dowuona-Hammond 2018, p. 338)).

However, as is the case in other legal systems, it has proved difficult for such legislation to codify all consumer rights. The drafters of the South African CPA had hoped that it would be a codification of consumer rights in respect of the areas covered, but, as it was pointed out to Parliament that the common law actually protected consumers more than the CPA in some respects, Parliament decided to add a savings clause for common law rights (s 2(10) of the CPA, not found in the Consumer Protection Bill 19 of 2008 introduced into parliament). Some fragmentation of sources of consumer law are inevitable as some sectors need dedicated legislation specifically for that sector, e.g., financial services, consumer credit, food safety, and product safety standards (although the basic statute should set out a right to safe goods that also comply with applicable safety standards). Even in the European Union, consumer protection rules are generally "fragmented and sector-specific, focusing on specific types of consumer consumers, such as consumer credit, package travel, timeshare, distance selling or doorstep selling" (Durovic and Micklitz 2017, p. 17). However, some EU directives, e.g., those on unfair contract terms and unfair commercial practices, apply to a broader range of consumer contracts.

Fragmentation with Respect to Enforcement Bodies

Some scholars from Anglophone Africa decry the fact that there is no centralized enforcement body (Mwenegoha 2018, p. 450 regarding Tanzania; Dowuona-Hammond 2018, p. 337 regarding Ghana). In South Africa, a number of bodies enforce the CPA, and this legislation

[8] Consumer Protection Act of 2012; see Malala (2018), p. 356–358.
[9] Consumer Protection Act of 2010; see Rizzi (2018).
[10] Consumer Protection Act 68 of 2008; see Naude (2018).
[11] Federal Competition and Consumer Protection Act 2019; Monye (2018).

is confusing regarding the route that a consumer complaint must or may follow (Naude 2010). In addition, although the legislation creates the impression that the consumer may and should approach the National Consumer Commission, this regulator habitually refers consumers who complain to the accredited industry ombuds (see, e.g., National Consumer Commission 2016, p. 36). Moreover, it would have been more cost-effective to pool the resources of the South African national government and the provincial governments to rather set up one central enforcement agency with satellite offices in the provinces than to duplicate consumer affairs departments in the provinces. However, due to realities in South Africa, some fragmentation is probably inevitable. Industry ombuds accredited by the Minister and financed by the industry have many advantages for those consumers who are affluent enough to access the ombuds' dispute resolution process online or over the telephone. But many low-income consumers, particularly in rural areas, do not have internet access, or even if they do, have little money to spend on data and phone calls. Thus, for them, the many small claims courts throughout the country are more accessible (Naude and Barnard 2018, p. 581). Ideally, a widely advertised national website and telephone hotline or call centre should be set up as a point of entry which can refer consumers to the relevant enforcer or avenue of redress. This is what is effectively now required in the South African Financial Sector Regulation Act 9 of 2017 (s 209).[12] However, consumers outside of the financial services sector need such a referral service even more than consumers in the financial services sector, given the complexity of the CPA provisions on the route that a consumer complaint must or may follow. Once again, low-income consumers are unlikely to be able to access such an information point. The solution in Belgium that public libraries must help consumers to access the central website is not a complete answer to the problem in African countries, particularly not in the case of many rural consumers. What is also needed, apart from more clarity in the legislation, is public awareness campaigns and financial support to consumer organizations that can drive information campaigns. However, there are apparently no active dedicated consumer organizations in South Africa and the National Consumer Commission takes the view that they cannot supply funding to consumer organizations. The National Credit Regulator has, however, been more effective in running awareness campaigns (Zerbst 2010).

Conclusion Regarding Fragmentation Within Legal Systems

Although several types of hyper-vulnerable consumers require special protection in rules applying only to them, the prevalence of hyper-vulnerability in Africa means that all consumer legislation should be drafted, interpreted, and applied with such consumers in mind. However, it is not necessary and unacceptable to exclude more privileged consumers from the protection of rules according to generally accepted standards in an attempt to prevent an increase in the wealth gap. Rather resources for enforcement and publicity campaigns should be prioritized for the protection of hyper-vulnerable consumers. The informal economy does not generally require different rules on consumer protection from the formal economy, but more resources must be allocated to enforcing safety standards and rooting out counterfeit goods that make their way into the informal economy. There is a need for and recent trend in Africa towards more focused consumer legislation setting out at least some important first-generation consumer rights in one piece of legislation. However, some fragmentation in the source of sector-specific laws is

[12] Section 209 requires that the Ombud Council operate one or more centres "to assist financial customers to formulate complaints and to identify for them the ombud appropriate to deal with their complaints."

inevitable. Some fragmentation at the level of enforcement agencies is also inevitable due to realities in African countries, such as the benefits of co-regulation in the form of accredited industry ombuds given low governmental resources but also the inaccessibility of such centrally situated ombuds for low-income consumers who would benefit from walk-in assistance from local small claims courts and/or local offices of governmental enforcement agencies.

The paper now turns to fragmentation versus convergence across legal systems, on which the African realities discussed above may have a bearing.

Fragmentation Versus Convergence/Harmonization Across Legal Systems

After some definitions of convergence across legal systems and harmonization, arguments for and against convergence will be set out and some conclusions drawn.

What Is Meant by Convergence and Harmonization of Laws

Although convergence across legal systems is often understood to be the same as harmonization, "[c]onvergence denotes movement along a spectrum of similarity which includes, but is not limited to harmonisation and uniformity of laws" (French 2016, p. 3; see also Godwin 2019, p. 3). Convergence could refer to convergence in the text of law, or in the application or interpretation of law, or convergence in outcomes (Godwin 2019, p. 4). Michaels's typology of convergence encompasses formal or hard convergence, for example, accomplished through uniform laws and conventions, as well as soft convergence, for example, accomplished through model laws and soft law such as guidelines and harmonization that does not involve uniformity (Godwin 2019, p. 3–4; with reference to an unpublished conference paper by Ralf Michaels[13]). Michaels also identifies "substantive convergence," "which includes convergence in the application or interpretation of law" (such as through collections of case law like CLOUT, and the case law of highest courts such as the European Court of Justice and the OHADA Common Court of Justice and Arbitration (Godwin 2019, p. 4 with reference to Michaels's unpublished conference paper, cited above)). Godwin (2019) adds to this typology convergence in the underlying concepts and philosophies of law. This typology highlights that "convergence or harmonisation of law does not necessarily require uniformity in the text of laws" (Godwin 2019, p. 5). Godwin states that although opinions may differ in relation to typology and categorization, "most people would probably agree that convergence involves a process by which the differences between the laws of jurisdictions become less pronounced, thereby facilitating cross-border transactions and activities and creating greater certainty and predictability" (Godwin 2019, p. 4).

Benefits of Convergence

Convergence helps to remove barriers to entry by suppliers from outside a country, which leads to increased consumer choice. Where a region aims for a single market, such as the

[13] Michaels, R. Legal Unification: Form and Substance. Unpublished conference paper presented at the conference Towards an Asian Legal Order: Conversations on Convergence, Singapore Management University, 8–9 December 2016 (on file with the author).

African Continental Free Trade Area, convergence may help to facilitate the common market (Howells and Reich 2011, p. 51).

Where service providers operate across various countries, such as airlines, fragmented consumer protection regulation may drive up costs for such suppliers in the form of training staff and setting up systems to apply different regimes (ICAO 2013, p. 11–12).

Cross-border dispute resolution is also simplified by some level of harmonization (Anderson 2004, p. 5; Godwin 2019, p. 9).

The even treatment of consumers which harmonized rules achieve is fairer to consumers, particularly where there is a global market such as in e-commerce, tourism, and transportation services.

Model laws and other instruments aimed at convergence may also provide "legal assistance benefits" which Anderson (2004, p. 5–6) explains as

> "filling a domestic legal vacuum or undeveloped area of law, particularly in new market economies and developing states that have not had significant international trade; creating a legal regime attuned to international transactions and thereby promoting foreign investment and trade; and providing foreigners with confidence in the sophistication and objectivity of the domestic legal regime or rule of law."

In addition, model laws may have "comparative law benefits," which Anderson (2004, p. 6) explains include

> "simplifying domestic legislation in the relevant area by consolidating the often disparate law; providing a normatively better law than any domestic legislation given that it was drafted by international experts with the benefit of wide comparative experience; and regardless of adoption, providing a well-reasoned comparative example to inform the domestic drafting process."

Both these types of benefits of soft convergence are particularly pertinent in Africa, where consumer law is in its infancy in many countries and some do not have comprehensive consumer legislation yet.

Suppliers such as social networking sites often have only a virtual presence and no physical place of business in many countries. In the absence of harmonization, such countries' attempts to regulate by legislation the potential abuses of their consumers are unlikely to affect the operating model of such suppliers, e.g., the privacy policies of social networking sites. This also applies to suppliers who trade online across borders, but ship goods sold from a central point or points. However, if there are adequate consumer rules in large jurisdictions such as the USA and the EU, consumers in other countries may benefit from suppliers changing their worldwide business models. Multinational companies may also have worldwide advertising campaigns, and these should be regulated. There has been a trend towards industry self-regulation of advertising on the basis of the Code of Advertising and Marketing Communication Practice of the International Chamber of Commerce.

Complete Convergence Impossible

The first part of this article already alluded to different needs of consumers in different parts of the world. For this reason, it would not be feasible to aim at formal or hard convergence of all

consumer law in the form of a convention, nor is it likely that all countries would adopt without amendment the text of soft convergence instruments, such as model laws. For example, some low-income consumers in Africa may need to be protected in the context of types of agreements that may not be well-known in some countries in the Global North, such as lay-by agreements, and affordability assessment rules that require bank statements or financial statements are discriminatory in some African countries. Thus, the current focus on soft law in the form of guidelines or recommendations or model laws seems sensible. There is a greater potential for hard convergence of some rules for transactions with an international element such as tourism and travel. The discussion below gives other reasons why generally, full harmonization would not be feasible for consumer law.

Some Fragmentation Inevitable Even if the Text of Legislation and Other Rules Harmonized

Even if a uniform consumer law convention applies across the world, this will not guarantee coherence in the absence of a central enforcement body. As long as enforcement of harmonized rules is left to local enforcement agencies such as domestic courts, specialized consumer tribunals, and/or ombuds, fragmentation may result as different enforcers are likely to interpret and enforce the consumer law differently (Godwin 2019). This obvious point applies to all international conventions, not just in the field of consumer law. A centralized website on which decisions by various enforcement bodies are reported may ameliorate this fragmentation to some extent, but this would require greater resources that are currently available in many countries in the Global South in the form of reporters of decisions, translators, and internet access. If steps are taken towards harmonization to some degree of rules on some transactions with a real cross-border interest, such as e-commerce, tourism, or travel, a network of enforcers who may be obliged or at least able to assist consumers against suppliers registered in their country could be set up. A central Online Dispute Resolution system could perhaps also be set up.

The Court of Justice of the European Union has played an important role in ensuring "a higher level of harmonisation between national regulatory regimes" in Europe (Durovic and Micklitz 2017, p. 17). For harmonization to be effective, it appears that such a court is necessary.

Efforts by the United Nations in the 1980s to set up a supra-national body tasked with enforcing consumer law failed (Durovic and Micklitz 2017, p. 72). It has also been said that differences in legal systems and culture imply that "it does not make much sense to try to identify an ideal regulatory model for the enforcement of consumer law" (Durovic and Micklitz 2017, p. 76). It is possibly more realistic to keep on aiming at coordination of enforcement amongst national enforcement agencies, as done through various regional organizations (such as the European Consumer Centres Network (ECC-Net), FIN-Net for financial services, and the African Consumer Protection Dialogue; Durovic and Micklitz 2017, p. 85–86). ADR mechanisms probably hold most promise to deal with cross-border transactions, as a consumer with the resources to enter into a cross-border transaction is likely to have some resources to lay a complaint by phone, email, or online, as such ADR would typically require (Durovic and Micklitz 2017, p. 76). However, it has been shown that ADR is least effective in countries without a long tradition of consumer activism (Durovic and Micklitz 2017, p. 77). This rings true for some African countries, even South Africa as one of the African countries with the highest GDP, where there is not much consumer education, hardly any active

consumer organizations that could assist individual consumers with enforcing their rights, little public information about ombuds (even effective ombuds), and where public enforcement agencies are not well-resourced financially. Only four African countries are member countries of the econsumer.gov online dispute resolution service offered by ICPEN.[14]

Another inevitable source of fragmentation in the application of harmonized rules may be decisions by courts that are based on a charter of human rights, e.g., in a Constitution, which local courts may interpret as requiring greater protection of consumers than provided for in the harmonized consumer law rules. In South Africa, for example, a court has used the Bill of Rights in the Constitution to fashion greater rights for consumers than are available under consumer legislation.[15]

In addition, often ombuds are expressly given the power to make decisions based on fairness and are therefore not obliged to merely ascertain and apply the applicable legal rules. It is obviously conceivable that opinions may differ on what is fair in a particular situation.

Arguments Against Harmonization

A general argument that militates against harmonization of consumer law is that cultural differences affect what rules are appropriate (Godwin 2019, p. 24). For example, one of the reasons why Consumer Dispute Resolution (CDR) takes on different formats in Europe may be a difference in culture. Thus, the Dutch system is focused on consensus-building given the reluctance by Dutch citizens to go to court and a strong pragmatism (Weber and Hodges 2012, p. 130–135). The opt-out approach to class actions in the USA accords more with the more litigious US American society, whereas in the EU, an opt-in model is preferred, due to concerns that the American model unjustifiably promotes the financial interests of those leading the litigation (Durovic and Micklitz 2017, p. 82). In addition, because consumers in different countries have been empirically proven to respond differently to advertising, it has been argued that a differentiated regulatory approach to marketing is required, as seen for example in the different rules on comparative advertising in the USA and EU (Wilhelmsson 2006; Durovic and Micklitz 2017, p. 26). Some societies may be more sensitive to advertising impinging on religious beliefs (Durovic and Micklitz 2017, p. 27).

Another argument against convergence is that the "best practices approach" of suggesting model rules for a region or the world is problematic as "it creates regulatory solutions without first conducting the fundamental analysis of the existing legal frameworks, or indeed relating to the needs of consumers in a given context" (Consumers International 2011, p. 17). An attempt at some harmonization on the basis of model rules should therefore be coupled with a deep understanding of existing legal norms in a particular legal system and how the new rules would interact with these as well as the impact of local culture. A regulatory impact assessment at an early stage of the process is therefore crucial (Consumers International 2011).

Another general disadvantage of harmonization is that fast-changing technological advances may present risks to consumers that can be addressed faster by rules made by individual states and/or by local industry through self-regulation in codes of conduct than rules made by the global or regional organization responsible for harmonized rules (BEUC 2018, p. 3). Multilateral solutions may stall due to competing interest groups spending much resources to voice their views (Carbone 2016, pp. 178–179). Compromises between

[14] Egypt, Nigeria, Kenya and Zambia (https://econsumer.gov/MemberCountries#crnt, accessed 16 August 2019).
[15] *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

competing interest groups may also lead to multilateral solutions being watered down to the least objectionable course, which may not effectively address the problem (Wilhelmsson 2002, p. 88). Model laws or minimum rules are therefore all that could be aimed for. Soft law allows the evolution and enhancement of rules to adapt to local conditions (Godwin 2019, p. 25).

In addition, complete harmonization ("maximum harmonization" in Europe) may be detrimental to consumers if their particular legal system had higher levels of consumer protection than the proposed harmonized rules, decreasing the chances of buy-in to the harmonization project.

An attempt at complete harmonization in the text of the rules is also problematic as it would be difficult to codify all the relevant rules. In respect of the control of unfair terms, it has been argued in Europe that "full harmonisation is not appropriate because the unfairness of a term can only be assessed by comparing it with a national law" (BEUC 2016, p. 11; see also Loos 2010, p. 30). The implication is that it would be nearly impossible to harmonize all the relevant residual rules of contract law that are relevant to the unfairness enquiry.

Complete harmonization is also costly, as it forces individual states to amend legislation and to make sure that businesses are not protected more than consumers where the harmonized rules impact on areas of law that were regulated by general contract law before (Loos 2010, p. 9). In addition, legal practitioners would have to be familiarized with the new harmonized rules (Loos 2010, p. 9). Complete harmonization of consumer contract law may also lead to incoherence and inconsistency of national contract law (Loos 2010, p. 33).

Loos (2010, p. 10–11) points out that doubts exist on the relevance of harmonization to the willingness of businesses and consumers to contract across borders.

Fragmentation across legal systems also allows for experimentation and the development of different solutions to a problem, from which the best could be chosen over time and learnt from elsewhere, such as neighbouring countries (Wilhelmsson 2002, p. 78, 86, 93–94). A related point is that a particular problem may be more pronounced in a particular country at first and that country's regulatory response could guide other nations where the problem is not so prevalent yet.

The question arises whether an additional argument against harmonization is that realities in the Global South are generally so different from those in the Global North that differentiation in rules are needed, so that there is little likelihood of any harmonization on a global level or even model rules being appropriate.

Multilingualism is probably more pronounced in the Global South than in the Global North, although this may be changing due to migration into the Global North. Does pronounced multilingualism require different rules in the Global South? A contrary argument is that rules on the language in which agreements and other documents should be couched, and the requirements placed on suppliers dealing with consumers with limited fluency in the dominant language, could be formulated in a general way and multilingualism and other hyper-vulnerabilities be stated to be relevant when applying these rules. For example, the legislation should require drafters of agreements and other documents to consider the target audience for which they draft. Lawyers should then be trained to draft in the light of the target audience's language skills and in the light of lifestyle measurement indices and other insights of economists and experts on marketing to make sure that communications with consumers are suited to their needs and vulnerabilities (De Stadler and Van Zyl 2017).

On the other hand, it should also be considered what impact harmonized regulation would have on suppliers in the Global South with less resources, including suppliers in the informal

economy. For example, to expect suppliers in the Global South to make agreements available in more than one official language or in vernacular languages may be very costly for small suppliers (which is why a proposed provision on the official languages in which consumer agreements should be couched was left out of the final version of the South African CPA).

There are of course more consumers with a low income and low levels of literacy in the Global South than in the Global North. This should impact consumer policy at the level of enforcement, as noted above. It requires that proactive enforcement be prioritized. It may also require a somewhat complex system of redress that recognizes the benefits of co-regulation by industry and government given low government resources, but also the inaccessibility of such co-regulation schemes to low-income consumers in more remote regions, who would require small claims courts or branch offices of regulators for walk-in assistance. But does socioeconomic inequality require different substantive rules? The first part of the article has suggested areas in which it does, including in relation to special types of transactions not known across the world and with requiring bank statements or financial statements for affordability assessments (whereas in the Global North most consumers will be able to produce such statements). Perhaps time limitation provisions may also have to be set more generously for consumers in the Global South. Do realities in the Global South count in favour of direct price control in respect of consumer goods and services, or should competition law and rules on improperly obtained consensus be the dominant form of regulation to nudge suppliers towards fair prices? In some African countries, consumer law provides a right to challenge the fairness of the price of goods and services. For example, South African consumers may challenge the fairness of the price of any goods or services covered by the South African CPA (s 48).

Thus, it appears that there are too many arguments against trying to achieve complete harmonization of consumer law within a region or the world. But, with some caveats, soft convergence has advantages. If harmonization in any form is considered for a region, research is needed to tease out the reasons behind current divergence, in order to establish whether convergence could be aimed at as well as its possible form (Godwin 2019, p. 27).

A promising development for developing countries such as African countries whose consumer law may be underdeveloped or in need of improvement (e.g., South Africa) is the possibility of voluntary peer review and concrete recommendations to improve states' consumer law by the UNCTAD (United Nations Conference on Trade and Development) Intergovernmental Group of Experts (IGE), which would draw on expertise in consumer laws from around the world (Guideline 97(g) of the UN Guidelines for Consumer Protection). A collection of states in a region (particularly if they have a common legal heritage like some countries in Southern Africa with mixed legal systems based on uncodified Roman-Dutch Law, English Law, and African Customary Law) may conceivably approach the IGE jointly to obtain expert advice on improving their consumer law, perhaps also with a view to consider some level of convergence which may help to facilitate cross-border trade and better consumer protection in the region.

Transactions with a Truly International Element

As noted above, in transactions with a truly international element, such as cross-border e-commerce transactions, travel, and tourism, the argument for harmonization of rules, at least in the form of model rules, is stronger.

In some areas, there are already progress towards harmonization, e.g., in the air travel industry. The Montreal Convention (Convention for the Unification of Certain Rules for

International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (ICAO Doc No. 4698)) on international flights and the IATA Core Principles of Consumer Protection (2013) (of the International Air Transport Association) are examples (see also Durovic and Micklitz 58). As international tourists also often utilize domestic flights in their destination country, and harmonization would benefit such international tourists, harmonized rules creating minimum standards for protection of passengers that also apply to domestic flights would be a welcome development, but less easy to draft. There are general rules in the South African CPA that happen to apply to the airline industry as well, such as the provision on "over-selling and over-booking" (s 47), and the consumer's "right to cancel an advance reservation, booking or order" (s 17, subject to payment of a reasonable cancellation charge, which is not payable "if the consumer is unable to honour the booking… because of the death or hospitalisation of the person for whom, or for whose benefit the booking… was made"). However, there could be more targeted rules on flight delays, such as in the USA (Durovic and Micklitz 2017, p. 59).

The ICC Code of Advertising Practice (in its latest version called the Consolidated Code of Advertising and Marketing Communication Practice, 2018) has been influential in codes adopted by self-regulatory structures (including in South Africa by the Advertising Standards Authority) and in legislation in some countries (Durovic and Micklitz 2017, p. 36; ICC 2018). Because advertising often occurs across borders, there is much to be said for attempts to harmonize rules. However, as industry self-regulation in this sector has many benefits, attempts at convergence could rather focus on cooperation between enforcement agencies than on harmonized law in the traditional sense.

Regarding e-commerce, the fast pace at which technology develops militates against a convention or complete convergence in regulating the supply of digital content (BEUC 2018, p. 3). States may adopt additional measures to protect consumers against problematic technological developments more quickly than if the rules were to be supplemented by the regional organization. BEUC (the European Consumer Organization) also argues that if minimum rules are proposed for online consumer contracts in Europe, the EU member states should be allowed to adopt higher standards on key aspects such as the limitation period and the reversal of the burden of proof on whether the digital content was defective at the time of supply (BEUC 2018, p. 3).

BEUC points out another problem with hard convergence in the e-commerce field, namely that

> "a fragmentation between the offline and online marketplaces should be avoided because it would come at the expense of consumer protection, would undermine clarity and consistency for both consumers and traders, and would place a stranglehold on free competition between online and offline sales" (BEUC 2016, p. 5).

In any event, it is not clear that harmonized rules on e-commerce contributes to the increase in cross-border e-commerce, but rather

> "the existence of a robust telecommunication infrastructure, user-friendly online payment systems and efficient distribution networks, particularly with regards to last mile-delivery. The creation of a conducive legal framework for cross-border e-commerce must therefore be regarded as part of a larger picture, comprising multiple regional initiatives addressing a wide spectrum of issues" (Mik 2017, p. 1).

Nevertheless, it is possible that harmonized principles or rules regarding privacy and other aspects of consumer protection may lessen apprehensions of consumers regarding cross-border transactions (Mik 2017, p. 14).

What is also important to encourage cross-border e-commerce in a region is a focus on effective, fast, and affordable dispute resolution mechanisms for cross-border commerce, such as online dispute resolution and cooperation between enforcement bodies (e.g., Kobrin 2001, p. 690). Certainly, contractual provisions that force consumers in another jurisdiction than the supplier to seek redress by way of arbitration or litigation in the supplier's country should not be allowed (Mik 2017, p. 18).

Conclusion

Fragmentation of consumer law within one legal system and across legal systems appears to be inevitable. Thus, for example, several types of hyper-vulnerable consumers require special protection. Drafters and interpreters of consumer legislation should keep in mind that the majority of African consumers are hyper-vulnerable anyway due to factors such as a low income, low literacy, or limited fluency in the dominant language in which standard form contracts are couched. Consumer legislation that is attuned to this reality needs special reference to the needs of such consumers and the types of transactions they could enter, including an exhortation to keep protection of these consumers in mind when interpreting, applying and enforcing all parts of the legislation. Nevertheless, the need to protect hyper-vulnerable consumers should not mean that more privileged consumers should not be protected by rules in accordance with generally accepted standards in an attempt to prevent an increase in the wealth gap. Rather more resources should be allocated to the protection of hyper-vulnerable consumers, including through proactive enforcement and accessible education campaigns. The informal economy may require some special rules, but the rules on quality of goods and services should for the most part remain the same. As the informal economy makes up such a big proportion of consumer transactions in African countries, more resources should be targeted at developing and enforcing safety standards and rooting out counterfeit goods. As far as fragmentation of sources of law are concerned, there is in Africa a need for and a recent trend towards more focused consumer legislation which at least sets out some important first-generation consumer rules in one piece of legislation. However, some fragmentation in the form of sector-specific laws remains inevitable. African scholars have decried fragmentation at the level of enforcement agencies, and certainly in South Africa there is much complexity and confusion about the path that a consumer complaint may or should follow, which also does not augur well for cost-effective enforcement. Nevertheless, due to realities in African countries, some fragmentation is inevitable. For example, co-regulation in the form of accredited industry ombuds are valuable given low governmental resources for enforcement, but many low-income consumers cannot access these centrally situated ombuds and would need walk-in assistance from local small claims courts and/or local offices of governmental enforcement agencies.

Even if rules are harmonized at a supra-national level, fragmentation is inevitable due to different interpretations by local enforcement agencies or courts. An attempt by the UN to set up a supra-national enforcement body had failed. Reporting local enforcement experience on a central website might assist in reaching some level of converging interpretation, but many African governments may not have the resources needed to fund and equip rapporteurs to such

a website. It may be more realistic to aim at coordination of enforcement amongst national enforcement bodies. An attempt at some convergence in the form of model rules or minimum standards to be applied has definite benefits, but there are also cogent arguments against harmonization. Cultural differences and the time it would take to adapt harmonized rules setting minimum standards rules to rapidly changing practices are examples of reasons why harmonization may be difficult and not beneficial. Some realities in the Global South also militate against harmonization. Nevertheless, there is greater potential to aim at some level of harmonization where there is a real cross-border interest, such as in relation to aspects of e-commerce and other transactions with an international element, such as travel and tourism. Soft law such as guidelines and model rules could be aimed at first in this regard. They would allow for diversity in approaches, which may gradually achieve convergence in outcomes. There are already high-level policies or principles which have been influential or are likely to be so. Examples are the UN Guidelines on Consumer Protection, the UNWTO (World Tourism Organization) Framework Convention on Tourism Ethics approved on 15 September 2017, the OECD Policy Guidance for Protecting and Empowering Consumers in Communication Services of 2008, the G20 High-level Principles on Financial Consumer Protection of 2011, and the OECD Recommendation on Consumer Protection in E-Commerce, 2016. UN agencies, such as UNCTAD, which drafted the UN Guidelines on Consumer Protection, may be well-placed to consider whether convergence on consumer protection in some areas, such as e-commerce, would be beneficial and what form these should take. If harmonization is considered, for example for a region, research is needed to tease out the reasons behind current divergence, in order to establish whether convergence could be aimed at as well as its possible form.

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