WAREHOUSE RECEIPT LAW REFORM IN AFRICA: OHADA AS A CASE STUDY

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Thesis Abstract

This PhD research assesses whether the United Nations Commission on International Trade Law (UNICTRAL) and International Institute for the Unification of Private Law Model Law on Warehouse Receipt (UNIDROIT MLWR) can be adopted by the Organisation for Harmonisation of Business Law in Africa (OHADA). The research also answers questions of which form of law will benefit the needs of businesses of OHADA member states, including smallholder farmers. The research assesses whether it will be beneficial to complement the provisions of the UNIDROIT MLWR with legal transplants from two chosen jurisdictions: the US and France. The primary research methods for this PhD research are comparative legal analysis and application of theories of harmonisation and unification of law and legal transplant.

The analysis from this research indicates that OHADA adheres to the French civil law tradition. OHADA follows the path dependency route, which resulted in the successful implementation of several legal instruments - Uniform Acts. Several intergovernmental organisations have named OHADA a successful international organisation with a mandate to implement supranational laws. Almost all OHADA member states have the same civil French background and closely adhere to the French civil law tradition. The UNIDROIT MLWR is designed so that any country can adopt it regardless of legal background.

Therefore, some provisions of the UNIDROIT MLWR can be tailored to address the business practices and traditions of OHADA member states. As OHADA member states follow a French legal background, the French warehouse receipt legislation can be utilised to tailor the UNIDROIT MLWR. The US warehouse receipt legislation is considered robust and has been adopted by many countries. Therefore, the US warehouse receipt legislation can also be used to adopt the UNIDROIT MLWR. This PhD research analysis recommends that OHADA adopt the UNIDROIT MLWR in the form of a Uniform Act on Warehouse Receipt.

Keywords: UNIDROIT, Model Law, Warehouse Receipt, OHADA, Africa, Uniform Act, Harmonisation, Unification, Business Law, African Law.

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List of Abbreviations

CISG – United Nations Convention on Contracts for the International Sale of Goods

ECOWAS – Economic Community of West African States

INCOTERMS – International Chamber of Commerce International Commercial Terms

MSME – micro, small and medium enterprises

OHADA – Organisation for the Harmonisation of Business Law in Africa

OHADA Treaty – Treaty on Harmonisation of Business Law in Africa

UNCITRAL – United Nations Commission on International Trade Law

UNIDROIT – International Institute for the Unification of Private Law

UNIDROIT MLWR – International Institute for the Unification of Private Law 'Model Law on Warehouse Receipts'

Chapter 1

1. Introduction

This chapter explores the background and context of the research, including the history and past attempts to reform warehouse receipt legislation. It also highlights the importance of warehouse receipt financing and its role in bolstering agriculture. This chapter outlines the case study for this research. In particular, it explains why the Organisation for Harmonisation of Business Law in Africa (hereafter OHADA) was chosen as a case study for this research. It highlights the importance of developing a hard or soft law norm to regulate warehouse receipt relationships in OHADA member states. In other words, this PhD examines the possibility of conducting warehouse receipt law reform in OHADA member states (regional level) by adopting the UNIDROIT Model Law on Warehouse Receipts (hereafter UNIDROIT MLWR) and either developing a new Uniform Act on Warehouse Receipts (hard law) or a new soft law instrument for OHADA. Additionally, this chapter provides an overview of the research, including the research limitations, the research questions, and the research methods, and explains how this research contributes to the development of regulation of warehouse receipt relationships in OHADA.

1.1. Background of Study

This section explains the importance of developing a Uniform Act on Warehouse Receipts or a soft law instrument[1] to regulate warehouse receipt relationships in OHADA member states. Additionally, it explains the connection between agriculture and warehouse receipts and how the lack of regulation regarding warehouse receipts affects smallholder farmers in Africa, including OHADA countries.

1.1.1. History and Current Situation with Warehouse Receipt Legislation

At the start of this subsection, it is essential to define the terms ‘warehouse receipt’ and ‘warehouse receipt financing’. A warehouse receipt is a document of title that confirms that a certain amount of collateral has been securely stored in a warehouse by a depositor.[2] A warehouse receipt asserts depositors' personal property rights to the stored goods. Warehouse receipts can be used as a guarantee to secure a loan.[3] Warehouse receipt financing is a system that allows farmers to store their harvested crops and other types of

[1] see ss 3.3., 4.3.
[2] Richard Lacroix, Panos Varangis, 'Using Warehouse Receipts in Developing and Transition Economies' (1996) 0033 Finance & Development 36.
[3] Philine Wehling, Bill Garthwaite, 'Designing Warehouse Receipt Legislation. Regulatory Options and Recent Trends' (FAO, Rome 2015) ix.

collateral in a warehouse and use the stored goods as collateral to secure a loan.[4] Warehouse receipt financing enables farmers to sell their goods later when prices are more favourable. In other words, warehouse receipt financing allows farmers to safely store different types of personal property in a warehouse and use them as a guarantee for a loan.[5]

Since ancient times, warehouse receipt financing has been closely connected to the banking system.[6] Warehouse receipts contributed to the emergence and development of modern financial institutions.[7] Nowadays, financial institutions, particularly banks, play a core role in warehouse receipt financing.[8] However, in developing countries, banks consider smallholder borrowers unreliable without collateral to secure a loan.[9] As a result, banks remain overly liquid. A well-established warehouse receipt financing system can open access to financial resources for smallholders, particularly from developing countries and facilitate the development of banking systems.

Concerning the situation with the warehouse receipt legislation, countries can be classified into three groups: countries with developed legislation,[10] countries in transition that are in the process of conducting law reform,[11] and countries that have not yet started law reforms and lack expertise and financial resources to develop law norms.[12] In Africa, most countries belong to the last two groups.[13] The US and France are examples of countries that have developed warehouse receipt legislation.[14] The US introduced the Warehouse Act[15] more than 100 years ago. France introduced warehouse receipt legislation in 1848,[16] and Book V of the Commercial Code currently regulates warehouse receipt financing.[17] Kenya represents the second group, as in 2019, it adopted the Warehouse Receipt System Act.[18] Cameroon is

[4] Francis M Mulangu, Mario J Miranda, Francis H Kemeze, 'Warehouse Receipt Financing for Smallholders in Developing Countries: Challenges and Limitations' (2019) 50 Agricultural Economics. The Journal of the International Association of Agricultural Economics 629.
[5] John Hanna, 'The Protection of Holder of a Warehouse Receipt' (1931) 15 Minnesota Law Review 292.
[6] Jason Roderick Donaldson, Giorgia Piacentino, Anjan Thankor, 'Warehouse Banking' (2018) 129 Journal of Financial Economics 250.
[7] ibid.
[8] International Finance Corporation, 'Warehouse Finance and Warehouse Receipt System: A Guide for Financial Institutions in Emerging Economies' (Washington 2013) 2.
[9] ibid 3.
[10] UNIDROIT, 'Background Research Paper' (Study LXXXIII - W. G. 1 - Doc. 4, Rome November 2020) s 16.
[11] Frank Hollinger, Lamon Rutten, 'The Use of Warehouse Receipt Finance in Agriculture in ECA Countries' (Technical Background Paper for the World Grain Forum, FAO, EBRD Cooperative Programme, May 2009) 27.
[12] UNIDROIT (n 10) 3.
[13] Gideon Onumah, 'Implementing Warehouse Receipt System in Africa. Potential and Challenges' (African Agricultural Markets Program Policy Symposium, Lilongwe 2010).
[14] UNIDROIT (n 10) s 16.
[15] Warehouse Act 1916 (The US).
[16] UNCITRAL, 'Warehouse Receipt: Developing an UNCITRAL Instrument on Warehouse Receipt. Legislative Reform' (UNCITRAL, Rome 2019) 24
[17] Commercial Code 1807 (France) book V.
[18] Warehouse Receipt System Act 2019 (Republic of Kenya).

an example of a country with no legislation at all to govern warehouse receipt financing.[19] Cameroon domestic contract law governs warehouse receipt financing, while the OHADA Uniform Act Organising Securities 2010[20] regulates parts of warehouse receipt financing connected to pledges.

Considering that most African countries lack legislation regarding warehouse receipts or do not have any at all, this research focuses on Africa. OHADA was chosen as a case study for this research for several reasons, which will be explained later in this chapter.[21] One of the main reasons for choosing OHADA is that its member countries are from the same legal background. This makes identifying and addressing the legal needs of OHADA member states easier. Even though OHADA does not have any specific legal norms to regulate warehouse receipt financing, it implemented law reform regarding secured transactions that are closely connected with warehouse receipt law. The OHADA legal norms regarding secured transactions can be a starting point for the warehouse receipt law reform.

A warehouse receipt is a major financing instrument in many developed countries.[22] Warehouse receipts can be used in various ways. For example, in the US, warehouse receipts are widely used as collateral for government-backed standard loans, such as marketing assistance loans;[23] as inventory documents for government strategic grain reserves;[24] as guarantees for crops stored in commercial storage; as delivery documents that could be traded on futures exchanges.[25] However, the prevalence of each of these methods depends on the market situation and legislation in the country. Warehouse receipts play a vital role in national economies and benefit local businesses and countries. For example, in the late 1970s, warehouse receipts enabled the US government to accumulate national grain reserves and regulate grain prices.[26]

A soft law would particularly benefit developing countries in transition and countries without legislation regarding warehouse receipt financing. Such countries lack the expertise and financial resources to draft and introduce warehouse receipt legislation.[27] In countries with no legislation concerning warehouse receipt financing, banks apply domestic contract law to

[19] World Bank Group, 'Enabling the Business of Agriculture 2019' (World Bank Group, Washington DC October 2019) 64.
[20] Uniform Act Organising Securities (adopted 15 December 2010).
[21] see s 2.1.
[22] Brian L Nelson, *Law and Ethics in Global Business: How to Integrate Law and Ethics into Corporate Governance around the World* (Routledge 2006) 43.
[23] US Department of Agriculture, 'Marketing Assistance Loans and Loan Deficiency Payments' (USDA, Washington DC 2020).
[24] Lacroix (n 2).
[25] ibid.
[26] Jerry A Sharpies, 'An Evaluation of U.S. Grain Reserve Policy, 1977-80' (Agricultural Economic Report No. 481, Washington DC 1982).
[27] Lacroix (n 2).

warehouse receipt relationships.[28] As a result, without proper legal protection, financial institutions are reluctant to credit smallholder farmers. Even if banks provide financial loans to such borrowers, 'the price of a loan' is higher due to potential financial risks.

OHADA has started taking steps to open access to financing to smallholders from its member states. In 2010, in cooperation with the International Finance Corporation, OHADA reviewed its laws concerning the secured transaction framework.[29] The main objective of that project was to introduce a 'light legal regime' for smallholders, which encourages them to leave the informal sector and participate in the formal economy.[30] This was the first step for OHADA in helping smallholders to obtain access to finance, which reduces investors' risks.

An independent evaluation of the International Finance Corporation's OHADA Investment Climate Program (2007-2017) was conducted in 2018. The review indicated that reforms of the Uniform Act on General Commercial Law,[31] the Uniform Act on Commercial Companies and the Economic Interests Groups,[32] the Uniform Act Organising Securities,[33] the Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities[34] had a positive impact on businesses of all sizes, including smallholders.[35] These reforms made it easier to register a business and access financial resources. The outcome of the introduction of the OHADA Uniform Act Organising Securities[36] is that around $4 billion in domestic credit was given in seven OHADA member states between 2011 and 2015.[37] However, the report highlights that more needs to be done to facilitate smallholders' access to finance. This could be achieved by implementing a Uniform Act on Warehouse Receipts with assistance from intergovernmental organisations.[38] Therefore, the implementation of the warehouse receipt law can further contribute to the efforts of OHADA to open smallholders' access to finance.

Drafting and introducing legislation concerning warehouse receipts is not enough. For warehouse receipt financing to work efficiently, the legislation should be enforceable and

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[28] see n 19 for an example of a country without warehouse receipt legislation.
[29] International Finance Corporation, 'IFC Partner OHADA Facilitates Access to Finance in Africa' (*IFC,* 20 December 2010) <https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/ifc_partner_ohada_facilitates_access_to_finance_in_africa> accessed 20 July 2022.
[30] ibid.
[31] Uniform Act on General Commercial Law (adopted 15 December 2010).
[32] Uniform Act on Commercial Companies and the Economic Interest Groups (adopted 30 January 2014).
[33] Uniform Act Organising Securities (adopted 15 December 2010).
[34] Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities (adopted 10 September 2015).
[35] International Finance Corporation, OHADA Permanent Secretariat, 'An Impact Assessment of OHADA Reforms. Uniform Acts on Commercial, Company, Secured Transactions, and Insolvency' (An Independent Evaluation by ECOPA and ECONOMISTI ASSOCIATI, Washington DC 2018).
[36] Uniform Act Organising Securities (adopted 15 December 2010).
[37] International Finance Corporation (n 35) 34.
[38] ibid 66, see ss 3.3., 4.3.

adaptable to each country's needs and business practices. Proper infrastructure, logistical channels, and markets to sell warehoused goods should be established.[39] Standardised and supervised warehouse facilities,[40] as well as insurance and financial guarantees from banks, should be made available.[41] The new legislation should be positively accepted by all stakeholders, including financial institutions and farmers, for it to work efficiently.[42] In 2013/2014, the World Bank Group conducted two case studies in Cote d'Ivoire and Senegal to assess factors influencing the implementation of warehouse receipt system reform.[43] The study indicates that creating awareness among smallholders about the benefits of warehouse receipt financing and understanding how it works is essential for the successful implementation of warehouse receipt system reform.[44]

Countries have different domestic legislation and business practices, which should be consistent with the warehouse receipt legislation to guarantee positive acceptance by all the stakeholders. Therefore, the International Institute for the Unification of Private Law (hereafter UNIDROIT), together with the United Nations Commission on International Trade Law (hereafter UNCITRAL), concluded that a model law should be drafted to harmonise warehouse receipt legislation.[45] UNIDROIT emphasised that the UNIDROIT MLWR should be drafted so that it can be adopted by any country, regardless of its legal background, business practices, and current domestic legislation concerning warehouse receipts.[46] Regional issues and specificities should be addressed separately in a guide to enactment or other separate statutory instruments. The UNIDROIT MLWR should be consistent with the existing international instruments that some countries have already adopted, such as the UNCITRAL Model Law on Secured Transactions.[47] Otherwise, countries that have already adopted such international instruments may refrain from accepting the UNIDROIT MLWR.

This subsection established that only a few countries have the proper legislation to regulate warehouse receipt relationships. Therefore, it is essential to analyse the legislative attempts of intergovernmental organisations to regulate warehouse receipt relationships. The

[39] Henry Deeb Gabriel, 'Warehouse Receipts and Securitisation in Agricultural Finance' (2012) 17 Uniform Law Review 369.
[40] Panos Varangis, Don Larson, 'How Warehouse Receipts Help Commodity Trading and Financing' (World Bank Group 1996).
[41] Hollinger (n 11).
[42] Vassil D Zhivkov, 'Warehouse Receipts: A Roadmap for the Harmonisation of Trans-Pacific Law and Practice' (2016) 33 Arizona Journal of International and Comparative Law 191.
[43] UNIDROIT, 'UNCITRAL/UNIDROIT Webinar. Model Law on Warehouse Receipt Project' (Summary Report, Rome March 2020) 12.
[44] ibid.
[45] UNIDROIT, 'Model Law on Warehouse Receipts' (*UNIDROIT,* 2021) <https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/#1456405893720- a55ec26a-b30a> accessed 20 October 2021.
[46] UNIDROIT, 'Issues Paper' (Study LXXXIII - W. G. 2 - Doc. 2, Rome March 2021).
[47] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016).

following subsection will discuss what intergovernmental organisations have done to regulate warehouse receipt relationships.

1.1.2. Legislative Attempts to Reform Warehouse Receipt Laws

Several intergovernmental organisations highlighted the importance of warehouse receipt law reform. The World Bank Group published comprehensive guidance on warehouse receipt law reform.[48] The guide explains the benefits of the warehouse receipt system supported by robust legislation and the practical aspects of the warehouse receipt system.[49] The guide also provides a detailed explanation of the warehouse receipt legislative reform process, including how stakeholders can be engaged in the process.[50] The guide explains the scope of warehouse receipt law reform, essential aspects of warehouse receipt legislation and its implementation.[51]

In 2015, the Food and Agriculture Organisation of the United Nations introduced a guide on drafting warehouse receipt legislation.[52] The guide provides two options for legislative reform: drafting separate legislation concerning warehouse receipt financing or incorporating the warehouse receipt legislation into the existing domestic laws.[53] The guide discusses the essential elements of warehouse receipt legislation, including scope and definitions, licensing, contractual parties' rights and obligations, and transfer and negotiation of warehouse receipts.[54] Moreover, the guide provides case studies of countries that are at different stages of legislative reform.[55]

UNIDROIT, in cooperation with the Food and Agriculture Organisation of the United Nations and the International Fund for Agriculture and Development, published a guide on legislative reform in contracting farming.[56] The guide emphasises the importance of robust legislation to facilitate agricultural commerce.[57] The guide provides detailed information regarding general contractual terms and legal issues pertaining to the farming relationship.[58] Even though the guide does not focus on any particular form of contract, it presents general terms and provisions that the contracting parties can adopt.[59] Instead of providing guidance on law reform, the guide presents best practice solutions for policymakers to adopt.

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[48] World Bank Group (n 19).
[49] ibid 12.
[50] ibid 41.
[51] ibid 53.
[52] Wehling (n 3).
[53] ibid 11.
[54] ibid 13.
[55] ibid 56.
[56] Food and Agriculture Organisation of the United Nations, UNIDROIT, International Fund for Agricultural Development, 'Legal Guide on Contracting Farming' (UNIDROIT, FAO, IFAD, Rome 2015).
[57] ibid 12.
[58] ibid 17.
[59] ibid xv.

The Report by the Organisation of American States emphasises the absence of a standardised legislative approach to regulating warehouse receipt financing and the need for agreement on how to conduct warehouse receipt law reform.[60] The report highlights that the Organisation of American States will allow countries to facilitate the development and use of electronic warehouse receipts and will not touch upon general principles and provisions concerning warehouse receipt financing.[61] Such an approach can establish preconditions for the development of general warehouse receipt legislation and complement it concerning the use of electronic warehouse receipts.[62]

The International Organisation of Securities Commission highlighted the lack of a standardised approach and the need for warehouse receipt legal reform. The Organisation of Securities Commission has published several reports regarding warehouse receipt financing, the latest one regarding best practices in commodity storage and delivery.[63] The report recommends ways to address storage infrastructure issues so that they do not affect market efficiency and price levels.[64] Even though the report mainly covers various regulatory aspects of warehouse receipt legislation, it also connects with the private law aspects of warehouse receipt financing. Thus, many commodity exchanges regulate warehouse facilities and impose specific requirements that may include provisions concerning private law aspects, such as standards of storage facilities, quantity, and deadlines for delivery of stored commodities.[65]

The International Finance Corporation published a guide to assist financial institutions, mainly from emerging economies, with lending against agricultural commodities stored in warehouses.[66] The guide targets financial institutions, but it can also be beneficial for other stakeholders, such as governments, to conduct law reform. The guide covers various aspects of private law, including the transferability and negotiability of warehouse receipts.[67] Additionally, the guide provides recommendations on how countries can switch from paper-based warehouse receipts to electronic warehouse receipts.[68] The guide also includes case studies of warehouse receipt practices in several countries, including Sub-Saharan Africa.[69]

UNCITRAL published the Model Law on Secured Transactions, which focuses on the

[60] Organisation of American States, 'Inter-American Juridical Report. Electronic Warehouse Receipts for Agricultural Producers' (Inter-American Juridical Report, Rio de Janeiro September 2016).
[61] ibid.
[62] ibid.
[63] International Organisation of Securities Commission, 'Commodity Storage and Delivery. Infrastructures: Good or Sound Practices' (Consultation Report, Madrid June 2018).
[64] ibid.
[65] UNIDROIT (n 10) s 14.
[66] International Finance Corporation (n 8).
[67] ibid s 4.4.
[68] ibid s 5.1.
[69] ibid ch 10.

security rights of movable property, including paper-based negotiable instruments.[70] The Model Law on Secured Transactions establishes specific rules on paper-based negotiable instruments, which apply to warehouse receipts.[71] For example, article 26 of the Model Law on Secured Transactions provides rules on the effectiveness of security rights against third-party possession.[72] The UNCITRAL Model Law on Electronic Transferable Records sets out rules concerning the use of electronic transferable records, including electronic warehouse receipts.[73] The Model Law on Electronic Transferable Records establishes the principle of functional equality of electronic transferable records and paper-based instruments.[74] The Model Law on Electronic Transferable Records includes provisions concerning issuing and transferring electronic transferable records that are functionally equivalent to paper-based documents.[75] The Model Law on Electronic Transferable Records can benefit countries in transition or without warehouse receipt legislation, as it can facilitate farmers' access to credits.

In 2020, UNIDROIT, together with UNCITRAL, started drafting a model law on warehouse receipts that aims to harmonise regulations in the field.[76] The UNIDROIT MLWR was drafted in cooperation with experts from various intergovernmental organisations, and it is based on the best practice approaches in the field and case studies.[77] The UNIDROIT MLWR is consistent with existing international instruments related to warehouse financing, including the UNCITRAL Model Law on Electronic Transferable Records and the UNCITRAL Model Law on Secured Transactions.[78] Therefore, the UNIDROIT MLWR enables countries in transition and countries without any warehouse receipt legislation to conduct legislative reform more efficiently.

It was identified in this subsection that currently, there is no international instrument that regulates warehouse receipt relationships. However, many intergovernmental organisations emphasised the importance of warehouse receipt legal reform. Since UNIDROIT, in cooperation with UNCITRAL, developed the UNIDROIT MLWR, it is essential to determine how warehouse receipts can contribute to the development of agriculture in Africa. Furthermore, it is vital to understand why it can be particularly beneficial for smallholder farmers. Therefore, the following subsection will explore the connection between agriculture

[70] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016).
[71] ibid art 26.
[72] ibid.
[73] UNCITRAL 'Model Law on Electronic Transferable Records' (13 July adopted 2017).
[74] ibid art 2.
[75] ibid ch 2.
[76] UNIDROIT, 'Model Law on Warehouse Receipts' (*UNIDROIT,* 2022) <https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/#:~:text=First%2C%20UNIDROIT%20will%20lead%20the,through%20an%20UNCITRAL%20Working%20Group.> accessed 13 June 2022.
[77] ibid.
[78] ibid.

and warehouse receipt financing and the importance of the agricultural sector in Africa.

1.1.3. The Connection between Warehouse Receipt System and Agriculture

The agricultural sector is crucial to the economies and populations of developing countries,[79] particularly in the African Region.[80] Agriculture plays a vital role in Africa as the population grows fast, and the region depends on food imports.[81] In 2020, agriculture contributed 20 per cent of Africa's GDP.[82] Since 2015, the situation of hunger and malnourishment in Africa has worsened steadily.[83] Agriculture accounted for almost 20 per cent of GDP,[84] with an average of 43.39 per cent of the population involved in agriculture in 2019.[85] Furthermore, approximately 65 per cent of the region's population depends on micro, small and medium enterprises (hereafter MSMEs) farming as their primary source of income.[86] In 2012, MSMEs employed around 65 per cent of the population.[87] However, around 92.4 per cent of workers employed by MSMEs in 2016 were informal workers.[88] In comparison to other sectors of the economy, the rate of informality is the highest in agriculture, with 97.9 per cent of workers involved in the informal sector.[89] In OHADA member states, the situation is even worse. For example, in Benin, an OHADA member state, 98.5 per cent of businesses were involved in the informal sector in 2008.[90] Furthermore, around 90 per cent of the country's population was employed in the informal economy, contributing to approximately 60-70 per cent of GDP.[91]

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[79] World Bank Group, 'World Development Report. Agriculture for Development' (World Development Report, Washington DC 2008) 1.
[80] International Finance Corporation, 'Money in the Barn: How Warehouse Receipts Can Improve the Life of Farmers' (*IFC,* 13 May 2015) <https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/za_ifc_warehouse_receipts_kenya> accessed 10 June 2022.
[81] African Union, 'Making Finance Work for Africa. Policy Brief on Agricultural Finance in Africa' (African Union, Tunis March 2012) 3.
[82] The Global Economy. Business and Economic Data, 'GDP Share of Agriculture in Africa' (*The Global Economy,* 2022) <https://www.theglobaleconomy.com/rankings/Share_of_agriculture/Africa/> accessed 22 April 2022.
[83] Food and Agriculture Organisation of the United Nations, International Fund for Agricultural Development, the United Nations International Children's Emergency Fund, World Health Organisation, 'The State of Food Security and Nutrition in the World 2019' (FAO, Rome 2019).
[84] The Global Economy (n 82).
[85] The Global Economy. Business and Economic Data, 'Employment in Agriculture in Africa' (*The Global Economy,* 2021) <https://www.theglobaleconomy.com/rankings/employment_in_agriculture/Africa/> accessed 20 October 2021.
[86] African Union (n 81) 3.
[87] ibid.
[88] International Labour Organisation, 'Women and Men in the Informal Economy: A Statistical Picture' (ILO, Geneva 2018) 30.
[89] ibid.
[90] ibid.
[91] World Bank Group, 'Benin Becomes the First OHADA Member Country to Implement the Entreprenant Status, a Simplified Legal Regime Promoting the Formalisation of Micro and Small Enterprises' (*World Bank,* 2015*)* <https://www.worldbank.org/en/news/press- release/2015/05/05/benin-becomes-the-first-ohada-member-country-to-implement-the-entreprenant- status-a-simplified-legal-regime-promoting-the-formalization-of-micro-and-small-enterprises> accessed 15 July 2022.

Agriculture is of great importance to the African region and employs a large number of people. However, the agriculture sector is underfinanced in Africa. In 2018, only around 10 per cent of the total loans were granted to companies operating in the agricultural industry.[92] Moreover, MSMEs from the agricultural sector barely received any loans at all.[93] Warehouse receipt financing can be a 'game changer' for Africa as it is closely connected to agriculture.

Warehouse receipt financing allows different types of commodities stored in warehouses to be used as collateral for a loan. These commodities include manufacturing, fishery, raw materials, and agricultural products. Warehouse receipt financing benefits agriculture by enabling farmers to access financial resources and sell crops later when the market price jumps.[94] Additionally, farmers can jointly sell their stored crops to more prominent traders, reducing transactional costs.[95] An opportunity to sell crops jointly is particularly relevant to MSMEs from developing countries, which mostly are rural poor and struggle to obtain access to financial resources.[96] In Africa, where most farmers cultivate less than two hectares of land,[97] and 65 per cent of the population depends on agriculture as a primary source of income,[98] implementation of warehouse receipt financing can be a 'win-win' situation. It can open access to financial resources to farmers while improving the situation for the rural poor.

One of the benefits of warehouse receipt financing is that a well-functioning warehouse receipt system can reduce post-harvest losses and improve the overall quality of harvested goods.[99] It has been established that smallholder farmers can be more efficient than more prominent farmers.[100] Smallholder farmers can grow and harvest more crops on limited land than larger farms.[101] Implementing warehouse receipt financing can also reduce post-harvest losses during production and storage.[102] This is particularly relevant to Africa, as in Sub-Saharan Africa, around 15 per cent of food losses accounted for post-harvest losses in 2016.[103] In 2019, post-harvest losses were 14 per cent, excluding retail level, and 17 per cent

[92] World Bank Group (n 19).
[93] ibid.
[94] Wehling (n 3) vi.
[95] ibid 2.
[96] Peter Hazell, 'Importance of Smallholder Farms as a Relevant Strategy to Increase Food Security' in Sergio Gomez y Paloma, Laura Riesgo, Kamel Louhichi (eds), *The Role of Smallholder Farms in Food and Nutrition Security* (Springer 2020) 30.
[97] African Union (n 81) 3.
[98] ibid.
[99] Wehling (n 3) vi.
[100] Robert Eastwood, Michael Lipton, Andrew Newell, 'Farm Size' in Robert Evenson, Prabhu Pingali (eds), *Handbook of Agricultural Economics* (Elsevier 2010).
[101] Donald F Larson, Keijiro Otsuka, Tomoya Matsumoto, Talip Kilic, 'Should African Rural Development Strategies Depend on Smallholder Farms? An Exploration of the Inverse-productivity Hypothesis' (2014) 45 Agricultural Economics. The Journal of the International Association of Agricultural Economics 355.
[102] Food and Agriculture Organisation of the United Nations, 'Tracking Progress on Food and Agriculture-related SDG Indicators 2021' (A Report on the Indicators under FAO Custodianship, Rome 2021).
[103] ibid 69.

of all produced food was lost during retail and consumption globally.[104]

A warehouse receipt system can reduce post-harvest losses and improve the quality of goods stored in a warehouse. This can be achieved by establishing storage standards, stabilising commodity prices, and reducing price volatility.[105] Warehouse receipt financing can also stabilise food markets and prices and, as a result, contribute to eliminating hunger and poverty, which directly correlates with achieving the United Nations Sustainable Development Goals (hereafter UN SDGs).[106] This is particularly advantageous for Africa since almost 35 per cent of malnourished people in the world are from the region.[107]

Table 1.1.3.(1)
Employment in Agriculture in OHADA countries (of total % employment) between 2018 and 2019[108]

Employment in Agriculture (of total % employment)		
OHADA Member States	**2018**	**2019**
Benin	39.10%	38.30%
Burkina Faso	27.10%	26.20%
Cameroon	44.20%	43.50%
Central African Republic	70.30%	69.80%
Ivory Coast	41.00%	40.20%
Congo	33.70%	33.50%
Comoros	35.00%	34.40%
Gabon	30.60%	30.00%
Guinea	61.30%	60.70%
Guinea-Bissau	61.10%	60.50%
Equatorial Guinea	39.20%	39.50%
Mali	63.00%	62.40%
Niger	72.90%	72.50%
Democratic Republic of the Congo	64.80%	64.30%
Senegal	30.80%	30.10%
Chad	75.40%	75.10%
Togo	33.10%	32.40%
The average among the OHADA Member States	**48.39%**	**47.85%**

[104] Food and Agriculture Organisation of the United Nations, 'Guidance on Core Indicators for Agrifood Systems - Measuring the Private Sector's Contribution to the Sustainable Development Goals' (FAO, Rome 2021) 74.
[105] Wehling (n 3) vi.
[106] United Nations, 'Sustainable Development Goals' (*United Nations,* 2021) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 1 November 2021.
[107] Food and Agriculture Organisation of the United Nations (n 83) xii.
[108] World Bank Group, 'DataBank. World Development Indicators. Employment in Agriculture (World Bank Group, Washington DC 2021).

The COVID-19 crisis severely impacted smallholder farmers in Africa, who were already in disadvantageous positions.[109] This resulted in food shortages and an increase in food prices in the African region.[110] Before the COVID-19 crisis, the cost of a healthy diet slightly increased worldwide, excluding Africa.[111] However, from 2017 to 2019, the cost of a healthy diet increased by almost 13 per cent in Africa overall and by 33 per cent in Eastern Africa.[112] As a result, around 1 billion people could not afford a healthy diet at all.[113] All of the above are particularly relevant to OHADA member states, as in 2018-2019, almost 50 per cent of the working-age population was involved in agriculture (Tables 1.1.3.(1), 1.1.3.(2)).

Even though the warehouse receipt system has been used widely in African countries and public donor agencies have been supporting projects to facilitate warehouse receipt financing, the system is still associated with significant risks and lacks proper infrastructure.[114] Additionally, the continent is diverse, and each country has established legal practices addressing warehouse receipt financing issues. As a result, there is no standardised approach to warehouse receipt financing across Africa, which hinders smallholder farmers' access to finance and cross-country commerce.[115]

Table 1.1.3.(2)
Employment in Agriculture Comparison between African Countries, World, and OHADA Countries (% of total employment) between 2018 and 2019[116]

Employment in agriculture (% of total employment)		
	2018	**2019**
World	27.20%	26.80%
Sub-Saharan Africa	53.30%	52.90%
Africa Western and Central	42.30%	41.70%
Africa Eastern and Southern	59.50%	59.20%
OHADA Member States	48.39%	47.85%

Governments and stakeholders in Africa are familiar with warehouse receipt financing and its benefits, but it is still considered risky.[117] Public donor agencies have been involved in

[109] United Nations Department of Economic and Social Affairs, 'The Sustainable Development Goals Report 2020' (United Nations, New York 2020).
[110] ibid.
[111] Food and Agriculture Organisation of the United Nations (n 83) 26.
[112] ibid.
[113] ibid 27.
[114] Frank Hollinger, Lamon Rutten, Krassimir Kirakov, 'The Use of Warehouse Receipt Finance in Agriculture in Transition Countries' (FAO Investment Centre Working Paper, Rome 2009) 50.
[115] African Development Bank, 'Africa's Agricultural Commodity Exchanges, Warehouse Receipt Systems and New Standards' (Côte d'Ivoire 2017) 71.
[116] World Bank Group (n 19).
[117] Hollinger (n 114) 50.

projects aiming to facilitate warehouse receipt financing in Africa. However, banks are hesitant to provide credits against agricultural collateral if no adequate legislative protection is in place.[118] For example, in 2009, the International Finance Corporation, in partnership with public donors, conducted the Warehouse Receipts Financing Initiative in Ethiopia.[119] The project facilitated access to financing resources for farmers and the advancement of commodity markets.[120] One significant obstacle in promoting the warehouse receipt system in Africa is the diversity of legal and business practices that address warehouse receipt financing. A standardised approach regarding warehouse receipt financing will enable MSMEs from the African region to engage in cross-country commerce and financial markets.[121] However, over the recent decade, little has been done to change the situation and encourage farmers to participate in cross-country commerce.[122]

To approach the diversity of legal systems and different business practices, the UNIDROIT MLWR was drafted neutrally. Such an approach helped UNIDROIT to address general issues in warehouse receipt financing and create one standardised approach to law reform. This PhD research examines the regional approach to law reform based on the principles of the UNIDROIT MLWR. The regional approach will help to adapt the UNIDROIT MLWR to address regional traditions in doing business and combine best practice approaches with local business specificities. The regional approach to law reform can create understanding and trust among all the stakeholders so that they will not oppose the warehouse receipt law reform. The warehouse receipt law reform in Africa can be conducted by one of the regional intergovernmental organisations. This will guarantee the acceptance of the new warehouse receipt law reform by all stakeholders, including financial organisations and farmers.

This subsection established the importance of the agricultural sector and its connection with warehouse receipts. It was highlighted that UNIDROIT developed an international instrument to regulate warehouse receipt relationships, namely the UNIDROIT MLWR.[123] The benefits of the regional approach to warehouse receipt law reform were identified. At this stage, it is essential to analyse which regional organisations have the capacity to conduct warehouse receipt law reform in Africa. In the following subsection, regional intergovernmental organisations and regional economic communities will be discussed. The following subsection

[118] ibid.
[119] International Finance Corporation, 'Warehouse Receipts Help Fill Africa's Agricultural Financing Gap' (*IFC,* 2022) <https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/whr-symposium-ethiopia> accessed 10 June 2022.
[120] ibid.
[121] African Development Bank (n 115) 71.
[122] ibid 20.
[123] see s 1.2.

will determine OHADA's potential to conduct a warehouse receipt law reform. It will explain why OHADA is a suitable intergovernmental organisation in Africa to conduct warehouse receipt law reform. The following subsection will discuss the experience of OHADA in cooperating with intergovernmental organisations while drafting instruments in private international commercial laws.[124]

1.1.4. OHADA and Regulation of Transnational Commercial Law in Africa

Several regional economic communities in Africa specifically focus on promoting economic cooperation and integration. One of the largest regional organisations in Africa in terms of the number of member states is the African Union, which currently consists of 55 member states and aims to facilitate international cooperation.[125] Among other regional economic communities that aim to achieve economic cooperation and integration are the Economic Community of West African States (ECOWAS),[126] the Arab Maghreb Union (UMA),[127] the East African Community (EAC),[128] the Common Market for Eastern and Southern Africa (COMESA),[129] the Community of Sahel-Saharan States (CEN-SAD),[130] the Economic Community of Central African States (ECCAS/CEEAC),[131] the Intergovernmental Authority of Development (IGAD),[132] the Southern African Development Community (SADC),[133] the Southern African Customs Union (SACU),[134] the International Conference on the Great Lakes Region (ICGLR),[135] and the Organisation for Harmonisation of Business Law in Africa.[136]

The African Union has been striving to achieve deeper integration and expand the number of its member states. However, the approach of the African Union lacks a legislative

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[124] see ch 3 for a detailed discussion of the legal framework and working methods of OHADA.
[125] African Union, 'About the African Union' (*African Union,* 2021) <https://au.int/en/overview> accessed 20 October 2021.
[126] Economic Community of West African States, 'Basic Information' (*ECOWAS,* 2021) <https://www.ecowas.int/about-ecowas/basic-information/> accessed 21 October 2021.
[127] Arab Maghreb Union, 'Objectives and Tasks' (*MAGHREBARABE,* 2019) <https://maghrebarabe.org/fr/objectifs-et-taches/> accessed 1 November 2021.
[128] East African Community, 'About EAC' (*EAC,* 2021) <https://www.eac.int/about-eac> accessed 1 November 2021.
[129] Treaty Establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 08 December 1994) art 1.
[130] Pan African Chamber of Commerce and Industry, 'The Community of Sahel-Saharan States – CEN-SAD' (*PACCI,* 2021) <https://www.pacci.org/the-community-of-sahel-saharan-states-cen-sad/> accessed 1 November 2021.
[131] Economic Community of Central African States, 'Presentation' (*CEEAC-ECCAS,* 2021) <https://ceeaceccas.org/en/#presentation> accessed 20 October 2021.
[132] Intergovernmental Authority of Development, 'About Us' (*IGAD,* 2021) <https://igad.int/about-us> accessed 1 November 2021.
[133] Southern African Development Community, 'About SADC' (*SADC,* 2021) <https://www.sadc.int/about-sadc/> accessed 1 November 2021.
[134] Southern African Customs Union, 'About SACU' (*SACU,* 2021) <https://www.sacu.int/show.php?id=395> accessed 1 November 2021.
[135] International Conference on the Great Lakes Region, 'ICGLR Overview' 2018) <https://icglr.org/index.php/en/background> accessed 1 November 2021.
[136] OHADA, 'General Review' (*OHADA,* 2021) <https://www.ohada.org/en/general-overview/> accessed 20 October 2021.

element of private international law, which is crucial for facilitating economic development and integration among its member states.[137] Unlike the African Union and the above-mentioned regional economic communities, OHADA focuses on harmonising business laws in Africa. The OHADA laws are called 'Uniform Acts', which are hard laws by nature.[138] The Uniform Acts are mandatory for all OHADA member states and have priority over domestic legislation if there is a contradiction.[139] OHADA cooperates with various regional unions and organisations, which enables it to share its expertise with them.[140]

To date, OHADA has successfully drafted and implemented laws in the field of private law solely or in cooperation with intergovernmental organisations. Thus, OHADA, in collaboration with UNIDROIT, drafted the Draft Uniform Act on Contract Law based on the UNIDROIT Principles of International Commercial Contracts.[141] OHADA drafted and implemented the Uniform Act Organising Securities[142] based on the UNCITRAL Legislative Guide on Secured Transactions.[143] OHADA has a unique approach and position to conduct warehouse receipt law reform, as its primary focus is to harmonise business laws. In addition to the distinctive position, OHADA has expertise and experience in cooperating with intergovernmental organisations while conducting law reforms.

OHADA was founded in 1993 in response to the economic crisis and the significant decline in investments in Africa.[144] The main objective of OHADA is to attract investments and promote the economic development of its member states by implementing simple and harmonised business rules tailored to their regional specificities.[145] In essence, the OHADA Uniform Acts are considered transnational laws due to their nature.[146]

Many legal scholars agree that regional economic communities and organisations can achieve the harmonisation of business laws in the African region.[147] Harmonisation can first be conducted among a group of countries with the same legal tradition, such as OHADA, and then later extended to the entire African region. OHADA is one of the few regional economic

[137] Richard Frimpong Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' (2006) 55 The International and Comparative Law Quarterly 911.
[138] Renaud Beauchard, Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (World Bank, Justice & Development Working Paper Series, Washington DC 2011) 1.
[139] OHADA Treaty.
[140] Beauchard (n 138) 14.
[141] Akin Akinbote, 'Strategies for Adopting OHADA Laws in Anglophone African Countries' (OHADA, Nigeria February 2008) 4.
[142] Uniform Act Organising Securities (adopted 15 December 2010).
[143] UNCITRAL 'Legislative Guide on Secured Transactions' (adopted 11 December 2008) A/63/438 (Vienna 2009).
[144] OHADA Treaty.
[145] ibid art 1.
[146] see s 2.1. for the definitions of commercial and transnational laws.
[147] Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011).

organisations in Africa that can provide a legal framework for the development and harmonisation of private commercial laws.[148] Additionally, OHADA is among the few economic communities in Africa that have the authority to draft and implement laws in the field of commercial law.[149]

The European Union's experience in harmonising private commercial law can serve as a model for harmonising private commercial law in African countries.[150] The European Union, a member of the Hague Conference on Private International Law, can be an example of how African intergovernmental organisations can harmonise commercial laws.[151] Among all those mentioned above, African regional organisations and economics communities, OHADA is the only intergovernmental organisation in Africa that can derive experience from the European Union. This is because OHADA has a mandate to conduct and implement reforms in private commercial laws. With the support of the African Union, the expertise and experience of OHADA can later be expanded to the African Economic Community. This can achieve three goals: harmonising laws, creating deeper legal relations among states, and facilitating cross-state commerce.[152]

This section established the history of the development of warehouse receipt law norms worldwide. The lack of international instruments governing warehouse receipt relationships was identified. The connection between agriculture and warehouse receipts and the need for warehouse receipt law reform in Africa was established. It was established that OHADA has a unique mandate for conducting law reform in its member states. The following section will determine which organisation is suitable for the case study for this PhD project. The following subsection will also establish the limitations of this research, as Africa is diverse,[153] and it is impossible to cover legal norms for the whole of Africa in this PhD project.

1.2. Scope of Research

This section explains why OHADA was selected as a case study for this PhD project. Due to the time limit of this research and the fact that various commodities can be used as collateral in warehouse receipt relationships,[154] it is also essential to establish the research limitations in this section.

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[148] see s 1.4.
[149] Johannes Döveling, Hamudi I Majamba, Richard Frimpong Oppong, Ulrike Wanitzek, *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Regional Economic Communities* (LawAfrica Publishing (K) Ltd 2018).
[150] Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (adopted 9 May 2008, entered into force 1 December 2009).
[151] Hague Conference on Private International Law, 'Member' (*HCCH,* 2022) <https://www.hcch.net/en/states/hcch-members/details1/?sid=220> accessed 10 June 2022.
[152] Oppong (n 137).
[153] see s 1.3.
[154] see s 1.1.

1.2.1. The Focus of the Research. Case Study - OHADA

This PhD project focuses on the UNIDROIT MLWR and its adoption and implementation in OHADA member states. This research aims to analyse the UNIDROIT MLWR and assess the possibility of adopting it to the regional business traditions and practices prevalent in OHADA member states, which share a similar civil law background.[155] Therefore, in this PhD research, the UNIDROIT MLWR is thoroughly analysed, and the possibility of tailoring it to the background of OHADA' civil law is assessed.

OHADA was chosen as an intergovernmental organisation for a case study for several reasons. Firstly, OHADA has adopted UNIDROIT and UNCITRAL instruments to meet the region's needs. For example, OHADA drafted and implemented the Uniform Act Organising Securities, based on the UNCITRAL Legislative Guide on Secured Transactions.[156] OHADA has significant experience in successfully adopting international instruments. Furthermore, OHADA has successfully drafted and implemented nine Uniform Acts in the field of private international law to date.[157] This makes OHADA the only intergovernmental organisation in Africa with unique expertise in successfully drafting and implementing commercial laws in cooperation with international organisations.

Secondly, the main objective of OHADA is to harmonise commercial law among its member states, distinguishing it from other regional organisations and unions that mainly focus on regional cooperation and economic integration. OHADA aims to establish 'simple modern common rules' tailored to the member states' financial and legal needs.[158] As a result, OHADA's mandate, coupled with its unique goals, can achieve the goal of harmonisation of laws in the field of warehouse receipts quicker and smoother.

Thirdly, the OHADA Uniform Acts are hard laws by nature, which means they are mandatory to all member states, even if they conflict with domestic legislation.[159] Two-thirds of the member states' representatives must vote in favour of the OHADA Uniform Acts for them to be adopted and enforced.[160] The OHADA Treaty[161] ensures that once accepted by member states, the Uniform Acts are promptly implemented and enforced. This guarantees the uniform application and implementation of the warehouse receipt law.

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[155] Justin Melong, 'Implementation of OHADA Laws in a Bilingual and Bijural Context: Cameroon as a Case in Point' (2013) 2 Revue de l'ERSUMA 259.
[156] UNCITRAL 'Legislative Guide on Secured Transactions' (adopted 11 December 2008) A/63/438 (Vienna 2009).
[157] OHADA, 'Uniform Acts' (*OHADA,* 2022) <https://www.ohada.org/en/uniform-acts/> accessed 10 June 2022.
[158] OHADA Treaty art 1.
[159] ibid art 10.
[160] ibid art 8.
[161] ibid.

Finally, OHADA member states are from the same civil law background.[162] This makes it easier to identify the member states' local business specificities and adapt the UNIDROIT MLWR to them.[163] Since most OHADA member states have a French civil law background, it is easier to recognise and address regional business specificities and then adapt the UNIDROIT MLWR to them. As a result, it increases OHADA member states' chances of accepting the warehouse receipt law and its quicker implementation.

Several Western and Central African countries signed the OHADA Treaty, which granted OHADA the authority to create supranational laws.[164] Among the reasons behind the creation of OHADA were the lack of foreign investments in Africa and the lack of experience and financial resources of individual states to draft and implement legislation in the field of international commercial laws.[165] The establishment of OHADA was driven by the unsatisfactory economic situation in Africa, which affected businesses, investors, financial institutions and the population.[166]

OHADA currently has seventeen member states (Image 1.2.1.):

1. Guinea-Bissau (ratified the OHADA treaty 15.01.1994, entered into force 20.02.1996);
2. Senegal (ratified the OHADA treaty 14.06.1994, entered into force 18.09.1995);
3. Central African Republic (ratified the OHADA treaty 13.01.1995, entered into force 18.09.1995);
4. Mali (ratified the OHADA treaty 07.02.1995, entered into force 18.09.1995);
5. Comoros (ratified the OHADA treaty 20.02.1995, entered into force 18.09.1995);
6. Burkina Faso (ratified the OHADA treaty 06.03.1995, entered into force 18.09.1995);
7. Benin (ratified the OHADA treaty 08.09.1995, entered into force 18.09.1995);
8. Niger (ratified the OHADA treaty 05.06.1995, entered into force 08.09.1995);
9. Ivory Coast (ratified the OHADA treaty 29.09.1995, entered into force 11.02.1996);
10. Cameroon (ratified the OHADA treaty 20.10.1995, entered into force 03.12.1996);
11. Togo (ratified the OHADA treaty 27.10.1995, entered into force 19.01.1996);
12. Chad (ratified the OHADA treaty 13.04.1996, entered into force 02.07.1996);
13. Congo (ratified the OHADA treaty 28.05.1997, entered into force 17.07.1999);
14. Gabon (ratified the OHADA treaty 02.02.1998, entered into force 05.04.1998);

[162] see s 1.5.
[163] Marcel Fontaine, 'Law Harmonisation and Local Specificities – a Case Study: OHADA and the Law of Contracts' (2013) 18 Uniform Law Review 50.
[164] OHADA Treaty.
[165] Ngaundje Doris Leno, 'The Organisation for the Harmonisation of Business Law in Africa (OHADA) System: Overview of Some Benefits and Problem Areas' (2018) 2 International Journal of Advanced Research and Publications 106.
[166] Peter Winship, 'Law and Development in West and Central Africa (OHADA)' (2016) <https://ssrn.com/abstract=2772121> accessed 10 February 2022.

15. Equatorial Guinea (ratified the OHADA treaty 16.04.1999, entered into force 13.08.1999);
16. Guinea (ratified the OHADA treaty 05.05.2000, entered into force 21.11.2000);
17. Democratic Republic of Congo (ratified the OHADA treaty 27.06.2012, entered into force 12.09.2012).[167]

OHADA initially adopted French as its official language. However, in 2008, OHADA expanded its working languages to Spanish, Portuguese, and English.[168] One of the reasons for this expansion was to accommodate member states that do not speak French as their official language. For example, Cameroon has English and French as its official languages,[169] Equatorial Guinea has two official languages, which are Spanish and French,[170] and Guinea-Bissau has Portuguese as its official language.[171] The second reason for expanding OHADA's working languages was to promote the development of the African Economic Community and attract new member states.[172]

Although OHADA offers many advantages and is suitable for conducting warehouse receipt law reform, certain barriers exist to extending its legislation to other African countries. The diversity of languages across African states is closely connected to their legal systems and traditions.[173] While OHADA has declared English one of its official languages, there are currently no official translations of the Uniform Acts or other documents into English.[174] This creates issues with understanding the OHADA instruments in common law countries and translating and implementing them in countries with a common law background. However, Cameroon is a bijural country with a common law and civil law background, and it is also an OHADA member state.[175] Cameroon's experience in adopting and implementing the OHADA Uniform Acts can be useful for other countries with a common law background in adopting the OHADA legal framework.

[167] OHADA, 'OHADA. History of OHADA' (*OHADA,* 2022) <https://www.ohada.org/en/history-of- ohada/> accessed 10 February 2022.
[168] OHADA Treaty art 42.
[169] OHADA, 'OHADA. Cameroon' (*OHADA,* 2022) <https://www.ohada.org/en/cameroon/> accessed 10 February 2022.
[170] OHADA, 'OHADA. Equatorial Guinea' (*OHADA,* 2022) <https://www.ohada.org/en/equatorial-guinea/> accessed 10 February 2022.
[171] OHADA, 'OHADA. Guinea Bissau ' (*OHADA,* 2022) <https://www.ohada.org/en/guinea-bissau/> accessed 10 February 2022.
[172] OHADA Treaty para 1-2.
[173] Melong (n 155).
[174] ibid.
[175] ibid.

Image 1.2.1.
Map of OHADA Member States[176]

Another issue is that African countries are often simultaneously members of multiple regional economic communities and regional organisations. Most of the regional organisations and economic communities share common goals and objectives. For instance, some OHADA countries are members of different regional organisations and unions. As a result, the OHADA Uniform Acts could overlap and contradict the policies and legislation of other regional organisations to which a country belongs.[177] For instance, a few OHADA member states are also members of the Economic Community of West African States (hereafter ECOWAS).[178] Both OHADA and ECOWAS have similar goals of harmonisation of policies in the commercial field and facilitating economic integration.[179] As a result, if a country adheres to the policies and laws of one organisation, it likely contradicts the policies of another one, which can create legal uncertainty and confusion. For example, the OHADA Uniform Act on Contract for the Carriage of Goods by Road[180] potentially overlaps and contradicts ECOWAS transport policy programmes.[181] However, it is essential to recognise that these organisations have different mandates. OHADA is an intergovernmental organisation with supranational power, while ECOWAS is a subregional group of countries.

[176] OHADA, 'OHADA.com' (*Association for the Unification of Law in Africa*, 2023) < https://www.ohada.com/> accessed 10 March 2023.
[177] Beauchard (n 138) 13-14.
[178] Economic Community of West African States (n 126).
[179] ibid.
[180] Uniform Act on Contracts for the Carriage of Goods by Road (adopted 22 March 2003).
[181] Economic Community of West African States, 'Infrastructure' (*ECOWAS,* 2022) <https://ecowas.int/ecowas-sectors/infrastructure/> accessed 12 February 2022.

Some African countries, such as Ghana and Nigeria, have assessed the possibility of becoming member states of OHADA and implementing its Uniform Acts despite their common law backgrounds.[182] Madagascar, Mauritania, Mauritius, Ethiopia, Djibouti, Rwanda, Burundi, Cape Verde, and Sao Tome and Principe have expressed interest in OHADA but have not yet attempted to join OHADA.[183] Although most OHADA member states share a civil law background, common law countries can adopt the OHADA Uniform Acts since some provisions of the OHADA laws are already recognised and accepted by common law lawyers in Africa.[184] Therefore, there is a possibility that the results of this research can not only apply to OHADA member states but also could potentially be accepted by other countries in Africa.

Another focus of this PhD research is to analyse the possibility of implementing legal transplants in conjunction with the provisions of the UNIDROIT MLWR. The goal of legal transplants would be to help OHADA to better adopt the provisions of the UNIDROIT MLWR to OHADA member state specificities. This is particularly relevant given that most OHADA member states belong to the same legal family. The possibility of legal transplants is assessed to tailor the UNIDROIT MLWR to the regional needs of OHADA. The potential adoption of provisions from the US Uniform Commercial Code[185] is assessed in relation to developing warehouse receipt regulations in OHADA countries. Additionally, since most OHADA member states share a French civil law background and French warehouse receipt legislation is robust, French legislation regarding warehouse receipts is also considered. The provisions from the French Commercial Code[186] related to warehouse receipts and secured transactions are evaluated for their potential adoption in a Uniform Act on Warehouse Receipts or a soft law instrument for OHADA to regulate warehouse receipt financing.

This subsection established that despite some implementation issues of the OHADA Uniform Acts, OHADA is a suitable candidate for conducting warehouse receipt law reform. It is essential to establish the focus and limitations of this PhD project, which will be discussed in the following subsection.

1.2.2. Limits of the Research

As previously established, most African countries, including OHADA member states, rely heavily on agriculture as a significant source of income.[187] In fact, in some OHADA member states, the dependency on agriculture is three times higher than the global average.[188] In 2019,

[182] Salvatore Mancuso, 'The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) 14 Annual Survey of International & Comparative Law 39.
[183] Beauchard (n 138) 18.
[184] Mancuso (n 182) 53.
[185] Commercial Code 1807 (France).
[186] Uniform Commercial Code 1952 (US).
[187] see s 1.1.3.
[188] see s 1.1.3.

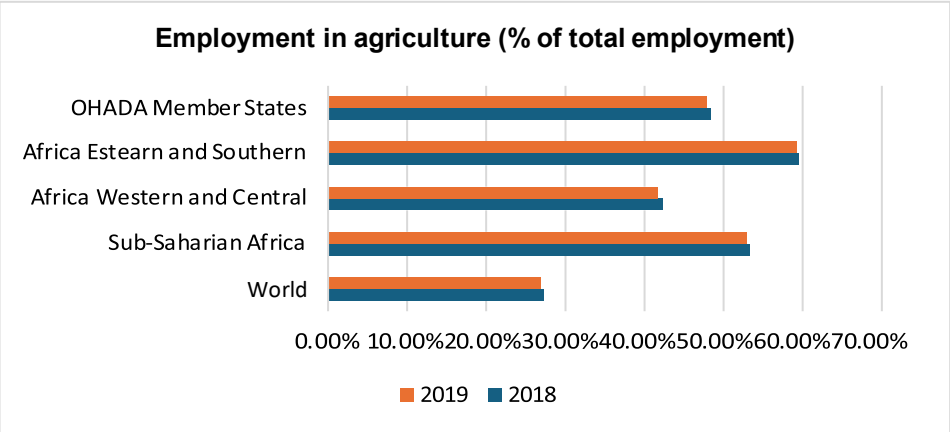
26.8 per cent of the world's working population was involved in the agricultural sector, but in OHADA member states, this percentage is almost twice as high (Chart 1.2.2.). Therefore, it is reasonable to focus this research on warehouse receipt legislation in the agricultural context.

Considering that agriculture is vital for the African region, including OHADA member states, and it is one of the primary sources of income,[189] other types of collateral are not discussed in this PhD research. Excluding other types of collateral supports a more precise identification of the needs of smallholder farmers in OHADA countries, as most of them are MSMEs.[190] However, the proposed legal reform could be adopted for other types of collateral, as the mechanisms for addressing regional issues are mostly the same. The results of this PhD research may also help to tailor the UNIDROIT MLWR to the legal background of OHADA member states in the context of other types of collateral for future application.

A few countries have implemented legislation governing warehouse receipt financing.[191] However, since most countries in Africa, including OHADA member states, are not likely to switch to electronic warehouse receipts anytime soon, this PhD project focuses on developing draft legislation concerning paper-based warehouse receipts. The main objective is to establish rules for paper-based warehouse receipts that can later be adopted for electronic warehouse receipts. For countries that do not have any legislation on warehouse receipts, it is more beneficial to establish ground rules for the use of paper-based warehouse receipts. These rules can later be amended and enriched with provisions specific to electronic warehouse receipts. This two-stage approach to law reform is particularly beneficial for countries with no warehouse receipt legislation, such as Cameroon.[192] It establishes fundamental rules and principles for the use of warehouse receipts, which can later be adopted for electronic warehouse receipts. Therefore, this PhD project only provides a general discussion of the legislative provisions regarding the use of electronic warehouse receipts and blockchain technologies. A detailed analysis needs to be conducted separately.

[189] International Finance Corporation (n 8).
[190] African Union (n 81) 3.
[191] see s 1.1.1.
[192] ibid.

Chart 1.2.2.
Employment in Agriculture: OHADA Countries, Globally, and African Countries (% of total employment) 2018-2019[193]



This section established a case study for this PhD project, the research focus, and the research limitations. Formulating research questions is crucial to ensuring that this PhD project reaches its goal and objective. The following section will outline the research questions that will be answered by the end of this PhD project.

1.3. Research Questions

The main research question of this PhD project is to determine if it is feasible to adopt the UNIDROIT MLWR in OHADA member states in the form of a Uniform Act on Warehouse Receipts or soft law instrument and, as a result, harmonise warehouse receipt legislation in OHADA member states. The study explores different possibilities for the adoption of the UNIDROIT MLWR. This research has three main objectives. First, the research aims to comprehensively analyse the provisions of the UNIDROIT MLWR and develop a thorough understanding of it. Second, the possibility of adopting the provisions of the UNIDROIT MLWR to the specificities of the OHADA member states is evaluated. Third, different options for conducting warehouse receipt law reform in OHADA member states are assessed.

This research aims to evaluate the existing regional instruments and regional legal traditions. It identifies what has been done in the field of warehouse receipts and how the final goal of harmonisation of warehouse receipt legislation in OHADA can be achieved. Based on a comprehensive analysis, this research identifies the specific needs of OHADA member states concerning warehouse receipt legislation and proposes legislative solutions based on regional specificities. The proposed legal solutions can be based solely on the UNIDROIT MLWR or a combination of the UNIDROIT MLWR and legal transplants from developed countries (the US and France).

[193] World Bank Group (n 79).

All the listed research objectives will be achieved by answering the following research questions:

1. How can OHADA achieve the final goal of harmonisation of warehouse receipt legislation? It is assessed whether it would be beneficial to conduct warehouse receipt legal reform and develop a hard law norm in the form of a Uniform Act on Warehouse Receipts or to propose a legal reform based on a soft law instrument and avoid developing a binding hard law instrument for OHADA.
2. Why is OHADA a suitable intergovernmental organisation to conduct a warehouse receipt law reform and develop successful transnational laws in the field? The mandate of OHADA and expertise in developing commercial law in private international law is discussed. Additionally, the process of developing the OHADA Uniform Acts, OHADA's cooperation with external intergovernmental organisations, and OHADA's previous experience in drafting legal norms is assessed.
3. Can legal transplants be a beneficial solution for OHADA member states in adapting the UNIDROIT MLWR to OHADA member states' backgrounds? The possibility of complementing provisions of the UNIDROIT MLWR with legal transplants from countries with robust warehouse receipt legislation (the US and France) is assessed. Additionally, it is evaluated if warehouse receipt legislation from the US and France can be incorporated into a Uniform Act on Warehouse Receipts or soft law instrument for OHADA. It is determined how these laws can help to address specific needs and business traditions in OHADA member states, thereby increasing access to finance for smallholders from OHADA member states.

This section established the research questions for this PhD project. The following section will identify how this PhD research can contribute to the further development of knowledge regarding warehouse receipts.

1.4. Contribution to Knowledge

This research contributes to the knowledge of warehouse receipt legislation in several ways. First, the UNIDROIT MLWR is thoroughly analysed to establish how it can be implemented in OHADA member states. The research identifies the legal background of OHADA member states and regional specificities related to the warehouse receipt system and finds ways to address them in one single legislation. It is also determined whether addressing them in a Uniform Act on Warehouse Receipts or soft law instrument is more beneficial for OHADA member states.

Second, the research answers the question of whether regional organisations can assist in implementing the UNIDROIT MLWR and whether it is better to develop legislation on a

regional level to address the specific needs of MSMEs or if it is better for each country solely to develop their warehouse receipt domestic legislation. This research evaluates the possibility of implementing an OHADA Uniform Act on Warehouse Receipts or a soft law instrument that OHADA member states can incorporate into their existing legislation without developing a specific regional instrument concerning warehouse receipt. This PhD project also explores the option of a mixed approach that combines a hard law norm with the legal reform of existing legislation connected to the warehouse receipt field. This research determines the most effective approach to harmonising warehouse receipt law in OHADA member states. It compares listed approaches to law reform and assesses which one is more suitable for OHADA. This PhD research draws on OHADA's previous experience implementing the Uniform Acts. Additionally, this research explores the possibility of adopting legal transplants and how positive experiences from the US and France can complement the proposed legal reform for OHADA.

Third, this research focuses on the agricultural sector, as most African farmers are smallholders who primarily rely on agriculture as their main source of income.[194] Although this PhD project mainly focuses on the agricultural sector, provisions concerning agriculture can later be adopted for other types of collateral. The main objective of this research is to identify specific provisions that should be included in a Uniform Act on Warehouse Receipts or soft law instrument to help MSMEs from OHADA member states to obtain access to financial resources and benefit from the warehouse receipt relationship. Apart from focusing on warehouse receipt law reform in OHADA member states, this research also identifies issues related to the implementation of either a Uniform Act on Warehouse Receipts or a soft law instrument and how it could be adopted smoothly and faster.

One of the main advantages of the warehouse receipt system is that it provides access to finance. This PhD project helps to exploit that fruitfully and, through legal reform, enables farmers in Africa to gain access to finance. This, in turn, creates new economic opportunities for MSMEs in OHADA member states by providing them with access to bank loans, increasing their revenues and reducing 'the cost of a loan.' Ultimately, this contributes to achieving the UN SDGs of eliminating poverty and hunger and providing opportunities for work and economic development.[195] Overall, this research plays a significant role in promoting economic growth in OHADA member states.

Finally, the ultimate objective of this research is to propose warehouse receipt legal reform based on a Uniform Act on Warehouse Receipts or soft law for OHADA. This research

[194] see s 1.1.3.
[195] United Nations, 'Sustainable Development. The 17 Goals' (*United Nations,* 2021) <https://sdgs.un.org/goals> accessed 1 December 2021.

evaluates the possibility of adopting the legal practices of developed countries with robust warehouse receipt legislation (the US and France) in warehouse receipt law reform for OHADA. This PhD project also determines the possibility of tailoring such practices to the legal specificities and business traditions of OHADA member states. Thus, this research aims to propose warehouse receipt legal reform that is unique and tailored to the regional issues of OHADA in the form of a Uniform Act on Warehouse Receipts or a soft law instrument.

1.5. Practical Implications

A law reform based on the UNIDROIT MLWR can create one standardised approach for OHADA member states, which can allow smallholders access to financial resources and participate in domestic and cross-country commerce, which in turn will directly contribute to achieving the UN SDGs: Goal 1'No Poverty',[196] Goal 2 'Zero Hunger',[197] Goal 3 'Good Health and Well-being',[198] Goal 5 'Gender Equality',[199] Goal 8 'Decent Work and Economic Growth',[200] Goal 10 'Reduced Inequalities',[201] Goal 12 'Responsible Consumption and Production',[202] Goal 15 'Life on Land'.[203]

Despite great advancement in achieving the United Nations Millennium Development Goals, progress was disproportional, and poverty and hunger remained a severe problem in Africa in 2015.[204] Compared with other regions, the African journey in adopting the UN SDGs started in 2016 from a less advantageous position.[205] Africa is still mostly rural, which affects Africa's exclusion in many aspects of economic development,[206] thereby increasing the importance of agriculture in the region. Moreover, the poorest countries in the world are mostly commodity-dependent agricultural economies, with many of the poorest people living in rural

[196] United Nations, 'Goal 1. End Poverty in All its Forms Everywhere' (*United Nations*, 2025) <https://sdgs.un.org/goals/goal1> accessed 20 January 2025.
[197] United Nations, 'Goal 2. End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture' (*United Nations*, 2025) <https://sdgs.un.org/goals/goal2> accessed 20 January 2025.
[198] United Nations, 'Goal 3. Ensure Healthy Lives and Promote Well-being for All at All Ages' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal3> accessed 20 January 2025.
[199] United Nations, 'Goal 5. Achieve Gender Equality and Empower All Women and Girls' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal5> accessed 20 January 2025.
[200] United Nations, 'Goal 8. Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal8> accessed 20 January 2025.
[201] United Nations, 'Goal 10. Reduced Inequality Within and Among Countries' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal10> accessed 20 January 2025.
[202] United Nations, 'Goal 12. Ensure Sustainable Consumption and Production Patterns' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal12> accessed 20 January 2025.
[203] United Nations, 'Goal 15. Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Deforestation, and Halt and Reserve Land Degradation and Halt Biodiversity Loss' (*United Nations,* 2025) <https://sdgs.un.org/goals/goal15> accessed 20 January 2025.
[204] African Union, 'Common African Position (CAP) on the Post 2015 Development Agenda' (African Union, Addis Ababa March 2014).
[205] Sustainable Development Goals Center for Africa, 'AFRICA 2030: SDGs Within Social Boundaries - Leave no One Behind Outlook Report' (Outlook Report, Kigali July 2021) 3.
[206] Maitreyi Bordia Das, Sabina Anne Espinoza, 'Inclusion Matters in Africa' (WBG, Washington DC 2019).

areas.[207]

In 2020, twenty-one per cent of the population in Africa was facing hunger.[208] Even under a positive scenario, by 2030, it is estimated that 19 per cent of Africa's population will remain poor.[209] This directly affects achieving the UN SDG 3, as in 2020, 346.6 million people in Africa experienced severe food insecurity, and 798.8 million people experienced moderate food insecurity.[210] Moreover, all regions except Africa indicated small increases in the cost of a healthy diet in 2019.[211] Thus, from 2017 to 2019, the cost of a healthy diet jumped by 12.9 per cent in Africa, and in Eastern Africa, it jumped by 33 per cent.[212] Therefore, a healthy diet was unaffordable for more than 1 billion people on the continent in 2019.[213]

Extensive agricultural practices are associated with biodiversity loss, affecting the ecosystem and human health.[214] The COVID-19 crisis affected all countries and countries' investments in healthcare. In Africa, where government investment in healthcare is already low, especially in Sub-Saharan Africa, where governments spent only around 1.9 per cent of GDP on healthcare in 2017, it can lead to catastrophe.[215] Moreover, COVID-19 also affected the population's access to social protection. This is particularly relevant to Africa, as in 2017, more than 80 per cent of people in Africa did not have access to social protection at all.[216] Moreover, almost 300 million children in Sub-Saharan Africa in 2014 lived in poverty and experienced multiple deprivations, which affected their well-being and development.[217] As a result, it directly affects the achievement of the UN SDG 3.

Many women are involved in agricultural labour in developing countries, including Africa.[218] However, fewer women have access to ownership rights of legally secured tenure rights over agricultural land in Africa, which is important for obtaining long-term loans and can

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[207] United Nations Department of Economic and Social Affairs, 'Trends in Sustainable Development. Agriculture, Rural Development, Land, Desertification Drought' (UN, New York 2012).
[208] United Nations Department of Economic and Social Affairs, 'The Sustainable Development Goals Report 2020' (UN, New York 2020).
[209] World Bank Group, 'A Measured Approach to Ending Poverty and Boosting Shared Prosperity' (WBG Policy Research Report, Washington DC 2015).
[210] International Fund for Agricultural Development, Food and Agriculture Organisation of the United Nations, United Nations Children Emergency Fund, the United Nations World Food Programme, World Health Organisation, 'The State of Food Security and Nutrition in the World 2021. Transforming Food Systems of Food Security, Improved Nutrition and Affordable Healthy Diets for All' (FAO, Rome 2021) 18.
[211] ibid 26.
[212] ibid.
[213] ibid 27.
[214] United Nations Environment Programme, World Health Organisation, 'Connecting Global Priorities: Biodiversity and Human Health. A State of Knowledge Review' (WHO, UNEP, Geneva 2015).
[215] United Nations Department of Economic and Social Affairs, 'Sustainable Development Outlook 2020. Achieving SDGs in the Wake of COVID-19: Scenarios for Policymakers' (UN, 2020).
[216] ibid.
[217] Marlous de Milliano, Ilze Plavgo, 'CC-MODA – Cross Country Multiple Overlapping Deprivation Analysis: Analysing Child Poverty and Deprivation in Sub-Saharan Africa' (UNICEF Office of Research Working Paper, Florence November 2014).
[218] Food and Agriculture Organisation of the United Nations, 'Tracking Progress on Food and Agriculture-related SDG Indicators 2021' (FAO, Rome 2021) 48.

also encourage them to join producer organisations.[219] Moreover, MSMEs run by women, mainly from poor rural areas, cannot access financial resources as they lack collateral to apply for official sources of credit.[220] However, women having access to and control over land is essential for achieving the UN SDG 5.[221]

The COVID-19 crisis has heavily affected Africa and undermined the progress that has been made in terms of employment and achieving the UN SDG 8. Thus, in 2021, around 471 million people were unemployed.[222] Furthermore, the extreme working poverty rate increased from 31.8 per cent in 2019 to 34 per cent in 2020,[223] with around 154 million working people living with their families in extreme poverty with less than two dollars a day and additionally around 119 million working people and their families living in moderate working poverty having between $1.9 to $3.20 a day across Africa.[224] Moreover, many women work low-paid, casual and temporary jobs and cannot acquire permanent jobs.[225]

Access to international trade is one of the stimuli for economic growth and inequality reduction[226] and for achieving the UN SDGs 10 and 12. However, less than 1 per cent of the world's exports in 2019 are from the least developed countries, whose population has grown from 10.7 per cent in 2000 to 13 per cent in 2020. Moreover, production affects economic growth and human well-being.[227] Reducing food loss during production, storage, and different steps of the supply chain is important for increasing food security. In 2016 almost 15 per cent of food was lost from production before reaching retail in Sub-Saharan Africa.[228] In 2019 it is estimated that around 14 per cent of this was lost due to post-harvest losses excluding the retail level, and 17 per cent of all food produced was lost at the retail and consumption levels.[229]

Agricultural production is a rapidly evolving ecosystem, especially in circumstances when the consumption of food is increasing.[230] Thus, 34 per cent of agricultural land is already degraded globally, and 25 per cent of human-induced land degradation accounts for Sub-

[219] FAO (n 218) 49.
[220] United Nations Department of Economic and Social Affairs, 'Micro-, Small, and Medium-sized Enterprises (MSMEs) and Their Role in Achieving the Sustainable Development Goals' (UNDESA Report on MSMEs and the Sustainable Development Goals, 2020).
[221] World Bank Group, Food and Agriculture Organisation of the United Nations, UN-Habitat, 'Measuring Individuals' Rights to Land: An Integrated Approach to Data Collection for SDG Indicators 1.4.2 and 5.a.1' (FAO, Washington DC 2019).
[222] International Labour Organisation, 'World Employment and Social Outlook. Trends 2021' (ILO Flagship Report, Geneva 2021) 44.
[223] ibid 45.
[224] ibid 44.
[225] United Nations Women, 'World Survey on the Role of Women in Development 2014. Gender Equality and Sustainable Development' (UN, Milan 2014).
[226] FAO (n 218) 63.
[227] ibid 68.
[228] ibid 69.
[229] United Nations Environment Programme, 'Planetary Action' (UNEP in 2021, Nairobi 2021).
[230] Millennium Ecosystem Assessment, 'Ecosystems and Human Well-being. Synthesis' (A Report of the Millennium Ecosystem Assessment, Washington DC 2005).

Saharan Africa.[231] Poorer countries cause greater pollution than richer countries as they have limited resources, unequal access to land and cannot invest in the green economy and as a result, destroy the natural resources they depend on in their livelihood.[232] These changes could affect ecosystems in developing countries. For example, intensive land use affects the quality of land and agricultural productivity, which in turn affects the achievement of the UN SDGs 12 and 15.[233]

The UN SDGs 1, 2 and 3 are essential and relevant to OHADA member states as most OHADA countries are commodity-dependent agricultural countries.[234] The UN SDGs 1 and 2 are the most desirable as they are preconditions for achieving all the other goals.[235] Many commodity-dependent countries, including OHADA member states, are among the countries that face food insecurity and critical food shortages.[236] High food prices put rural people in a position where they spend almost all their income on food, which diminishes countries with such households the possibility of achieving the UN SDGs 1 and 2.[237] Furthermore, it is hard for developing agricultural countries to achieve long-term economic growth by facilitating and implementing a strategic industrial growth plan.[238] The situation is particularly relevant to OHADA member states as developing countries in Africa are less industrialised than even the least developed countries.[239]

Even though commodity prices are volatile and commodity dependency is considered an economic trap, there is proof that if a commodity sector is well managed and regulated, it could contribute to economic development.[240] Thus, Brazil improved its economic and social development by enhancing the soybean industry, as did Botswana and Sierra Leone by enhancing their diamond sectors.[241] Implementing robust legislation and transforming commodity markets can improve social and economic performance. This can also contribute to developing the sustainable management of commodities, which can, in turn, contribute to

[231] Food and Agriculture Organisation of the United Nations, 'The State of the World's Land and Water Resources for Food and Agriculture. Systems at Breaking Point' (Synthesis Report 2021, Rome 2021).
[232] United Nations Environment Programme, 'Sustainable Consumption and Production. A Handbook for Policymakers' (UN, 2015).
[233] Nick Middleton, David Thomas, 'World Atlas of Desertification. Second Edition ' (United Nations Environment Programme, London 1997).
[234] United Nations Trade and Development, 'Commodity Dependence and the Sustainable Development Goals' (Multi-year Expert Meeting on Commodities and Development Ninth session, Geneva October 2017).
[235] Food and Agriculture of the United Nations, 'Food and Agriculture. Key to Achieving the 2030 Agenda for Sustainable Development' (FAO, Rome 2016).
[236] World Food Programme, 'Global Report on Food Crises 2017' (Food Security Information Network, March 2017).
[237] ibid.
[238] United Nations Trade and Development (n 234) 32.
[239] ibid 32.
[240] ibid 6.
[241] United Nations Trade and Development, 'Commodities and Development Report 2017. Commodity Markets, Economic Growth and Development' (UNCTAD, FAO, New York 2017).

structural reforms in the economy and innovations to achieve the UN SDGs.[242] Furthermore, increasing efficiency in commodity-related industries can improve labour productivity and facilitate green technologies, goods and services.[243]

Warehouse receipt law reform based on the UNIDROIT MLWR can contribute to eliminating poverty and hunger in OHADA member states as it mainly targets production and management as well as food security for the rural poor, who face extreme poverty.[244] Warehouse receipt law reform can also provide opportunities for social protection and development for smallholder farmers and other rural poor people involved in agriculture.[245] This can be achieved by giving access to financial resources and opportunities to handle risks, such as secure storage opportunities, insurance opportunities, and opportunities to postpone selling the warehoused goods to obtain a better price.[246] Furthermore, the chance to cooperate and mobilise their resources to sell their crops jointly and access markets could enable small-scale producers to increase their agricultural investment, raise productivity,[247] and participate in international markets.

The adoption of the UNIDROIT MLWR by OHADA can contribute to the development of domestic legislation in OHADA member states, which in turn can facilitate the development of sound macroeconomic policies and create a stable economic environment for agricultural development in OHADA member states.[248] This can facilitate the development of the labour market, create new job opportunities, especially for rural people and improve the economic performance of OHADA countries.

Furthermore, the UNIDROIT MLWR can create opportunities to adopt other international instruments related to warehouse receipt for OHADA, such as the UNCITRAL Model Law on Electronic Transferable Records[249] and the UNIDROIT Principles on Digital Assets and Private Law.[250] This can create opportunities for the development of new technologies related to warehouse receipt financing,[251] such as electronic warehouse receipts and an option to use technologies to obtain market and price information, which can eliminate risks of fraudulent

[242] Organisation for Economic Co-operation and Development, 'Towards Green Growth. A summary for Policy Makers' (OECD, Paris May 2011).
[243] United Nations Trade and Development (n 234) 9.
[244] Food and Agriculture Organisation of the United Nations, 'FAO and the 17 Sustainable Development Goals' (FAO, Rome 2015).
[245] United Nations Trade and Development, 'Commodities and Development Report 2015. Smallholder Farmers and Sustainable Commodity Development' (Commodities and Development Report, New York and Geneva 2015).
[246] ibid.
[247] Denis Herbel, Eve Crowley, Nora Ourabah Haddad, Maria Lee, ' Good Practices in Building Innovative Rural Institutions to Increase Food Security' (FAO, IFAD, Rome 2012).
[248] United Nations Trade and Development (n 245).
[249] UNCITRAL 'Model Law on Electronic Transferable Records' (adopted 13 July 2017).
[250] UNIDROIT 'The UNIDROIT Principles on Digital Assets and Private Law' (adopted 12 May 2023).
[251] United States Agency for International Development, 'ICT to Enhance Warehouse Receipt Systems and Commodity Exchanges in Africa' (Briefing Paper, November 2010).

activities and enable farmers to access agriculture services.[252]

Adoption of the UNIDROIT MLWR on the regional level - OHADA,[253] can allow countries to coordinate amendments to their domestic legislation and incorporate their domestic business practices and traditions. This can facilitate regional integration and cooperation, develop regional infrastructure and facilities, establish regional agricultural value chains, and encourage the establishment of sustainable commodity production and trade practices.[254] All the above-mentioned can contribute to attracting public donor agencies and private investors to the continent.

Furthermore, by creating favourable conditions for MSMEs in OHADA member states, the warehouse receipt law can also create new job opportunities with better conditions and, at the same time, increase the social protection of the population. This is particularly important as only 58 per cent of the population at the age of employment can secure a job in Africa, including OHADA member states.[255] Therefore, implementing the UNIDROIT MLWR could enable OHADA member states to take essential steps and develop preconditions for pursuing the UN SDGs.

1.6. Research Methods

Overall, the primary research method that is used in this PhD project is the qualitative legal research method, namely the doctrinal legal research method.[256] The main objective of the doctrinal research method is to thoroughly analyse the legislation and case law governing a specific type of social relationship, find difficulties and establish a future development in that particular area of law.[257]

Doctrinal research methods involve two steps. The first step consists of identifying relevant sources of law, while the second requires analysing and interpreting them.[258] During the first step, I identify the objective reality.[259] In the second step, the identified reality is assessed using deductive logic, inductive reasoning, and analogy.[260] This research method is beneficial for analysing legislation, case law, and statutory instruments related to warehouse receipts at international, regional, and domestic levels. It enables me to obtain comprehensive

[252] United Nations Trade and Development (n 234) 45.
[253] UNIDROIT, 'Drafting Options on Electronic Warehouse Receipts for the MLWR and Guide to Enactment' (Study LXXXIII – W.G.4 – Doc. 4, Rome March 2022) 16.
[254] United Nations Trade and Development (n 234) 47.
[255] Sustainable Development Goals Center for Africa (n 205) 52.
[256] Mike McConville, Wing Hong Chui, *Research Methods in Law* (2nd edn, Edinburgh University Press 2007) 18.
[257] Dennis Charles Pearce, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education* (Australian Government Publishing Service 1987).
[258] Terry Hutchinson, Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 110.
[259] Terry Hutchinson, *Researching and Writing in Law* (4th edn, Pyrmont 2018).
[260] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011).

knowledge of warehouse receipt law norms and propose harmonisation or unification of the law.

As part of doctrinal research, an analysis of existing literature related to warehouse receipts – both theoretical and empirical – is conducted. This analysis aims to identify positive practices and gaps in addressing issues related to warehouse receipt legislation in international law, particularly in OHADA member countries.[261] The doctrinal analysis can help to combine theoretical knowledge related to warehouse receipts with the existing legal and business practices in the field. This can identify the best ways to address issues related to warehouse receipt relationships.

This section explained the doctrinal legal research methods and how they can help to achieve the objectives of this research. The following subsection will discuss the main research methods that will supplement the doctrinal research methods and assist in addressing the main research questions. The following subsection will focus on the comparative legal analysis method and how it can achieve the main objectives of this research.

1.6.1. Comparative Legal Analysis Method

This research uses the comparative legal research method as a part of the doctrinal research method. Comparative legal research is a technique that facilitates the comparison of different legislative provisions in a single legal system or across different legal systems in various countries to establish similarities and differences between them.[262] Comparative legal analysis is a two-stage process. In the first stage, the legal issues are described, and similarities and differences are identified, while in the second stage, possible legal transplants are analysed.[263] The primary goal of comparative legal analysis is to achieve harmonisation or unification of law.[264]

The comparative legal research method for this PhD research helps to obtain the necessary knowledge about warehouse receipt relationships, which assists in drafting a Uniform Act on Warehouse Receipts or a soft law instrument tailored to the needs of OHADA member states. At the same time, the chosen research method helps to achieve the final research objective - the harmonisation of the warehouse receipt law in OHADA member states. Therefore, this PhD research, with the assistance of the selected methodology, aims to answer the main research question: Is it possible to harmonise warehouse receipt laws in OHADA member states?

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[261] Maggie Walter, *Social Research Methods* (4th edn, Oxford University Press 2019) 485.
[262] Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law* (3d edn, Clarendon Press 1998) 3-5.
[263] Mathias Reimann, Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (2d edn, Oxford University Press 2019) 306.
[264] Zweigert (n 262) 15-18.

As a part of a comparative legal analysis,[265] different types of documents are analysed:

- Treaties, conventions, and model laws concerning the warehouse receipt system;
- Guidance and documents on legislative reform in the field of warehouse receipts;
- Reports, working papers, background research papers, issues papers, drafts of model laws and other documents of intergovernmental organisations related to warehouse receipt laws;
- Reports, working papers and other documents by regional intergovernmental organisations in the field of warehouse receipts;
- Domestic legislation of different countries concerning warehouse receipt system;
- Theoretical works of legal scholars, including books and journal articles related to warehouse receipt systems.

The research objectives and main goals can be achieved through the use of the comparative functional research method and the law-in-context method.[266] The functional approach allows the comparison of legal and non-legal institutions with the same functions in different legal systems.[267] By comparing and assessing functionally equivalent[268] institutions and their mandates, I can identify the best way to conduct warehouse receipt law reform in OHADA member states. The comparative functional research method can help to determine which laws should be compared and the scope of the comparison.[269] The comparative functional research method can enable the identification of legislation with the same functions from different jurisdictions and assist in finding solutions to problems in warehouse receipt law in different jurisdictions by comparing legislation with the same function.

The concept of functionalism can aid me in assessing specific provisions of warehouse receipt legislation in connection with the institutions and their function in that relationship.[270] Such analysis can provide a broader picture of the warehouse receipt system and identify connections between certain institutions and warehouse receipt legislative provisions. This approach can assist in identifying solutions to the issues faced by OHADA member states regarding warehouse receipt relationships that are relevant to other institutions.[271] Ultimately, this can facilitate the smoother implementation of the proposed warehouse receipt law reform in OHADA member states.

This subsection discussed how the comparative legal analysis method can complement

[265] Dawn Watkins, Mandy Burton, *Research Methods in Law* (Routledge 2013) 100.
[266] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method 1.
[267] Reimann (n 263) 342.
[268] Functionally equivalent means that institutions can only be comparable if they serve the same functions in different legal systems - ibid 342.
[269] Zweigert (n 262) 34.
[270] Reimann (n 263) 364.
[271] ibid 366.

doctrinal legal research and assist in answering research questions. Moving forward, the following subsection will delve into the concepts of harmonisation and unification of law, which will be used in this research to achieve the main objectives of this PhD project.

1.6.2. Harmonisation and Unification of Law

This research aims to apply concepts of the unification and harmonisation of law, which are historically closely connected with the functional method.[272] The unification and harmonisation of law are based on comparative legal analysis, which allows the identification of similarities and differences in legislation.[273] The rationale behind this approach is that different legal systems address issues related to warehouse receipt legislation differently. Therefore, this approach helps to identify the most suitable method for OHADA member states to handle issues related to warehouse receipt relationships based on the successful experience of other jurisdictions. Using a combination of comparative legal analysis and a functional approach, this research can establish a basis for the unification or harmonisation of law by identifying rules that could be used to develop general unified rules.

It is essential to consider which legislation should be compared to identify similarities and differences. Legal experts suggest not to choose too many different legislations to compare due to the common principle of the law of diminishing returns.[274] Countries from similar legal families typically adopt legislation from robust legal systems. However, they do not possess the same degree of originality. Therefore, comparing the original legislation with the robust developed legislation in the chosen field is more than enough.

Since OHADA member states have French legal backgrounds and French warehouse receipt legislation is advanced and robust, French legislation on warehouse receipts was chosen for comparison. The French legal system has influenced the legislation of many civil law countries worldwide.[275] In addition, the US has also implemented a successful and well-designed warehouse receipt legislation. The US legislation influenced warehouse receipt legal norms in different countries. The US legislation was chosen as another domestic legislation for comparison. The comparison is limited to the US and French warehouse receipt laws as they represent two different legal traditions and influenced warehouse receipt legislation in various countries.

The concepts of unification and harmonisation of law are closely related to the legal transplant and legal reception approach, which provide the foundation for the development of unified or harmonised legal rules. It is essential to explain what legal transplants and reception

[272] ibid 376.
[273] ibid.
[274] Zweigert (n 262) 41.
[275] Wehling (n 3) 77.

mean. Legal transplant and reception can be described as the legal change and a predominant condition for the unification and harmonisation of law.[276] Legal transplant is the process of borrowing provisions from legislation from the same or a different legal family and adapting them in another jurisdiction.[277] Legal reception is the adoption of a system of law from another jurisdiction or historical time relevant to the country's socio-economic circumstances.[278] One advantage of legal transplants and reception is that they are based on existing legal practices that have been tested in the real world. Legal transplants also make it possible to conduct law reforms innovatively and cost-effectively, as opposed to developing legal rules from scratch.[279] Since African countries, including OHADA member states, lack financial resources and expertise, legal transplant and reception would be the best way to conduct warehouse receipt law reform. This would also create a solid basis for the unification and harmonisation of warehouse receipt legal norms. Even though legal scholars highly value legal transplants and reception, some critics of these concepts are discussed in the second chapter of this PhD project.[280]

This PhD research aims to identify similarities and differences in the legislation of OHADA member states. The goal is to determine how the UNIDROIT MLWR can be adjusted to the specific needs of OHADA countries to develop a Uniform Act on Warehouse Receipts or a soft law instrument beneficial for businesses in OHADA member states, particularly for smallholders. The comparison is conducted on both the macro and micro levels. This involves comparing the UNIDROIT MLWR with other existing international and regional instruments concerning warehouse receipts and domestic legislation of countries with robust legislation concerning warehouse receipt systems (the US and France).

This subsection discussed how the unification and harmonisation of warehouse receipt legislation can help to answer the research questions for this PhD project. The following subsection will discuss the comparison level for the chosen research methodology.

1.6.3. Levels of Comparison

This PhD research is conducted using two levels of comparison: macro and micro. At the macro comparison level, different legal systems, legal procedures, and legal materials from different countries are analysed and compared.[281] This helps to analyse the spirit and style of laws to assess their suitability for adoption in OHADA member states. By comparing legislation

[276] Reimann (n 263) 455, for a more detailed discussion of legal transplant, see s 2.3.
[277] Alan Watson, *Legal Transplants: An Approach to Comparative Literature* (2d edn, University of Georgia Press 1993).
[278] Reimann (n 263) 443.
[279] Alan Watson, 'Aspects of Reception of Law' (1996) 44 American Journal of Comparative Law 335.
[280] see s 2.3.3.1.
[281] Zweigert (n 262) 4.

from different legal families, the differences in addressing issues related to warehouse receipt relationships can be identified.[282] Whereas, a macro comparison of legislation from the same legal families can assist in identifying similarities in addressing warehouse receipt relationships.[283] At this level, the differences between legal families in addressing warehouse receipt relationships, specific business practices from two chosen countries (the US and France), and the business practices in OHADA member states are compared. This analysis can assist in developing an understanding of how warehouse receipt relationships can be addressed more effectively in a Uniform Act on Warehouse Receipts or a soft law instrument for OHADA member states.

The micro-comparison level helps to identify and compare how to deal with specific legal problems.[284] At the micro comparison level, countries, even from different legal families, are expected to have similar attitudes and provisions concerning addressing specific issues related to warehouse receipt systems. The similarities can be identified at this level, which later can be used as a basis for warehouse receipt legal reform for OHADA. At this level, the specific provisions of the UNIDROIT MLWR, different international norms, and domestic legislation are compared to find provisions of law that could be adopted in OHADA member states and can be used as a basis for developing either a Uniform Act on Warehouse Receipts or a soft law norm.

The comparative legal method can assist in identifying specific favourable legal provisions regarding warehouse receipts in different countries. In particular, French legal provisions are analysed as most OHADA countries have French legal backgrounds. Additionally, the US warehouse receipt legislation is examined as the US warehouse receipt legislation is perceived as one of the most robust systems concerning warehouse receipts worldwide. By comparing the OHADA legal framework, legal systems from other countries (the US and France), and the UNIDROIT MLWR, it is possible to establish a basis for critical comparison and draw conclusions about the warehouse receipt legislation in OHADA countries. This can be established by creating a single piece of new legislation or reforming existing legal norms.

Using normative claims, the comparative legal analysis can help to establish general norms in warehouse receipts, which can create a basis for a Uniform Act on Warehouse Receipts or a soft law instrument for OHADA.[285] The interpretative aspect of comparative legal research enables the researcher to describe and adopt specific provisions of the UNIDROIT

[282] Reimann (n 263) 388.
[283] ibid.
[284] Zweigert (n 262) 5.
[285] Jhon Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing Plc 2013).

MLWR and legislation from selected jurisdictions to the needs of OHADA member states.[286] The interpretations primarily focus on the current legislation of OHADA member states to ensure that the final warehouse receipt law does not contradict existing regional and domestic laws in OHADA member states. This enables me to achieve the primary goal of warehouse receipt law reform of OHADA, which is the harmonisation of warehouse receipt legislation. Furthermore, this approach can also help to address the legal terminology of OHADA member states.

This subsection identified the levels of comparison for the comparative legal analysis. The following subsection will discuss the hermeneutic research method that will assist in answering the research questions for this PhD project.

1.6.4. Hermeneutic Approach to Research

Comparative legal research is conducted using a hermeneutic approach. This approach enables me as a researcher to look beyond legal analysis and consider the wider context of legal norms (historical, cultural, and socio-economic).[287] This approach allows for an in-depth analysis of the existing warehouse receipt legislation and the UNIDROIT MLWR.[288] The main aim of the comparative legal method is to interpret legal norms and develop a basis for the harmonisation and unification of law.[289] The hermeneutic approach assists in developing a deeper understanding of the legal norms in their broader context (social, political, and cultural). This helps to determine how specific provisions of legislation are positioned in the system of social regulations.[290] Therefore, this approach allows me to analyse the UNIDROIT MLWR and provisions of domestic legislation chosen for the legal transplant (the US and France) in the context of OHADA's legal, social, political, and cultural background. As a result, it allows the proposed warehouse receipt law reform for OHADA to be tailored so that it can be positively accepted in its member states by different stakeholders, including international investors.

Using this approach, the rules concerning warehouse receipt legislation can be compared from two different perspectives: the position of an observer and an insider.[291] Such an approach can help me to understand the rules and their social and cultural context.[292] Using

[286] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632.
[287] Brad Sherman, 'Hermeneutics in Law' (1988) 51 The Modern Law Review 386.
[288] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' in Maksymilian Del Mar, William Twining, Michael Giudice (eds), *Legal Theory and the Legal Academy* (Routledge 2010).
[289] M A Damirli, 'Comparative Law Hermeneutics: Cognitive Possibilities' (2010) Journal of Comparative Law 65, 67.
[290] ibid 68.
[291] Bell (n 285) 170.
[292] ibid.

the hermeneutic approach, I can avoid the epistemological problem of comparative legal analysis. This approach allows for comparing current legal rules and business practices and considers the specific cultural, legal, economic, political, and moral backgrounds.[293] This approach enables me as a researcher to be 'historically conscious' while interpreting and adopting the provisions of the UNIDROIT MLWR for OHADA.[294]

Looking at OHADA member states, countries with civil law backgrounds, from the position of a civil law researcher can help me become 'culturally fluent in the legal language of OHADA member states.'[295] This perspective assists in gaining a deeper understanding of legal norms and rules and the context and background of specific legislative provisions. This inside knowledge can be used to make recommendations that address the particular needs of OHADA member states. Additionally, this approach can enable the researcher to understand the background and norms themselves and identify similar rules in the legislation of other countries that could be used as a legal transplant.[296] By critically assessing the possibility of a legal transplant from the position of a civil law scholar, I can determine whether it is feasible and appropriate to propose specific legal changes. This enables me to analyse the UNIDROIT MLWR in a wider context, including its social, historical, and cultural background. This can further increase the possibility of acceptance of the proposed warehouse receipt legal reform.

The above-mentioned research methods, applied to the proposed comparison levels, can assist in identifying similarities and differences and determine a legislative solution for OHADA member states. This approach assists comparative legal analysis as it can establish the broader connection between different legal rules and their interlinkage.[297] As a result, it helps to develop an integral picture for the legal analysis.[298] This aids in addressing the unique aspects of warehouse receipt relationships in OHADA member states in a Uniform Act on Warehouse Receipts or a soft law instrument for OHADA. Therefore, the research provides a comprehensive understanding of the UNIDROIT MLWR, regional documents concerning warehouse receipts and domestic legislation. This enables me to achieve the final goal of the research – to propose warehouse receipt legal reform and contribute to the overall goal of harmonisation of the warehouse receipt law in OHADA member states. The hermeneutic approach supports this research by going beyond the formalistic focus of law and comparing legal norms, considering a broader context where legal rules exist.[299]

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[293] William Ewald, 'Comparative Jurisprudence(I): What Was it Like to Try a Rat' (1995) 143 University of Pennsylvania Law Review 1889.
[294] Sherman (n 287) 391-394.
[295] Mitchel De S-O-L'E Lasser, 'The Question of Understanding' in Pierre Legrand, Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2009).
[296] Zweigert (n 262) 35.
[297] Damirli (n 289) 68-69.
[298] ibid.
[299] Gregory Leyh, 'Introduction' in Gregory Leyh (ed), *Legal Hermeneutics* (University of California Press 1992) xii-xiii.

Additionally, the chosen research methods can assist in identifying differences and similarities in legislation, finding a comprehensible solution, and adapting it to the background of the OHADA member states. A Uniform Act on Warehouse Receipts or a soft law instrument can be based on the legal specificities of OHADA member states and can be evaluated using a comparative functional method. This method enables the researcher to assess the proposed warehouse receipt law reform from the conceptual context of the national doctrine of domestic legislation.[300] Additionally, it helps to evaluate the proposed warehouse receipt law reform from the position of functionality and how it could address and satisfy the needs of OHADA member states.[301]

All research methods mentioned above assist in comparing the UNIDROIT MLWR, international instruments, warehouse receipt legislation of the US and France, and OHADA member states legislation. The comparison helps to identify similarities, differences, best practice approaches, and common specificities in OHADA member states. The chosen research methods enable the researcher to identify provisions that could address such specificities in the best way, considering the legal and cultural background and business practices of OHADA member states. Thus, the final goal of drafting a Uniform Act on Warehouse Receipts or a soft law instrument can be achieved by the research methods described above.

The previous sections identified the background of the research, its scope and limitations, research questions, and research methods. The following section will summarise the chapters of the PhD thesis.

1.7. Summary of Chapters

The second chapter of this research aims to analyse the concepts of unification and harmonisation of law. It also explores the connection between hard and soft law norms, highlighting their differences. Various approaches and strategies that have been proposed by governmental and non-governmental organisations in the field of warehouse receipt legislation will be assessed. The role of different intergovernmental organisations in conducting law reforms is discussed, along with concepts of supranational power and mandates. Particular emphasis is placed on the work of UNIDROIT and UNCITRAL in relation to the harmonisation of private international laws connected to warehouse receipts. Furthermore, the concepts of legal transplant and reception are explained in the context of OHADA member states, and their influence on the OHADA Uniform Acts will be examined. It also discusses the concepts of colonial and malicious legal transplants and the relation of these concepts to the legal backgrounds of OHADA member states.

[300] ibid 44.
[301] ibid.

In the third chapter, the background and history of OHADA are discussed, paying close attention to the concept of colonisation, OHADA's approach to law reform, and its mandate. Analysing the historical background of OHADA and its member states can assist in developing a deeper understanding of OHADA laws. The relationship between OHADA and other intergovernmental and regional organisations is discussed. This chapter assesses whether OHADA can conduct a warehouse receipt legal reform and cooperate with intergovernmental organisations. The OHADA Uniform Acts and the process of drafting and implementing legal norms in OHADA member states are discussed. This chapter explains how the OHADA Uniform Acts can contribute to the harmonisation and unification of warehouse receipt laws. Particular attention is paid to the Uniform Act Organising Securities.[302] It is assessed whether drafting a separate Uniform Act on Warehouse Receipts or developing a soft law norm is more beneficial and can facilitate warehouse receipt law reform in OHADA member states efficiently. The analysis from this chapter helps to establish how warehouse receipt law reform can be conducted in OHADA member states, taking into consideration the historical and socio-economic background of OHADA and its member states.

The fourth chapter discusses the history of the development of personal property rights in connection to the warehouse receipt system. Particular attention is paid to the development of personal property rights in civil law countries, as most OHADA countries have a civil law background. The specificities in addressing personal property rights in civil law countries are explained. Close attention is paid to the classification of property rights, concepts of ownership and possession, modes of acquiring ownership, concepts of obligations and contracts, and concepts of real securities. This chapter discusses the theories of legal evolution and path dependency and their relation to the context of OHADA member states. This chapter employs a comparative research method and hermeneutic approach to develop a deeper understanding of OHADA laws. The analysis from this chapter can assist in tailoring the UNIDROIT MLWR to the OHADA legal and socio-economic background.

The fifth chapter provides a thorough analysis of the UNIDROIT MLWR. It also examines the relevant warehouse receipt legislation from France and the US. In particular, the provisions of the US Uniform Commercial Code[303] and the French Commercial Code[304] are analysed and assessed to determine the possibility of a legal transplant. This chapter employs the method of comparative legal analysis to establish the basis for the development of a Uniform Act on Warehouse Receipts or a soft law instrument for OHADA. This chapter employs the hermeneutic approach to further tailor the UNIDROIT MLWR to OHADA's historical and socio-economic background. This chapter analyses the UNIDROIT MLWR in the context of

[302] Uniform Act Organising Securities (adopted 15 December 2010).
[303] Uniform Commercial Code 1952 (US).
[304] Commercial Code 1807 (France).

OHADA's current legal norms and its historical and socio-economic backgrounds.

The sixth chapter concludes the research and provides a final recommendation. This chapter discusses the proposed legislation for OHADA and how it can be implemented. The benefits of implementing a Uniform Act on Warehouse Receipts or a soft law norm in OHADA member states are also addressed. This chapter establishes the limitations of the research and how the research achieved its main objectives. This chapter also provides recommendations for future research in the area of warehouse receipt legislation.

Chapter 2

2. Harmonisation and Unification of Law in Private International Law

This chapter establishes the theoretical basis for the analysis of the UNIDROIT MLWR and the OHADA legal framework. This chapter's theoretical analysis can assist in identifying whether it is more suitable to develop a Uniform Act on Warehouse Receipts or a soft law norm for OHADA and answer research questions.[1] In particular, this chapter answers the research question of how OHADA can achieve the final goal of harmonisation of warehouse receipt law in its member states.[2] It is essential to understand what harmonisation and unification of law in international private law mean to discuss law reform and establish how it can be conducted in OHADA member states. It is also vital to establish a connection between the harmonisation and unification of law, the concept of hard and soft law norms, and how they differ and relate to each other. This can assist in identifying what is more suitable for OHADA: a Uniform Act on Warehouse Receipts or a soft law instrument to regulate warehouse receipt relationships. For better representation of the information, this chapter is divided into four main parts, which are the concepts of harmonisation and unification of private international law; the concepts of soft and hard law norms; the concepts of legal transplant and legislative reform in the field of international commercial law; mandates and different approaches to legislative reform of formulating agencies.

2.1. International Commercial Law: Definition and Scope

At the beginning of this chapter, it is essential to establish the definitions of international commercial law and transnational commercial law. It is also necessary to understand the difference between international and transnational commercial law and the relationship between international commercial law and warehouse receipt relationship. This helps to understand the nature of the OHADA Uniform Acts and propose suitable warehouse receipt law reform for OHADA: a Uniform Act on Warehouse Receipts or a soft law instrument.

Commercial law is a set of rules and provisions that establish the rights and responsibilities of the professional parties involved in commercial transactions.[3] Commercial law does not cover institutional, consumer, and public law regulations, although there may be some overlap between these areas of law.[4] International uniform legal rules govern the rights

[1] see s 1.3.
[2] ibid.
[3] Roy Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 8.
[4] Roy Goode, Herbert Kronke, Ewan McKendrick, *Transnational Commercial Law* (2nd edn, Oxford University Press 2015) 4.

and obligations of contracting parties concerning international commercial transactions.[5] Transnational commercial law is different from international commercial law.[6] It refers to a set of common rules that regulate cross-border transactions and the rights and obligations of contracting parties.[7] Although there is no single definition of transnational law in modern academic literature,[8] it is generally understood that transnational commercial law does not involve a governmental regulatory element. Instead, transnational commercial laws are executed through commercial usage and acceptance by the merchant community.[9]

Transnational commercial law does not necessarily require the interaction of governments.[10] These laws are not included in domestic legislation. An example of transnational law is *lex mercatoria*.[11] Another example is the UNIDROIT Principles of International Commercial Contracts,[12] which are widely accepted by the merchant community worldwide.[13] Transnational commercial laws unite common commercial rules derived from different legal systems and are used in many jurisdictions.[14] The emergence of transnational commercial law is based on the harmonisation of international commercial law[15] and domestic legislation.[16]

Transnational commercial law refers to all the regulations and legal norms beyond domestic legislation, including international law.[17] This means that transnational commercial law covers all the norms regulating commercial transactions beyond domestic frontiers.[18] International commercial law and transnational commercial law are interconnected and interlinked. International commercial law is a branch of transnational commercial law. Therefore, this PhD research analyses sources of international commercial law from a broader

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[5] Norbert Horn, 'Uniformity and Diversity in the Law of International Commerical Contracts' in Norbert Horn, Clive M Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (Kluwer 1982) 8.
[6] Maren Heidemann, *Transnational Commercial Law* (Hart Publishing 2018) 1.1.2.
[7] ibid ch 1.
[8] Gbenga Bamodu, 'Extra-National Legal Principles in The Global Village: A Conceptual Examination of Transnational Law' (2001) 4 International Arbitration Law Review 6.
[9] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Shalom Lerner, Jacob S Ziegel (eds), *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing 1998).
[10] ibid ch 1.
[11] Clive M Schmitthoff, 'Nature and Evolution of the Transnational Law of Commercial Transactions' in Norbert Horn, Clive M Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (Kluwer 1982).
[12] UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts 2016' (Rome 2016).
[13] see s 2.2.2.3.
[14] Sandeep Gopalan, 'Transitional Commercial Law: The Way Forward' (2003) 18 American University International Law Review 803, 810.
[15] For a definition of harmonisation, see s 2.2
[16] Jonathan Bashi Rudahindwa, 'OHADA and the Making of Transnational Commercial Law in Africa' (2018) 11 Law and Development Review 371.
[17] Philip Caryl Jessup, *Transnational Law* (Yale University Press 1956) 1.
[18] Christian Twigg-Flesner, *Foundations of International Commercial Law* (Routledge 2021) 3.1.

perspective of transnational commercial law.

The scope of transnational commercial law encompasses various sources of international commercial law, including soft and hard law international instruments,[19] trade usage and commercial customs, international trade terms, contracts related to international transactions, national laws applicable to cross-country commerce, and private rules.[20] Transnational commercial law has a broader scope, as it also includes trade customs and usage.[21] Whereas international commercial law mainly includes so-called 'uniform laws' such as conventions, treaties, and model laws.[22] This PhD research primarily focuses on the sources of international commercial law related to the warehouse receipt relationship. However, since international commercial law does not exist in isolation and is an essential part of transnational commercial law, sources of transnational commercial law are discussed in detail, highlighting international commercial law in connection to warehouse receipt relationships.

Warehouse receipts are essential for farmers to access finance and participate in cross-country commerce.[23] Warehouse receipts play an essential role in supply-chain and value-chain financing,[24] which requires a regulatory framework at the national and international levels. International legal norms regarding warehouse receipts establish the rights and obligations of financial organisations and warehouse operators, increasing their trust and promoting more extensive use of warehouse receipt financing.[25] The absence of harmonised domestic laws concerning warehouse receipts hinders cross-country commerce and prevents the facilitation of international trade.[26] Therefore, an international instrument on warehouse receipts can contribute to the harmonisation of domestic warehouse receipt legislation and the creation of standardised 'ground rules'. As a result, an international instrument on warehouse receipts can contribute to economic growth and development.

2.2. Harmonisation and Unification of Private International Law

The previous section defined international commercial and transnational law, including the difference between these terms. This section focuses on the concepts of legalisation, harmonisation, and unification of law. This section distinguishes the difference between hard and soft law instruments, including their connection with the concepts of unification and

[19] see s 2.2.2.
[20] Twigg-Flesner (n 18) 3.1.
[21] Horn (n 5) 14.
[22] ibid.
[23] see s 1.1.2.
[24] UNIDROIT, 'Model Law on Warehouse Receipts. Study LXXXIII' (*UNIDROIT,* 2022) <https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/> accessed 19 February 2023.
[25] Philine Wehling, Bill Garthwaite, 'Designing Warehouse Receipt Legislation. Regulatory Options and Recent Trends' (FAO, Rome 2015) xi.
[26] see s 1.1.

harmonisation of law norms. The analysis from this section assists in establishing the benefits and drawbacks of harmonisation and unification as well as soft and hard law norms. This, in turn, assists in answering the research question of which form of warehouse receipt law reform can be beneficial for OHADA (a Uniform Act on Warehouse Receipts or a soft law instrument).

2.2.1. Concept of Legalisation

The concept of legalisation establishes the basis for the concepts of hard and soft law norms, harmonisation, and unification of law. Legalisation refers to a form of institutionalisation with three significant characteristics: obligation, precision, and delegation.[27] Legalisation can be defined as a combination of primary and secondary rules, with the former imposing legal obligations on entities and the latter applying or modifying the former.[28] However, international law mainly comprises primary sources and lacks secondary rules.[29] Therefore, legalisation in international law is mainly comprised of primary sources.

In international law, legalisation refers to the establishment of legally binding agreements between states.[30] This means that states are obliged to follow the rules outlined in the agreement they signed, which are interpreted and enforced by third parties with special authority.[31] For example, the World Bank Group has the mandate to develop standards and policies that could be binding to borrower states through signed loan documents.[32] The World Bank's Inspection Panel enforces these standards and policies.[33] Total legalisation means that a state is bound by law, and all actions are scrutinised under international and domestic law.[34]

International law employs the principle of legalisation to increase the credibility of agreements and minimise transaction costs.[35] Legalisation increases the agreement's credibility by creating an official translation and interpretation of the agreement, excluding double interpretation and self-serving interpretation by contracting states.[36] This increases the

[27] Kenneth W Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter, Duncan Snidal, 'The Concept of Legalisation' (2000) 54 International Organisation 401.
[28] Herbert Lionel, Adolphus Hart, *The Concept of Law* (3d edn, Oxford University Press 2012) ch V.
[29] ibid ch X.
[30] Abbott (n 27) 401.
[31] ibid.
[32] Laurence Boisson De Chazournes, 'Issues of Social Development: Integrating Human Rights into the Activities of the World Bank' in L'Institut International des Droits de L'homme Institute Rene Cassin de Strasbourg (ed), *World Trade and the Protection of Human Rights in Face of Global Economic Exchanges* (Bruylant Bruxelles 2001).
[33] Ibrahim FI Shihata, *The World Bank Inspection Panel: In Practice* (2nd edn, World Bank Publications 2001).
[34] Judith Goldstein, Miles Kahler, Robert O Keohane, Anne-Marie Slaughter, 'Introduction: Legalisation and World Politics' (2000) 54 International Organisation 385, 387.
[35] Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 88-89.
[36] Kenneth W Abbott, Snidal Duncan, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421, 427.

'cost of refusal' for states, further enhancing the credibility of such agreements.[37] However, legalisation can limit the decision-making autonomy of states and increase negotiating costs.[38] Even though legislation restricts a country's autonomy and sovereignty, it helps individual states to increase international cooperation by harmonising domestic legislation with international law.[39] Compliance with international legislation increases the efficiency of domestic legislation and provides legal certainty for domestic actors and foreign investors based on highly effective international principles and the 'rule of law'.[40]

The concept of highly legalised states refers to these states that base their domestic legislation on the principles of international laws.[41] These laws are incorporated into states' legal systems, and their interpretation and application are delegated to third parties.[42] However, it can be difficult to distinguish between different degrees of legalisation as the types of legislation vary greatly. Instead, two broad legalisation categories can be identified: hard law legalisation and soft law legalisation. Hard law legalisation is binding, and states are obligated to comply with it. One of the significant benefits of hard law legalisation is the credibility of hard law agreements, but it also entails a significant drawback - sovereignty costs.[43] In such circumstances, soft law legalisation could offer a compromise and find flexible solutions. Despite the ongoing discussion among legal scholars on which form of legalisation is better, international legalisation remains one of the primary tools in international relations regardless of its form (soft or hard). Therefore, to determine which legal instrument is suitable for particular law reform, it is essential to analyse the legal background and tradition so that law reform will be accepted by the stakeholders. To determine whether it is more beneficial for OHADA to develop a Uniform Act on Warehouse Receipts or a soft law instrument, the analysis of the legal background and traditions of OHAFA will be discussed later in this PhD project.[44]

2.2.2. Concepts of Soft and Hard Law Norms

The previous subsection established that legalisation can be implemented through hard or soft law norms.[45] To understand the nature of these instruments, it is vital to define such norms and examine their potential benefits and drawbacks. This can help to understand which

[37] ibid.
[38] Goldstein (n 34) 397.
[39] Beth A Simmons, 'Compliance with International Agreements' (1998) 1 Annual Review of Political Science 75, 78.
[40] Anne-Marie Slaughter, 'Liberal International Relations Theory and International Economic Law' (1995) 10 American University International Law Review 717.
[41] Abbott (n 27) 418.
[42] ibid.
[43] ibid 455.
[44] see ch 3, 4.
[45] see s 2.1.1.

instrument (hard or soft law) is more beneficial for OHADA and fits into the current legal framework of OHADA. The following subsections will focus on a detailed discussion of hard and soft law norms and their advantages and disadvantages.

2.2.2.1. Hard Law Norms

Hard law instruments refer to legally binding agreements obligatory to contracting states that are protected by international law.[46] An obligation is considered a hard law norm if states are bound by it, and there are clear implications in case of non-compliance.[47] The definition of hard law instruments establishes their binding nature, which is their most essential attribute. Treaties and conventions are major examples of hard law norms.

One of the most significant benefits of hard law instruments is their high reliability, as hard law norms increase the credibility of agreements.[48] This benefit of hard law instruments is related to their binding nature, which makes it difficult for states to leave agreements once they have ratified or acceded to them. Hard law norms are considered highly credible because the cost of breaching such agreements is very high for countries.[49] Therefore, hard law norms can be called 'self-executing' because states develop domestic laws to execute them.[50] Hard laws compel domestic actors to abide by them.[51] Such norms create new tools in domestic legislation through the domestic enactment procedure, which increases the cost of their violations.[52] This means that if domestic actors fail to comply with these laws, there will be significant ramifications. Countries enforce hard law norms using state enforcement mechanisms, such as courts.[53]

Despite significant benefits, hard law norms are also associated with some drawbacks. One of the main drawbacks of hard law norms is that they create legally binding obligations, which some countries perceive as a threat to their national sovereignty. This perception makes some countries reluctant to ratify or accede to such agreements. Some countries may take decades to ratify or accede to the convention.[54] For example, Belgium signed the United

[46] United Nations Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980 No. 18232) 1155 UNTS 331 (VCLT) art 2.
[47] Susan Block-Lieb, 'Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law' (2019) 40 Michigan Journal of International Law 433.
[48] Abbott (n 27) 427.
[49] Andrew T Guzman, 'The Design of International Agreements' (2005) 16 The European Journal of International Law 579, 582.
[50] Abbott (n 27) 428.
[51] ibid.
[52] ibid.
[53] ibid 427.
[54] Henry Deeb Gabriel, 'The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference' (2009) 34 Brooklyn Journal of International Law 655, 664.

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958.[55] However, it took almost twenty years to ratify it.[56] The binding nature of hard law norms can also limit states' sovereignty.[57] The creation of international commercial laws is considered the start of the elimination of states' autonomy, as nowadays, intergovernmental organisations and regional organisations play a more critical role in the process of developing international laws.[58] Another limitation of hard law norms is that countries must ratify or accede to hard law instruments to be a party to the agreement.[59] Therefore, countries that cannot comply with the instruments for some technical or financial issues or disagree with the obligation are automatically excluded from such agreements.[60] Consequently, the number of potential states participating in the agreement is limited from the outset.

Moreover, hard law norms create legal obligations that countries need to negotiate thoroughly, which is a time-consuming process. Finding common principles and rules that can be accepted positively by as many states as possible takes a lot of time.[61] For example, preparing the United Nations Convention on the Carriage of Goods by Sea took ten years.[62] The process of amending national laws and approving adjustments takes even longer.[63] For example, Albania adopted the United Nations Convention on the Carriage of Goods by Sea, which was drafted in 1978, only in 2006.[64] Altogether, developing and implementing hard law norm instruments may take decades. As a result, hard law norms cannot quickly reflect socio-economic changes in society because the process of drafting or adjusting hard law norms takes a significant amount of time.[65]

Another drawback of hard law norms is that states refrain from binding agreements

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[55] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959).
[56] UNCITRAL, 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (*United Nations,* 2022) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 22 September 2022.
[57] Abbott (n 27) 455.
[58] Sandeep Gopalan, 'The Creation of International Commercial Law: Sovereignty Felled' (2004) 5 San Diego International Law Journal 267.
[59] Wolfgang H Reincke, Jan Martin Witte, 'Challenges to the International Legal System Interdependence, Globalisation, and Sovereignty: The Role of Non-binding International Legal Accords' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003) 88.
[60] ibid.
[61] Gabriel (n 54) 663.
[62] Audiovisual Library of International Law, 'United Nations Convention on Contracts for the International Sale of Goods' (*United Nations,* 2022) <https://legal.un.org/avl/ha/ccisg/ccisg.html> accessed 22 September 2022.
[63] Harmurt Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 European Journal of International Law 499.
[64] United Nations Convention on the Carriage of Goods by Sea (adopted 31 March 1978, entered into force 1 November 1992) A/CONF.89/13.
[65] David M Trubek, Patrick Cottrell, Mark Nance, 'Soft Law, Hard Law and EU Integration' in Joanne Scott, Grainne de Burca (ed), *Law and New Governance in the EU and the US* (Hart Publishing 2006).

because states may face reputational costs in case of non-compliance.[66] Therefore, states lean more toward soft law norms.[67] This drawback makes states think twice before joining such agreements and furiously negotiate every provision of such agreements. In some cases, certain international agreements may not even be able to enter into force due to a lack of ratifications. For example, the UNIDROIT Convention on Agency in the International Sale of Goods[68] has not yet entered into force as countries refrain from ratifying or acceding to it.

Finally, drafting hard law norms is time-consuming because they are designed to attract as many countries as possible.[69] Drafters of hard law instruments have a mandate to develop new laws that comply with the existing law in the field, which can make the unification of law more challenging.[70] One of the main difficulties in this process is addressing different legal traditions and cultures.[71] Successful hard law norm instruments are usually consistent with international commercial practices and the legal culture of the countries that ratify them.[72] The United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG)[73] is an example of a very successful international hard law norm, as it is equally successful in civil and common law countries.[74] Hard law norms are beneficial in situations where the advantages of the agreement are high, but the chance of breaching the agreement is quite likely.[75] Therefore, hard law norms are better for regulating well-established socio-economic relationships that do not change frequently.

This subsection defined hard law norms and discussed their advantages and disadvantages. The analysis from this subsection helps to assess and understand the nature of the OHADA Uniform Acts and its legal framework. The following subsection will define and compare soft law norms to hard law norm instruments. The advantages and disadvantages of soft law norms will be assessed in the following subsection. The analysis of the following subsection will help to understand the nature of the UNIDROIT MLWR. Analysis of these two subsections will assist in identifying a suitable form of legal reform for OHADA: a Uniform Act on Warehouse Receipts or a soft law instrument.

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[66] Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 71.
[67] ibid.
[68] UNIDROIT Convention on Agency in the International Sale of Goods (adopted 17 September 1983, not in force).
[69] Gabriel (n 54) 663.
[70] ibid 661.
[71] Henry Deeb Gabriel, 'Inapplicability of the United Nations Convention on the International Sale of Goods As a Model for the Revision of Article Two of the Uniform Commercial Code' (1997) 72 Tulane Law Review 1995.
[72] Gabriel (n 54) 662.
[73] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) No. 25567 (CISG).
[74] Henry Deeb Gabriel, *Contracts for the Sale of Goods: A Comparison of U.S. and International Law* (3d edn, Oxford University Press 2008) 14.
[75] Abbott (n 36) 429.

2.2.2.2. Soft Law Norms

The definition of 'soft law' norms varies greatly in contemporary legal literature as every legal scholar has their definition of 'soft law'.[76] Some legal scholars simplify the term 'soft law' and call all agreements that differ from treaties and conventions 'non-treaty' agreements, which are, in essence, soft law instruments.[77] Despite this, academics have tried to analyse existing definitions of soft law norms and produced a general definition. According to them, 'soft law' norms are 'laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect.'[78] An agreement is considered a soft law norm if it is unclear, imposes no obligations on states or has no consequences for non-compliance.[79] Compared to hard law norms, soft law norms can be described as a weaker and more flexible form of obligation, as they do not have binding force for states.[80] If an agreement is not legally binding, it is, in essence, a soft law norm.[81] One of the major examples of soft law is model law.

However, a formally binding agreement can still be considered soft if the content is vague and non-specific, making it difficult to enforce[82] or if there is no third-party authority to control the implementation and enforcement.[83] For example, the CISG[84] is a hard law norm, but it is also considered a soft law because there are no procedures in place to monitor the application of its provisions. Additionally, certain provisions of the CISG, such as party autonomy or usage of trade practice agreed upon by contracting parties,[85] are soft by nature. If a treaty's fulfilment or withdrawal is left to the good faith of the states that have ratified or acceded to it, such a treaty should also be considered a 'soft law'.[86]

Soft law norms may become binding under certain circumstances: when soft laws clarify or explain specific terms of hard law instruments[87] or when soft laws apply uniformly without any flexibility.[88] For example, the Uniform Customs and Practice for Documentary Credits,[89] which is used and applied uniformly to all letters of credit transactions by banks in over 175

[76] Linda Senden, *Soft Law in European Community Law* (1st edn, Hart Publishing 2004) 111.
[77] Hillgenberg (n 63).
[78] Senden (n 76) 112.
[79] Block-Lieb (n 47).
[80] Abbott (n 36) 422.
[81] Gregory C Shaffer, Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706, 715.
[82] Hillgenberg (n 63) 500.
[83] Andrew T Guzman, Timothy L Meyer, 'International Common Law: The Soft Law of International Tribunals' (2009) 9 Chicago Journal of International Law 515.
[84] CISG.
[85] ibid art 9.
[86] Hillgenberg (n 63) 501.
[87] Alan Boyle, 'Some Reflection on the Relationship of Treaties and Soft Law' (1999) 48 International & Comparative Law Quarterly 901.
[88] Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12 Uniform Law Review 5, 16.
[89] International Chamber of Commerce, 'Uniform Customs and Practice for Documentary Credits' (ICC Publication 600, Paris 2007).

countries.[90] This standard banking practice is considered a soft law norm, but it functions and applies as a hard law norm and is enforced by central banks in each state. As a result, the label or form of norms does not always indicate their nature, and it is more practical to assess the results or focus of norms to understand their nature (soft or hard).

Soft laws are more advantageous than hard law norms to a certain degree. One such benefit of soft laws is that they do not require a lengthy ratification process, making them less time-consuming in terms of ratification or adaptation.[91] Soft laws are ready for adoption once they have been drafted.[92] Additionally, soft law norms have their own benefits, which make them attractive not only because they are quicker to adapt than hard law norms.[93] Soft law norms combine the advantages of hard law norms while avoiding drawbacks associated with hard law instruments.[94] One of the soft laws' main advantages is their flexibility, which helps to facilitate harmonisation and makes it easier to adopt such instruments.[95]

Soft law norms contribute to establishing compromise and cooperation between international actors from different backgrounds with different aims and interests.[96] Soft laws can facilitate three types of compromise. Soft laws can allow for compromise on the terms and provisions that will be adopted.[97] Moreover, soft law norms can facilitate compromise over time when an agreement should be adopted.[98] Soft law norms can also foster compromise between powerful developed states and weak developing states.[99] Therefore, soft law norms are easier to negotiate because they are non-binding[100] and are less costly to countries' sovereignty. This makes them more desirable for countries to adopt. In contrast, the drawbacks associated with hard law norms cause countries to refrain from ratifying or acceding to them. For example, some conventions fail to enter into force because not enough countries have ratified, accepted, approved, or acceded to them. The 1988 United Nations Convention on International Bills of Exchange[101] is an example of such a convention.

States can adapt soft law norms to suit their socio-economic changes and different

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[90] International Chamber of Commerce, 'Banking & Finance. Global Rules' (*ICC,* 2022) <https://iccwbo.org/global-issues-trends/banking-finance/global-rules/#1488883561633-a6f3f3ac- 5b0b> accessed 08 March 2022.
[91] Gabriel (n 54).
[92] ibid.
[93] ibid 665.
[94] Charles Lipson, 'Why Are Some International Agreements Informal?' in Beth A Simmons, Richard H Steinberg (eds), *International Law and International Relations* (Cambridge University Press 2012).
[95] Gabriel (n 54) 665.
[96] Abbott (n 36) 444.
[97] ibid.
[98] ibid.
[99] ibid.
[100] John J Kirton, Michael J Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Routledge 2016) 9.
[101] United Nations Convention on International Bills of Exchange and International Promissory Notes (adopted 9 December 1988, not in force).

domestic backgrounds.[102] Soft law norms are designed to be adopted by individual states and can be developed into international and domestic legislation templates.[103] For example, the UNCITRAL Model Law on Electronic Commerce[104] was used as a template for the Canadian Uniform Electronic Commerce Act[105] and the Australian Electronic Transaction Act.[106] As a result, soft laws allow greater cooperation and involvement from states and non-state actors, such as non-governmental organisations and international secretariats.[107] Soft laws are more advantageous than hard laws as they do not require domestic approval, which makes them easier for states to adopt.[108] By adopting provisions of soft law norms, states can signal to international actors that they accept development in a particular area of law and are open to future commitments to other international instruments in that field.[109] Regarding contracting costs, soft law norms may be more advantageous for states than hard law norms, as they reduce the costs of managing and enforcing such norms.[110]

States often opt for soft law norms because they can avoid reputational risks in case of non-commitment.[111] This also connects with another functional benefit of soft laws, which is the gap-filling function. This function enables states to fill in gaps in hard law norms when applicable international or domestic law does not provide a solution. For instance, the UNIDROIT Principles of International Commercial Contracts[112] are used by domestic courts to complement provisions of the CISG,[113] when the convention does not address the issue in question.[114]

Legal scholars have criticised soft laws, considering them window dressing due to the lack of an independent judiciary to enforce such norms.[115] While the flexibility of soft law norms can be both an advantage and a disadvantage, it makes it difficult to track the compliance of states and non-state actors to their commitments.[116] This can lead to legal uncertainty and confusion. Soft law agreements require a domestic legislative basis for enforcement, which can create legal uncertainty as domestic legislation may not be able to address the initial

[102] Shaffer (n 81) 719.
[103] Gabriel (n 54) 666.
[104] UNCITRAL 'Model Law on Electronic Commerce' (adopted 12 June 1996).
[105] Uniform Electronic Commerce Act 1999 (Canada).
[106] Electronic Transactions Act 1999 (Australia).
[107] Hillgenberg (n 63) 501.
[108] ibid.
[109] Lipson (n 94) 498.
[110] Abbott (n 36) 434.
[111] Guzman (n 49) 582.
[112] UNIDROIT (n 12).
[113] CISG.
[114] *Yoshimoto* v *Canterbury Golf International Ltd* [2000] NZCA 350; [2001] 1 NZLR 523 (27 November 2000) (New Zealand).
[115] Abbott (n 36) 422.
[116] Danielle De Carolis, 'Some Features of the Harmonisation of International Trade Law in the Third Millennium' (2015) 15 Uniform Law Review 37, 61.

agreement in the desired way.[117] For example, in the European Union, the domestic courts of each member state must apply their national laws to international agreements, which limits the choice of law.[118] A significant disadvantage of soft law norms is the lack of certainty of enforceability. In comparison, hard law instruments provide legal certainty and enforceability of legal norms in international commercial law.

The UNIDROIT MLWR is a soft law norm by its nature, and therefore, states are free to amend its provisions. This flexibility of the UNIDROIT MLWR can hinder the desired result of harmonisation of warehouse receipt law. The OHADA Uniform Acts are hard laws and automatically enforceable once adopted in its member states.[119] Therefore, the OHADA Uniform Acts do not require each member state to ratify or accede to them, which enables OHADA to avoid one of the major drawbacks associated with hard law instruments.[120] The enforcement of the OHADA Uniform Acts is guaranteed by the Common Court of Justice and Arbitration.[121] Therefore, the adoption of a Uniform Act on Warehouse Receipts can allow OHADA to mitigate disadvantages associated with soft laws, guarantee the uniform application of warehouse receipt law in its member states, and, as a result, achieve the desired goal of harmonisation of laws in the field of warehouse receipts.[122]

Soft law norms are criticised because their widespread use in international law can threaten the entire international normative system.[123] According to some academics, soft law norms are politically motivated and do not uphold the formal law and its principles.[124] The argument is that in the process of drafting hard law norms, state representatives and international organisations are widely involved in promoting their interests. In comparison, the process of drafting soft law norms is shorter and does not require the extensive involvement of government representatives, which can affect the quality of law. Therefore, such legal scholars believe that soft laws can only serve as a basis for developing hard law norms, and soft laws may not be suitable for international law.

The perception of soft law norms has changed over time, and nowadays, more legal scholars believe that soft law instruments can be used to regulate international law on their own. However, soft laws can serve as a stepping stone for the development of hard law norms. For instance, the International Chamber of Commerce International Commercial Terms

[117] Gabriel (n 54) 670.
[118] European Union Convention on the Law Applicable to Contractual Obligations (adopted 19 June 1980, entered into force 1 April 1991).
[119] see s 3.3.
[120] see s 2.2.1.
[121] see s 3.4.1.
[122] This assumption will be further assessed in ch 3, 4.
[123] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413.
[124] Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nordic Journal of International Law 381.

(hereafter INCOTERMS)[125] are non-binding but can be binding if the contracting parties voluntarily agree to them.[126] Another example is the UNIDROIT Principles of International Commercial Contracts,[127] which states have used as a basis for developing their domestic legislation in international commercial contracts.[128] The UNIDROIT Principles of International Commercial Contracts were used in drafting the Civil Code of the Russian Federation[129] and the Civil Code of the Republic of Lithuania.[130]

Considering the pros and cons of soft and hard law norms, it can be concluded that various factors and contexts determine the selection of a suitable norm for law reform. The choice of legal norm is influenced by the type of relationship and the social and economic context in which it would operate. When drafting legal norms, the issue in question should be carefully examined to determine which instrument (hard or soft) would better govern the relationship and attract the maximum number of states to comply. Regarding the context of OHADA, it is essential to analyse the legal background and tradition of OHADA and its member states,[131] as well as the nature of the OHADA Uniform Acts and its legal framework.[132] This assists in identifying which form of warehouse receipt law reform is more suitable for OHADA member states: a Uniform Act on Warehouse Receipts or a soft law instrument.

Previous subsections defined the terms ‘hard’ and ‘soft’ law norms and discussed their advantages and disadvantages.[133] It was also established that the nature of legal norms can vary even if they are categorised as ‘hard’ or ‘soft’. The following subsection will discuss emerging hybrid law norms and examine the blended approach to law reform in international commercial law.

2.2.2.3. Blended Approach. Hybrid Law Norms

Soft and hard law norms can complement one another and create balance.[134] The balance between hard and soft law norms can be achieved in two ways: soft laws can be used as a basis for the later development of hard law instruments, or soft laws can complement hard law norms by creating subordinate laws, recommendations, and interpretations to fill in gaps in

[125] International Chamber of Commerce, 'INCOTERMS 2020' (ICC, Paris 10 September 2019).
[126] Michael C Rowe, 'The Contribution of the ICC to the Development of International Trade Law' in Norbert Horn, Clive M Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (Springer 1982).
[127] UNIDROIT (n 12).
[128] Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 208.
[129] Civil Code 1994 (Russia).
[130] Civil Code 2000 (Lithuania).
[131] see ch 4.
[132] see ch 3.
[133] see ss 2.2.2.1., 2.2.2.2.
[134] Mario Giovanoli, 'The Reform of the International Financial Architecture after the Global Crisis' (2009) 42 New York University Journal of International Law and Politics 81.

hard law norms.[135] An example of when a soft law norm was developed into a regional hard law norm[136] is the OHADA Uniform Act Organising Securities,[137] which is based on the UNCITRAL Legislative Guide on Secured Transactions.[138] The UNCITRAL Model Law on International Commercial Arbitration[139] exemplifies how soft law norms can evolve into hard law norms. The UNCITRAL Model Law on International Commercial Arbitration was created to harmonise arbitration procedures and practices in different countries.[140] It encouraged domestic law reforms of arbitration law in many countries.[141] As of now, 85 states have developed their national legislation in commercial arbitration based on the UNCITRAL Model Law on International Commercial Arbitration.[142] This Model Law is now considered a standard similar to *lex mercatoria* due to its wide acceptance by the international community.[143] This is an example of the development of national arbitration legislation, which is regarded as a hard law instrument based on the UNCITRAL Model Law, which is a soft law norm.[144]

According to Kirton and Trebilcock, when soft laws complement and fill gaps in hard law norms, it creates the most desirable balance between soft and hard law norms.[145] Others consider that when soft laws evolve (harden) into hard law norms, it makes a perfectly balanced regulatory framework.[146] However, a blended approach is generally accepted among legal scholars, who believe that the way in which hard and soft law norms complement each other is not significant.[147] A major benefit of the blended approach is its flexibility in addressing different issues and situations. For example, the CISG[148] and the UNIDROIT Principles of International Commercial Contracts complement each other. The CISG provides general principles and rules, while the UNIDROIT Principles of International Commercial Contracts

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[135] Shaffer (n 81) 721.
[136] Marek Dubovec, Louise Gullifer, *Secured Transactions Law Reforms in Africa* (Bloomsbury Publishing 2019) 213.
[137] Uniform Act Organising Securities (adopted 15 December 2010).
[138] UNCITRAL 'Legislative Guide on Secured Transactions' (adopted 11 December 2008) A/63/438 (Vienna 2009).
[139] UNCITRAL 'Model Law on International Commercial Arbitration ' (adopted 1985).
[140] UNGA 'International Commercial Arbitration. Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' UNCITRAL 18th Session UN Doc A/CN.91264 (3 - 21 June 1985).
[141] Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International 1999) 61-63.
[142] UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985)' (*UNCITRAL,* 2022) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 08 March 2022.
[143] Julian D M Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arbitration International 179.
[144] Carolis (n 116) 63.
[145] Kirton (n 100) 31.
[146] David M Trubek, Louise G Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination' (2005) 11 European Law Journal 343, 355.
[147] Janet Koven Levit, 'Bottom-Up Lawmaking: The Private Origins of Transnational Law' (2008) 15 Indiana Journal of Global Legal Studies 49, 71.
[148] CISG.

serve the gap-filling function and supplement the provisions of the CISG.[149] Therefore, when hard and soft law norms complement one another and create a balance, it contributes to the facilitation of international cooperation and the harmonisation and unification of international laws.[150]

When negotiations between governments fail to produce the desired results or are unlikely to do so, soft law norms could be a viable solution.[151] The adoption of soft laws by states can indicate their willingness to participate in binding agreements in the future.[152] By expressing interest in adopting soft law norms, states imply that they are eager to discuss and communicate a hard law norm later.[153] Moreover, when hard law norms incorporate soft law commitments, it is difficult to identify the boundary between norms.[154] Soft law norms are often used as a basis for hard laws, making it even harder to differentiate between the two instruments.[155] When the differences between hard and soft law norms are blurred, it can confuse state and non-state actors. However, once one understands the nature of hard law and soft law norms and the processes of harmonisation and unification of law, it becomes relatively more straightforward to identify provisions of law that could be described as hard and soft law instruments.[156]

Contemporary legal scholars believe that the process of harmonisation of private international law has changed and could be called a 'hybridisation'. Most private international law norms are now formulated by intergovernmental organisations that focus more on the harmonisation process, and the distinction between soft and hard law norms has become blurred.[157] Hybrid law norms can be described as hard by intent but soft in enforcement, with elements of both hard and soft law norms.[158] The CISG[159] can be an example of a hybrid law norm. The convention is a hard law norm, which requires countries to ratify or accede to it, but its nature is soft as there are no procedures to inspect the application of its provisions.

The emergence of hybrid laws in transnational law is linked to the adoption of law to

[149] Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2010) 26 International Law Review 321.
[150] Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of Soft Law' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003) 10.
[151] Kirton (n 100) 24.
[152] Lipson (n 94).
[153] Block-Lieb (n 47) 435.
[154] Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law'* (Oxford University Press 2003) 8.
[155] ibid 10.
[156] Boyle (n 87) 902.
[157] Carolis (n 116).
[158] Inger-Johanne Sand, 'Hybrid Law – Law in a Global Society of Differentiation and Change' in Andreas Fischer-Lescano, Christian Calliess, Dan Wielsch, Peer Zumbansen (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65 Geburtstag* (De Gruyter 2009) 871.
[159] CISG.

address the challenges of globalisation and different legal normative orders of domestic legislation.[160] Hybrid laws are considered part of the evolutionary process, or the so-called 'globalisation of the law'.[161] Globalisation has impacted the law, resulting in the decrease of countries' sovereignty and the increase in the role of international institutions and non-state actors.[162] As a result, regulation in the field of private international law is a process of cooperation of countries, international and non-governmental organisations, and other non-state actors.[163] The distinction between the levels of law (national and international levels) becomes blurred as international law starts to incorporate into domestic legislation.[164]

One of the major drawbacks of hybrid law norms is their soft enforcement. Even if states are committed to such norms, they cannot be fully accountable in case of non- compliance.[165] This happens because the enforceability of such norms depends not on individual states but on a joint effort among states and non-state actors.[166] Another major issue of hybrid law norms is that they can create a false perception of international law and public accountability. Formally binding hybrid law norms can falsely mislead civil society regarding actual government commitments and the enforceability of such obligations.[167] Private actors may rely on such norms without knowing that the enforcement of such norms is impossible.

Soft and hybrid law norms offer flexibility as one of their main advantages. However, this flexibility can make it hard to determine whether or not an agreement has been violated, leading to increased legal uncertainty.[168] This can give rise to a new legal uncertainty in international law: the uncertainty of overlapping sources of national and international laws, leading to failure to cooperate.[169] Hybridisation creates a theoretical challenge in distinguishing between legal and non-legal, between law and social norms.[170] This creates an issue of identifying whether a norm regulates social relationships or merely describes social

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[160] Poul F Kjaer, 'Between Integration and Compatibility: The Reconfiguration of Cognitive and Normative Structures in Transnational Hybrid Law' in Poul F Kjaer, Paulius Jurčys, Ren Yatsunami (eds), *Regulatory Hybridisation in the Transnational Sphere* (BRILL 2013) 281.
[161] Carolis (n 116) 59.
[162] Harold Hongju Koh, 'Review: Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599.
[163] Harm Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 19-20.
[164] Carolis (n 116) 59.
[165] Veerle Heyvaert, 'Hybrid Norms in International Law' (2009) LSE Legal Studies Working Paper 9/2009, 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342366> accessed 01 October 2022 3.
[166] ibid 3.
[167] ibid 22.
[168] Carolis (116) 61.
[169] ibid 62.
[170] Klaus Günther, A M Frankfurt, 'Legal Pluralism and the Universal Code of Legality: Globalisation as Challenge to Legal Theory' in Camil Ungureanu, Klaus Günther, Christian Joerges (eds), *Jürgen Habermas* (Routledge 2011).

life.[171]

The distinction between hard and soft law norms in international law is not always clear. However, it is vital to identify which norms are legally binding as they establish legal boundaries and lead to different consequences.[172] Despite their drawbacks, hybrid law norms can be a successful solution when states want to adopt hard law instruments jointly and have mutual commitments.[173] States accept such law norms, but if only a few states adopt such an instrument, they will not face any ramifications in case of non-compliance. Drafters of international law tend to choose hybrid harmonisation as it enables them to combine soft and hard law instruments and mitigate the disadvantages of each instrument.[174] The development of a Uniform Act on Warehouse Receipts based on the UNIDROIT MLWR is a form of hybridisation. Based on a soft law, the UNIDROIT MLWR, an international hard law – a Uniform Act on Warehouse Receipts - automatically become a part of the national legislation of OHADA member states.

2.2.3. Concepts of Harmonisation and Unification of Law

The concepts of hard and soft law norms are closely connected to the harmonisation and unification of law. The differences between hard and soft law norms were established in the previous subsection.[175] Therefore, this subsection defines the harmonisation and unification of law and the differences between these concepts. This helps to further understand the goals, framework and working methods of OHADA. Understanding the difference between harmonisation and unification of law can assist in answering the research question of which particular form of law (hard or soft) is suitable for OHADA.

2.2.3.1. Definitions of Unification and Harmonisation of Law

The term ‘uniformity of law’ in private international law has been used in various contexts concerning globalisation, but the literature does not clearly define it.[176] According to UNCITRAL, unification is a process that helps to eliminate barriers in international commerce and to facilitate global trade.[177] According to UNIDROIT, unification and harmonisation of law brings together legislation from different states to modernise, coordinate and establish ground

[171] Ralf Michaels, 'The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism' (2005) 51 Wayne Law Review 1225.
[172] Peter M Haas, Richard B Bilder, 'Compliance Theories Choosing to Comply: Theorising from International Relations and Comparative Politics' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003).
[173] Heyvaert (n 165) 26.
[174] Carolis (n 116) 59.
[175] see s 2.2.2.
[176] Michael Greenhalgh Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 Pace International Law Review 55.
[177] CISG preamble.

rules between various countries and blocs of countries.[178] Therefore, unification and harmonisation always involve international elements or different jurisdictions.[179] Unification and harmonisation are crucial elements that closely relate to globalisation.[180] Uniform laws are generally global, as they aim to reduce differences in national legislation and establish common international rules.[181] Globalisation accelerates the unification and harmonisation of law to some degree, and it is becoming even more significant in a world where national borders seem like obstacles to international commerce.

The concept of harmonisation and unification of law closely connects with the idea of colonisation. During colonial unification, the coloniser enforced its laws on its colonies, sometimes with some degree of variation.[182] For example, French legislation influenced the legislation of its former colonies, including OHADA member states.[183] Colonial unification was different from modern unification, which respects all legal systems. Colonial unification aimed to eliminate indigenous legislation and replace it without consent with the coloniser's laws.[184] Even though former colonies have the freedom to modify their legislation, most still maintain the fundamental principles of their colonisers' legislation.[185] For example, OHADA countries - former French colonies - maintain core elements of French legislation.[186] One of the major exceptions is the US, where legislation progressed differently after its separation from English law.[187]

The unification and harmonisation of law refer to the creation of general common rules that apply to different jurisdictions to varying degrees.[188] The concept of unification of law focuses on the application of law and its effect rather than just on drafting and creating new legislation. Legislation is unified only when it has been successfully implemented in different jurisdictions with the establishment of shared rules and common practices. The level of unification cannot be absolute and may vary to some degree from country to country. The successful implementation of harmonised or unified norms depends on the project's planning,

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[178] UNIDROIT, 'About UNIDROIT' (*UNIDROIT,* 2021) <https://www.unidroit.org/about-unidroit/> accessed 10 January 2022.
[179] Camilla Baasch Andersen, 'Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts through a Global Jurisconsultorium of the CISG' in Camilla Baasch Andersen, Mads Andenas (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 31.
[180] Bridge (n 176) 55-89.
[181] Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 24.
[182] David B Schorr, 'Questioning Harmonisation: Legal Transplantation in the Colonial Context' (2009) 10 Theoretical Inquiries in Law Forum 49.
[183] Rodolfo Sacco, 'One Hundred Years of Comparative Law' (2001) 75 Tulane Law Review 1159.
[184] Gopalan (n 58) 277.
[185] see ch 4.
[186] ibid.
[187] Daniel Berkowitz, Katharina Pistor, Jean-Francois Richard, 'The Transplant Effect' (2003) 51 The American Journal of Comparative Law 163, 174.
[188] Andersen (n 179) 32.

scope, and organisation.[189] Sometimes, working groups may focus too much on the content of the drafted instrument, which could result in low demand for the newly drafted laws.[190] For example, the European Convention Providing a Uniform Law on Arbitration[191] contained complex provisions that addressed theoretical problems and were, therefore, rarely applied in practice. Despite the efforts of several international organisations involved in legal harmonisation projects, the number of successful projects is still limited.[192]

Harmonisation of law may be more desirable when there is no need for unification of law and achieving uniformity seems complicated or when only minimal adjustments are necessary to a domestic legal system.[193] Harmonisation is the process of minimising significant differences between jurisdictions to achieve a certain degree of similarity so that ground rules regulating general aspects in a particular area of law in different jurisdictions will be similar.[194] Harmonisation of law aims to create specific standards and principles that are the same among jurisdictions despite the variability of national domestic laws. Compared with the unification of law, harmonisation does not aim to achieve a high degree of similarity among jurisdictions. Harmonisation recognises the variability of domestic laws and only intends to create standardised rules to eliminate legal inconsistencies and obstacles.[195] Even though the two processes are quite similar, their aims are different. Harmonisation aims to make regulations similar, whereas unification seeks to make legal rules identical and have a higher degree of legal uniformity than harmonisation.[196]

The concept of harmonisation of law has different meanings in modern legal literature. However, most legal scholars define it as a process of adjusting legislation across various countries to function similarly.[197] Thereby reducing the differences in domestic legislation.[198] Harmonisation of law emerged as an evolutional process of globalisation and the increasing importance of the supranational power of intergovernmental organisations.[199] Unlike unification, harmonisation of law does not aim to create a single standardised legal framework

[189] Goode (n 3) 215.
[190] ibid 217.
[191] European Convention Providing a Uniform Law on Arbitration (adopted 20 January 1966) ETS No.056.
[192] Jose Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 Uniform Law Review 5, 8.
[193] UNCITRAL, 'A Guide to UNCITRAL. Basic Facts about the United Nations Commission on International Trade Law' (Vienna 2013) art 38.
[194] Stelios Andreadakis, 'Regulatory Competition or Harmonisation: The Dilemma, the Alternatives and the Prospect of Reflexive Harmonisation' in Camilla Baasch Andersen, Mads Andenas (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 56.
[195] ibid 58.
[196] Andersen (n 88) 15.
[197] David W Leebron, 'Claims for Harmonisation: A Theoretical Framework' (1996) 27 Canadian Business Law Journal 63.
[198] Gopalan (n 58) 275.
[199] H Patrick Glenn, 'Harmony of Laws in the Americas' (2003) 34 Inter-Amerrican Law Review 223, 246.

among jurisdictions but instead suggests different ways of eliminating legal differences among jurisdictions.[200] Apart from law reform, harmonisation can be expedited by provisions of private law accepted by contracting parties from different jurisdictions.[201]

Harmonisation is a process that creates a standard framework for the development of domestic laws. Unlike unification, harmonisation allows for flexibility and alteration, which helps different cultures, traditions, and domestic specificities coexist. Harmonised rules can be adopted in each state with some alterations. The US is an example of a harmonised system, where the federal government provides a common framework, and each state is free to adapt and develop its regulations and rules.[202] OHADA's legislation is an example of a unified system. The OHADA Uniform Acts are obligatory and binding for all its member states.[203]

Harmonisation and unification of law are two methods for achieving consistency in international law. Harmonisation values a country's sovereignty and allows gradual adaptation to a general framework.[204] Unification, conversely, aims to minimise differences between domestic legislation and requires a compromise for drafters. In terms of sovereignty, unification can cause two results: 'the international rules will not conform to the domestic rules, or the domestic rules will have to be redrafted to conform to emerging international law.'[205] Many countries consider unification an infringement of their sovereignty because it requires changes in domestic legislation to conform to international hard law norms if the country has ratified or acceded to such an instrument. The process of unification requires the delegation of power to international organisations with supranational power, which states consider 'sovereignty costly' as they associate it with a potential infringement of sovereignty.[206] In comparison, harmonisation offers more flexibility and does not impose extra obligations on states.[207] Therefore, countries are more willing to accept harmonised laws.[208] Additionally, harmonisation grants states greater control over their domestic legislation as they can choose which provisions to accept and reject.[209] This sense of control helps them to maintain their power and sovereignty.[210]

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[200] Stephen Zamora, 'NAFTA and the Harmonisation of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12 Arizona Journal of International and Comparative Law 401.
[201] ibid 403.
[202] Andreadakis (n 194) 58.
[203] Treaty on Harmonisation of Business Law in Africa (adopted 17 October 1993, entered into force 18 September 1995) art 10.
[204] Simon Deakin, 'Regulatory Competition versus Harmonisation in European Company Law' in Damien Geradin, Daniel C Esty (eds), *Regulatory Competition and Economic Integration Comparative Perspectives* (Oxford University Press 2001) 194.
[205] Gabriel (n 54).
[206] Abbott (n 36).
[207] Gabriel (n 54) 662.
[208] ibid.
[209] Abbott (n 36).
[210] ibid.

This subsection established definitions of harmonisation and unification of law and explained their differences. The following subsection will discuss the benefits and potential drawbacks of unification and harmonisation. Understanding the benefits and drawbacks of harmonisation and unification of law will help to determine which form of law will be more suitable for conducting warehouse receipt law reform in OHADA member states.

2.2.3.2. Benefits of Harmonisation and Unification of Laws

One of the main arguments for harmonising national laws in international commercial law is that harmonised national laws create legal certainty. When differences in national laws create legal confusion, businesses refrain from engaging in commercial agreements and transactions.[211] This affects a country's economy and development. Harmonisation and unification can create general standardised legal rules that are clear for businesses from different jurisdictions.[212] If differences in the legal system do not create obstacles for businesses or business transactions, unification is not desirable. Without a strong reason, when differences in domestic legislation create hurdles for global commerce and transactions, unification is not necessary, as it may lead to wasted resources if countries refrain from hard law instruments.[213]

Even if commercial parties engage in commercial transactions in situations of legal uncertainty, such a situation can increase transaction costs for them. This is because the contracting parties involved in commercial transactions may be required to spend time and money to gather information about foreign law that applies to their agreements.[214] The diversity of legislation across different states can significantly increase the cost of doing business, and companies may choose not to enter into a profitable economic agreement. It is desirable to harmonise or unify laws across different countries to address this issue. This would enable businesses to reduce the cost of doing business and participate in agreements they might not have been able to otherwise. Having a single international instrument to govern international transactions would be particularly beneficial as it would allow businesses to reduce costs further and participate in even more profitable agreements.[215]

Harmonisation and unification of law are necessary for the facilitation of international transactions. Domestic laws are often unsuitable for such transactions because they are

[211] Leebron (n 197).
[212] ibid.
[213] Gopalan (n 58) 279.
[214] Ole Lando, Christian V Bar, 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code' (2002) 10 European Review of Private Law 183.
[215] Anthony Saunders, Anand Srinivasan, Ingo Walter, Jeffrey Wool, 'The Economic Implications of International Secured Transactions Law Reform: A Case Study' (1999) 20 University of Pennsylvania Journal of International Law 309.

diverse and propose limited solutions to issues arising from international transactions.[216] Applying domestic legislation to international commercial law may not provide adequate solutions.[217] For instance, when there was no international registry for mobile equipment (such as aircraft equipment), countries had to search different national registers to address priority-related issues.[218] Therefore, harmonisation and unification of law were desirable and clearly solved the problem.[219]

Harmonisation and unification of law play an essential role in facilitating international commerce. Many countries, especially developing ones, lack the expertise to create their own legislation. To overcome this, legislators in developing countries often try to implement the desirable legislation by copying it in their own country.[220] For instance, Zambia's Companies Act 1994[221] regarding the companies registry was based on the UK Companies Act 1948.[222] Although it seems like a harmonisation, in reality, it is quite the opposite. While copying the legislation, a country can make as many changes as it wants, resulting in more diversity in national systems instead of harmonising laws in the field. In that sense, harmonisation and unification offer better solutions to such countries as they enable countries to base their new legislation on international experience and best practice approaches.

Harmonisation and unification can motivate the modernisation of laws. This enables countries, especially developing ones, to update their outdated legislation and make their legal system work more efficiently.[223] An example of this is the reform of the secured transaction law in Mexico. Before the reform and implementation of changes to the Mexican Commercial Code,[224] the legislation in the field was not transparent and created legal confusion.[225] The Mexican secured transactions legislation amendments were based on the US Uniform Commercial Code Article 9[226] and aimed to harmonise secured transaction laws to eliminate boundaries in cross-country commerce.[227] This is an example of how an initial aim for

[216] Roy Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2008) 50 International and Comparative Law Quarterly 751.
[217] René David, *The International Unification of Private Law* (Mohr 1971) 2.
[218] Gopalan (n 58) 282.
[219] The Cape Town Convention on International Interests in Mobile Equipment (signed 16 November 2001, entered into force 1 March 2006) and Protocol on the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (signed 16 November 2001, entered into force 1 March 2006) created a framework for the operation of the international registry for aircraft equipment.
[220] Glenn (n 199) 242.
[221] Companies Act 1994 (Zambia) part 5.2.
[222] Companies Act 1948 (the UK).
[223] Gopalan (n 58) 287.
[224] Code de Commerce 1889 (Mexico).
[225] Dale Beck Furnish, 'Mexico's Emergent New Law of Secured Transactions: Recent Developments 2000-2010' (2011) 28 Arizona Journal of International and Comparative Law 143, 145.
[226] Uniform Commercial Code 1952 (US) article 9.
[227] D Michael Mandig, 'Secured Lending Reform in Latin America: A Practitioner's Point of View on Mexico' (2011) 28 Arizona Journal of International and Comparative Law 183.

harmonisation can also serve the function of modernisation.

Contracting parties usually opt for their own legal system to govern their agreement because they are more familiar with it. However, in cross-border commerce, this may create a deadlock if neither of them wants to compromise on their choice of law.[228] In such circumstances, harmonisation and unification of law can offer a neutral choice of law that will not force parties to compromise their preferences. The CISG[229] is an example of a law that was drafted to provide a neutral legal framework to contracting parties, putting all of them in an equal legal position.[230] The UNIDROIT Principles of International Commercial Contracts[231] is an example of harmonisation of law that provides a neutral choice of law for contracting parties and complements provisions of the hard law norm.[232]

This subsection established the benefits of harmonisation and unification of law. The following subsection will discuss potential challenges associated with these concepts.

2.2.3.3. Drawbacks of Harmonisation and Unification of Law

Despite the benefits of harmonisation and unification of law, there are some drawbacks.[233] Many legal scholars consider harmonisation and unification of law superfluous and hazardous to international commerce.[234] They argue that the draft of uniform laws is always a compromise, which can hamper domestic legislation.[235] Furthermore, some legal scholars consider it just a form of 'diplomatic uniformity' that is not freely chosen by each country.[236] The terms and provisions of these instruments are often broad and challenging to translate into other languages.[237] This argument is based on the assumption that the natural evolution of laws through legal transplants is more desirable as it does not involve problems of negotiation and compromise. However, the argument ignores the fact that the natural evolution of laws can create differences in the legal systems of different countries, which can create serious obstacles to international commerce and transactions. These differences in the national legal system can cause legal risks for contractual parties and discourage potentially profitable transactions because clear 'game rules' are not in place.[238]

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[228] Gopalan (n 58) 289.
[229] CISG.
[230] Christiana Fountoulakis, 'The Parties' Choice of 'Neutral Law' in International Sales Contracts' (2005) 7 European Journal of Law Reform 303.
[231] UNIDROIT (n 12).
[232] Fountoulakis (n 230) 322.
[233] Leebron (n 197) 65.
[234] J S Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 Law Quarterly Review 530.
[235] Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 The American Journal of Comparative Law 97.
[236] Hobhouse (n 234) 534.
[237] Andersen (n 88) 27.
[238] Paul B Stephan, 'The Futility of Unification and Harmonisation in International Commercial Law' (1999) 39 Virginia Journal of International Law 743.

It has been argued that unification and harmonisation lead to the disappearance of diversity, eliminate the freedom of choice of laws, and negatively affect legal cultures.[239] This argument is based on the political point of view that not all countries should be required to agree to terms and conditions that are acceptable to most countries.[240] This is particularly relevant to developing countries, as they may have to compromise their legal frameworks to the predominant legal systems of more powerful states.[241] Countries with less political power may be forced to accept conditions that states with considerable political power find favourable and acceptable. This is particularly relevant to OHADA and its member states, as the UNIDROIT MLWR offers flexibility in adopting its provisions. Otherwise, OHADA would have to accept the terms of a new hard law instrument in the field of warehouse receipt.

The overall goal of the unification and harmonisation of international commercial law is to bring clarity, flexibility, and modernisation to the legislation to facilitate economic development.[242] Apart from that, unification and harmonisation aim to achieve three primary objectives: to manage legal risks related to international trade and unpredicted legal rules; to improve legislation by conducting law reform; and to equip legal advisors with tools and knowledge to advise and assist businesses.[243] The degree of achieving the main goals and objectives of harmonisation and unification of law varies depending on the form of law: hard law norms – strict adherence; soft law norms – a higher degree of flexibility.

However, managing legal risks can hinder international trade as it requires the creation of developed and specific rules, which can reduce flexibility and eliminate individualised terms of business contracts. Therefore, unification and harmonisation should aim to reduce legal risks to the extent that it enables contractual parties to be flexible.[244] Law reform can improve legislation through harmonisation and unification by enabling countries to adopt foreign commercial law while preserving their sovereignty and independence.[245] The harmonisation and unification of law can be achieved through law reform, which will be discussed later in this chapter.[246]

It was established in this subsection why harmonisation and unification of law can be desirable. Risks associated with the concept of unification and harmonisation were identified. The following subsection will discuss the interchangeable use of the terms ‘unification’ and

[239] Andersen (n 88) 27.
[240] Herbert Kronke, 'The Role of UNIDROIT' in Loukas A Mistelis, Ian F Fletcher, Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001).
[241] Pistor (n 235).
[242] UNCITRAL, 'Uniform Commercial Law in the 21st Century: Proceedings of the Congress of the United Nations Commission on International Trade Law' (UN, New York 1992) 11.
[243] Stephan (n 238) 744.
[244] ibid 748.
[245] ibid 750.
[246] see s 2.3.1.

'harmonisation' and the problems associated with it.

2.2.3.4. Interchangeable Use of Terms Harmonisation and Unification

Over the recent years, the importance and use of soft law norms in international commercial law have grown exponentially.[247] This is because, unlike hard law instruments, soft law norms offer countries great flexibility, allowing them to choose the provisions they want to adopt.[248] Contemporary legal scholars generally associate hard law norms with the unification of law. However, the final results that can be achieved using legal instruments are more important than the instrument itself.[249] The process of drafting and implementing specific legislative instruments and how each instrument can fit into a cultural and political environment is more important than the form of a law.[250] Therefore, it is more important to consider how all stakeholders will accept the legislation and whether it will be easier to implement and enforce it.

A blended approach between the processes of harmonisation and unification of law can overcome their limitations and shortcomings and take advantage of their respective benefits.[251] Formulating agencies should carefully consider what instrument might be more suitable in particular situations and how hard and soft law norms could complement each other and suit specific backgrounds and contexts.[252] To understand the nature of harmonisation and unification more profoundly and the differences between these two processes, it is essential to understand the norms associated with them.

In contemporary legal literature, harmonisation and unification are often used interchangeably or replaced with other terms, such as integration.[253] It is not only literature that uses the 'changed meaning' of the terms, but sometimes policymakers use the 'changed meaning' of the terms as well. For instance, OHADA aims to harmonise business law among its member states, but it creates uniform laws that are binding and obligatory for all its member states. Therefore, OHADA, in essence, unifies the legislation of its member states. In the US, the National Conference of Commissioners on Uniform State Laws drafts Uniform Acts that serve as model laws, which states are free to adopt or reject.[254] These Uniform State Laws

[247] Gopalan (n 58) 310.
[248] Shaffer (n 81) 710.
[249] Cynthia Crawford Lichtenstein, 'Hard Law v Soft Law: Unnecessary Dichotomy?' (2001) 35 The International Lawyer 1433.
[250] Amelia H Boss, 'The Evolution of Commercial Law Norms: Lessons to be Learned from Electronic Commerce' (2009) 34 Brooklyn Journal of International Law 673.
[251] Arthur S Hartkamp, 'Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope' (2003) 8 Uniform Law Review 81.
[252] Faria (n 192).
[253] Anne Lise Kjær, 'A Common Legal Language in Europe' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 378.
[254] Uniform Law Commission, 'What is a Uniform Act' (*Uniform Law Commission,* 2022) <https://www.uniformlaws.org/acts/overview/uniformacts> accessed 10 January 2022.

are soft laws in nature. As a result, to identify whether it is harmonisation or unification, one should pay close attention to the rules behind the process and how specific rules are enforced and applied.

This subsection clarified the concepts of soft and hard law norms.[255] Their connection to the process of unification and harmonisation of law was established.[256] Harmonisation and unification of law can be achieved via law reform, which can be conducted with the assistance of formulating agencies.

2.3. Law Reform. Concept of Legal Transplant

This section focuses on the concept of law reform as a tool for achieving harmonisation and unification of law. Understanding the concept of law reform can help to understand the working methods of OHADA and determine the most suitable way to conduct warehouse receipt law reform for OHADA. The role of formulating agencies in conducting law reforms in private international commercial law is also discussed. This can assist in answering the research question of whether OHADA can use the UNIDROIT MLWR as a basis for conducting warehouse receipt law reform in its member states. This section explains the role of legal transplants in international commercial law. Understanding the role of legal transplant in international commercial law can help to answer the research question of how the provisions of the UNIDROIT MLWR can be further tailored to the OHADA member states' legal background.

2.3.1. Concept of Law Reform. Supranational Power

The concept of law reform closely connects with the unification and harmonisation of law. Law reform involves activities undertaken by law reform commissioners and formulating agencies[257] to change the substance of the law.[258] The term ‘law reform’ should be differentiated from ‘law consolidation’ and ‘law revision’. Law reform involves changing the substance of the law, not only its form. In today’s global world and market economy, law reform is necessary to establish an international legal framework and certainty, without which modern economies would not function efficiently.[259] When social changes exceed national boundaries,

[255] see s 2.2.2.
[256] see s 2.2.3.
[257] see s 2.3.2.
[258] Commonwealth Secretariat, 'Changing the Law: A Practical Guide to Law Reform' (Commonwealth Association of Law Reform Agencies, London 2017) 11.
[259] Michael Bogdan, 'Development Assistance in the Legal Field: Promotion of Market Economy v Human Rights' in Antonina Bakardjieva Engelbrekt, Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing 2009) 35.

there is a need for supranational laws to govern such relationships.[260] The unification and harmonisation of law and the concept of legal reform are closely connected with the concept of legal transplant, which will be discussed later in this chapter.[261]

The rationale for creating supranational laws is to regulate cross-border commerce and promote economic development among individual states. When differences in domestic legislation create boundaries for businesses, supranational laws can create a framework to solve the problem.[262] International law reforms should fit into individual states' preexisting domestic legislation to create an advantage for economic development.[263] Legal norms should be harmonised to work correctly in the global world so that private actors in every state can fruitfully exploit them and participate in international trade.

It is generally accepted that the law should be indifferent and neutral.[264] The indifference of law should not be only political but also cultural[265] so that it can equally address the needs of different interest groups. This correlates with the notion that law reform agencies must be independent of any external influence and possess adequate expertise.[266] In international law, to maintain independence and neutrality, states delegate the authority to develop laws in certain areas to international organisations with supranational power. Most international organisations with supranational power focus on technical aspects of law, excluding politics and cultural context, to maintain neutrality and political independence.[267] This enables them to address specific issues and avoid political influence. Delegation of power is the main characteristic of an international organisation with supranational power. In other words, states agree to delegate part of their sovereignty to an international organisation, which grants such an organisation supranational power to develop law norms.[268] The power delegated to an international organisation varies in scope – the area of law where the organisation can execute its power- and centralisation - the extent to which the organisation can execute its power in the particular area of law.[269]

Countries decide to delegate power to supranational organisations for several reasons.

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[260] Gianmaria Ajani, 'Legal Change and Economic Performance: An Assessment' in Antonia Bakardjiev Engelbrekt, Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing Limited 2009) 4.
[261] see s 2.3.3.
[262] Leebron (n 197) 75.
[263] Ajani (n 260) 8.
[264] Florencio López-De-Silanes, 'The Politics of Legal Reform' (2002) 2 Economía 91.
[265] Ajani (n 260) 9.
[266] Commonwealth Secretariat (n 258) 20.
[267] Ajani (n 260) 13.
[268] Mireille Hildebrandt, 'International and Supranational Law' in Mireille Hildebrandt (ed), *Law for Computer Scientists and Other Folk* (Oxford University Press 2020).
[269] Abbott (n 27) 404-408.

First, it can reduce the cost of policymaking.[270] Delegating supranational power to formulating agencies can decrease the transactional costs of policymaking. Formulating agencies not only draft and enforce international agreements but also monitor them, which also increases cooperation among states.[271] Second, delegating supranational power to formulating agencies increases the credibility of international agreements.[272] Supranational delegation of power creates mechanisms that allow only formulating agencies to interpret, enforce and monitor international agreements and, as a result, restrict states' power in that area.[273] This automatically eliminates the possibility of misinterpretations of the provisions of law and speculations from states.

In the legal literature, international organisations with supernational power are generally called ‘formulating agencies’ or ‘supranational organisations.’ Formulating agencies can be international, regional or national organisations that are delegated power to develop policies and rules in international commercial law.[274] Three major international organisations have the power to develop law norms in international private law, namely UNIDROIT,[275] UNCITRAL,[276] and the Hague Conference on Private International Law.[277] However, the Hague Conference on Private International Law mainly consolidates its efforts outside international commercial laws. Thus, the Hague Conference on Private International Law primarily focuses on other areas of law, such as family law.[278]

International organisations with supranational power should not be confused with other international organisations. For example, the World Bank Group and the European Bank for Reconstruction and Development have actively published guidance for law reform.[279] Neither the World Bank Group nor the European Bank for Reconstruction and Development has been granted mandates to draft and implement laws. Such organisations can only publish legislative

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[270] Mark A Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 51 International Organisation 99.
[271] ibid 103.
[272] Manuele Citi, Mads Dagnis Jensen, 'The Effects of Supranational Delegation on Policy Development' (2022) 60 Journal of Common Market Studies 337.
[273] ibid 339.
[274] Loukas Mistelis, Clive M Schmitthoff, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Ian F Fletcher, Marise Cremona, Loukas Mistelis (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 1-040.
[275] Statute of UNIDROIT (adopted 26 March 1993).
[276] UNGA 'Establishment of the United Nations Commission on International Trade Law' UNCITRAL 31st Session Session UN Doc A/6396 A/31/PV.99 (17 September 1966).
[277] Statute of the Hague Conference on Private International Law (adopted 31 October 1951, entered into force 15 July 1955).
[278] Hague Conference on Private International Law, 'Legislative Work' (*HCCH,* 2022) <https://www.hcch.net/en/projects/legislative-projects> accessed 1 October 2022. The Hague Conference on Private International Law has a broader scope than UNIDROIT and UNCITRAL. However, compared with UNCITRAL and UNIDROIT, the Hague Conference on Private International Law is not that active in drafting legal norms in the field of international commercial law.
[279] World Bank Group, 'A Guide to Warehouse Receipt Financing Reform: Legislative Reform' (WBG, Washington DC 2016).

recommendations and guidance, which can only be a basis for the development of new legislation and do not have any binding effect.

2.3.2. UNIDROIT and UNCITRAL

Defining the term ' formulating agency' is essential before discussing the two main formulating agencies in international commercial law. In international commercial law, the term formulating agency refers to an international organisation with the supranational power[280] to draft legal instruments in international commercial law at the global or regional levels.[281] Several intergovernmental organisations develop legal norms in international commercial law. In addition to UNIDROIT and UNCITRAL, examples include the International Chamber of Commerce, which developed the international trade terms INCOTERMS.[282] The Organisation of American States,[283] OHADA and the Southern Common Market (MERCOSUR) are among the regional intergovernmental organisations with the authority to draft legal norms with supranational power.[284] However, only two international intergovernmental organisations are active in developing legal norms in private commercial laws on the global level, namely UNIDROIT and UNCITRAL.

In 1940, the Statute of UNIDROIT granted UNIDROIT a mandate to draft uniform law norms in private international law.[285] The UNIDROIT Governing Council later explained what constitutes uniform laws. Apart from hard law norms, the term uniform law should encompass soft law instruments such as the UNIDROIT Principles of International Commercial Contracts.[286] The UNIDROIT aims to develop uniform laws such as international conventions.[287] However, since soft law norms are becoming popular when developing a hard law is non-essential, UNIDROIT also aims to propose soft law norms in the form of model laws and legal guides.[288] Therefore, UNIDROIT has the mandate to develop not only hard law norms but soft laws as well.

UNIDROIT currently consists of 63 member states from different regions and legal

[280] ibid.
[281] Goode (n 3) 171.
[282] International Chamber of Commerce (n 89).
[283] Organisation of American States, 'About Us' (*OAS,* 2023) <https://www.oas.org/en/about/who_we_are.asp> accessed 21 February 2023.
[284] Southern Common Market (MERCOSUR), 'What is MERCOSUR?' (*MERCOSUR,* 2023) <https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/> accessed 21 February 2023.
[285] Statute of UNIDROIT (adopted 26 March 1993) art 1.
[286] UNIDROIT Governing Council, 'Memorandum of the UNIDROIT Governing Council' (73d Session, Rome 1994).
[287] UNIDROIT, 'Strategic Plan' (91st Session of the Governing Council A.G. (71) INF. 2, Rome 2012).
[288] ibid 12-14.

families.[289] UNIDROIT has developed around seventy drafts of legal norms so far.[290] Currently, UNIDROIT is comprised of four member states from the African region (Egypt, Nigeria, South Africa, and Tunisia).[291] UNIDROIT closely cooperates with regional organisations in Africa. For example, UNIDROIT, together with OHADA, presented a draft of the Uniform Act on Contract Law.[292] UNIDROIT's main aims are to contribute to international cooperation and coordination in private international law, assess the possibility of law harmonisation, coordinate law reforms, and assist states in adopting legal norms in private international law.[293] To avoid duplication of work, UNIDROIT closely cooperates with other formulating agencies such as UNCITRAL and the Hague Conference on Private International Law. Thus, as a part of the cooperation, UNIDROIT, with UNCITRAL and the Hague Conference on Private International Law, developed the Legal Guide to Uniform Instruments in the Areas of International Commercial Contracts, focusing on Sales.[294] This guide's main aim is to provide recommendations on how different instruments developed by formulating agencies in the field of contracts of sales of goods interact and complement each other.[295] The guide clarifies which instrument should be used in a particular situation and how to apply such recommendations to international agreements, making it easier for contracting parties to understand their rights and obligations.

Another formulating agency in the field is UNCITRAL. Growing legal confusion regarding competition among international organisations in international commercial law was the main reason for the creation of UNCITRAL.[296] Before the creation of UNCITRAL, various United Nations bodies, including the United Nations Conference on Trade and Development,[297] the United Nations Regional Commissions (such as the United Nations Economic Commission for Africa),[298] and specialised agencies, such as the International Bank for Reconstruction and Development, were involved in recommending and drafting rules in international commercial law.[299] It was determined that the efforts of various formulating agencies were uncoordinated

[289] UNIDROIT, 'Overview' (*UNIDROIT,* 2022) <https://www.unidroit.org/about-unidroit/overview/> accessed 10 October 2022.
[290] ibid.
[291] UNIDROIT, 'Membership' (*UNIDROIT,* 2022) <https://www.unidroit.org/about-unidroit/members-states-2/#1651667996792-7cf7396a-ff9d> accessed 12 October 2022.
[292] UNIDROIT, 'Preliminary Draft OHADA Uniform Act on Contract Law' (UNIDROIT, Rome 2008).
[293] Statute of UNIDROIT (adopted 26 March 1993) art 1.
[294] Hague Conference on Private International Law, UNCITRAL, UNIDROIT, 'Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales' (United Nations, Vienna 2021).
[295] ibid 1-3.
[296] Harold Cooke Gutteridge, *Comparative Law* (Cambridge University Press 1946) 183-184.
[297] United Nations Conference on Trade and Development, 'History' (*UNICTAD,* 2022) <https://unctad.org/about/history#:~:text=The%20first%20United%20Nations%20Conference,held%20in%20Geneva%20in%201964.> accessed 1 October 2022.
[298] United Nations Economic Commission for Africa, 'UNECA Overview' (*UNECA,* 2022) <https://www.uneca.org/about> accessed 1 October 2022.
[299] International Bank for Reconstruction and Development, 'Who We Are' (*World Bank Group,* 2022) <https://www.worldbank.org/en/who-we-are/ibrd> accessed 2 October 2022.

and led to duplication of work, which slowed progress towards harmonisation and unification of law.[300] Therefore, UNCITRAL was established as the leading United Nations body responsible for international commercial law to address this.[301] UNCITRAL members are elected for a six-year term with the assurance that various regions and economic and legal systems will be represented.[302] Currently, fifteen African countries are members of UNCITRAL. In addition to member states, UNCITRAL includes observer member states and international and regional organisations with expertise in its working agenda.[303]

UNCITRAL was granted the mandate to harmonise and unify laws related to international commerce.[304] Later, UNCITRAL clarified the terms harmonisation and unification. Thus, harmonisation aims to increase predictability in cross-country trade by amending domestic legislation, and unification seeks to establish common legal standards for international trade.[305] UNCITRAL focuses its work on four main categories: cooperation with international organisations in international commercial law, drafting legal norms in the field, supporting the harmonisation of laws in the field, and supporting law reforms in the field.[306]

Despite the successful work of UNCITRAL and UNIDROIT in private international law, some obstacles still prevent their progress.[307] For example, the reason for creating UNCITRAL was to establish coordination among international organisations in commercial law, which is still in progress. UNIDROIT's main aims are cooperation and coordination in harmonising international commercial law. UNCITRAL in cooperation with UNIDROIT[308] developed the CISG.[309] Despite all the successful coordination and efforts, there is still a chance of duplicate work as both international organisations aim to harmonise international commercial laws.[310] Moreover, the mandates of these two international organisations are quite similar, which can lead to further obstacles.

Since the creation of UNCITRAL, several regional and international organisations have

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[300] UNGA, 'Report of the Secretary-General' (Documents A/6396 and ADD1 and 2, New York 1966).
[301] Jose Angelo Estrella Faria, 'The Relationship between Formulating Agencies in International Legal Harmonisation: Competition, Cooperation, or Peaceful Coexistence - A Few Remarks on the Experience of UNCITRAL' (2005) 51 Loyola Law Review 253, 255.
[302] UNCITRAL, 'Origin, Mandate and Composition of UNCITRAL' (*UNCITRAL,* 2022) <https://uncitral.un.org/en/about/faq/mandate_composition> accessed 3 October 2022.
[303] UNGA 'Establishment of the United Nations Commission on International Trade Law' UNCITRAL Session Session UN Doc A/6396 A/31/PV.99 (17 September 1966) 183.
[304] ibid I.
[305] UNCITRAL, 'Frequently Asked Questions - Mandate and History' (*UNCITRAL,* 2022) <https://uncitral.un.org/en/about/faq/mandate_composition/history#:~:text=What%20is%20the%20mandate%20of,the%20law%20of%20international%20trade> accessed 06 October 2022.
[306] UNGA 'Establishment of the UN Commission on International Trade Law' UNCITRAL Session Session UN Doc A/6396 A/31/PV.99 (17 September 1966) 183.
[307] Faria (n 302) 270.
[308] UNIDROIT, 'International Sales Law' (*UNIDROIT,* 2022) <https://www.unidroit.org/studies/international-sales-law/#1456405893720-a55ec26a-b30a> accessed 10 October 2022.
[309] CISG.
[310] Faria (n 302) 274-278.

emerged. Among them are the Asia-Pacific Economic Cooperation (APEC)[311] in the Asian Region, the Southern Common Market (MERCOSUR)[312] in South America, the United States-Mexico-Canada Agreement (USMCA)[313] in North America, OHADA in Africa and others. Most of these organisations share similar goals of harmonising regulations in international trade law. The creation of new international and regional organisations with different regional mechanisms of cooperation and integration has increased the chances of overlaps in legal norms.[314] New intergovernmental organisations may impact the efforts of UNIDROIT and UNCITRAL in international harmonisation.[315] Duplication is also possible, especially at the private level of non-governmental organisations. The International Chamber of Commerce is the most prominent example.[316] Even though the International Chamber of Commerce is not an international organisation with supranational power, it can develop standards in the area of contract law that may contradict or create legal confusion among private actors.[317]

The previous subsection defined law reform[318] and it was established how international organisations with supranational power can increase legal certainty and conduct law reforms.[319] It was established that UNIDROIT and OHADA have mandates to develop international commercial law with supranational power. Furthermore, it was established that the UNIDROIT has positive expertise and experience in drafting laws in the field of private international law. This indicates that the UNIDROIT MLWR is a suitable basis for the development and conducting of warehouse receipt law reform in OHADA member states.

The following subsection will analyse the concept of legal transplant and its connection with law reforms. The following subsection will define the term ‘legal transplant’. The following subsection will also closely examine the benefits and drawbacks of adopting legal transplants in international commercial law and their connection with law reforms. This will assist in establishing the theoretical basis in the field of legal transplant and assess whether the provisions of the UNIDROIT MLWR can be further tailored to the legal background of OHADA member states.

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311 Asia-Pacific Economic Cooperation, 'About APEC' (*APEC,* 2022) <https://www.apec.org/about-us/how-apec-operates> accessed 10 October 2022.
312 Southern Common Market (n 285).
313 United States-Mexico-Canada Agreement, 'Home. USMCA' (*USMCA,* 2022) <https://www.trade.gov/usmca> accessed 10 October 2022.
314 UNIDROIT (n 288) s 63.
315 ibid.
316 International Chamber of Commerce, 'Who We Are' (*ICC,* 2022) <https://iccwbo.org/about-us/who-we-are/> accessed 10 October 2022.
317 UNIDROIT (n 288) s 65.
318 see s 2.3.1.
319 see ss 2.3.1., 2.3.2.

2.3.3. Legal Transplant

In simple terms, legal transplants can be described as the process of adopting the rule of law from one country to another.[320] Legal transplants involve spreading legal norms by adopting legislation from one country to another, leading to a legal change.[321] The term 'legal transplant' is often used interchangeably with other phrases such as 'circulation of legal model', 'legal transfer',[322] 'legal borrowing',[323] 'legal transposition',[324] and legal 'imitation'.[325]

Legal transplants have become widely popular due to globalisation and countries' desire for economic integration.[326] There are several other reasons why countries seek to adopt legislation from different jurisdictions: the social changes in the society, which is known as 'adaptational reception',[327] the aim to reshape the society in a chosen way,[328] the aim to gradually improve legislation inside the country,[329] reduction of the costs related to drafting new legislation from scratch.[330] Among the main factors which influence the decision of what laws should be transplanted are recognised reputation and authority in the field of law,[331] the prestige of specific legislation,[332] a necessity to change a particular area of law,[333] belief in the efficiency of the law of certain countries,[334] and political ambitions.[335] In modern legal literature, it is well-established that legal transplants can take diverse forms and types. The most popular

[320] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 21.
[321] Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 443.
[322] ibid.
[323] Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 192.
[324] Esin Örücü, 'Law as Transposition' (2002) 51 The International and Comparative Law Quarterly 205.
[325] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 The American Journal of Comparative Law 343.
[326] Loukas A Mistelis, 'Regulatory Aspects: Globalisation, Harmonisation, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 International Lawyer 1055.
[327] Gyula Eörsi, *Comparative Civil (Private) Law: Law Types, Law Groups, the Roads of Legal Development* (Budapest: Akadémiai Kiadó 1979) 564.
[328] David Nelken, 'Comparatists and Transferability' in Pierre Legrand, Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).
[329] Peter Grajzl, Valentina P Dimitrova-Grajzl, 'The Choice in the Lawmaking Process: Legal Transplants vs Indigenous Law' (2009) 5 Review of Law & Economics 615.
[330] Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 The American Journal of Comparative Law 839.
[331] Alan Watson, 'Legal Culture v Legal Tradition' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004).
[332] Sacco (n 326) 398.
[333] Esin Örücü, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004).
[334] Daniel Berkowitz, Katharina Pistor, Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 European Economic Review 165.
[335] Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' (2000) CID Working Paper Series. Harvard University 2000.44, 22 <http://nrs.harvard.edu/urn- 3:HUL.InstRepos:39526299> accessed 1 October 2022.

ones are provisions of specific legislation.[336] In addition to legal norms, citations from court decisions from other jurisdictions can be subject to legal transplants.[337] Recently, it has been acknowledged that legal ideas, methods, culture, mindset, education and mentality of countries can also be transplanted.[338] Considering the wide use of legal transplants in international commercial law, it is essential to establish their pros and cons, which will be discussed in the following subsection. This assists in answering the research question of whether legal transplants can help OHADA to tailor the UNIDROIT MLWR to its legal background.

2.3.3.1. Benefits and Drawbacks of Legal Transplants

Protagonists of legal transplants highlight that most legal systems in the Western world were derived either from the Roman civil law system or the English common law system.[339] Most legal systems already contain some elements of civil and common law and have been tested in the real world. According to Alan Watson, the provisions of private law are not tied to any particular time, state, or system.[340] Not only can provisions of legal rules be transplanted, but legal structures and institutions can also be transplanted.[341] International organisations and economists highly accept the use of legal transplants, which enables them to tackle specific socio-economic issues more rapidly.[342] Legal transplant advocates view laws as a set of rules that can function in any circumstance regardless of socio-economic context.

Antagonists of legal transplants challenge the idea that law norms are just a set of rules. According to them, legal norms should be considered in cultural and socio-economic circumstances in a chosen country.[343] Some legal scholars have an entirely negative view of legal transplants and consider them detrimental to the development of domestic legislation.[344] In fact, some scholars even refer to legal transplants as ‘legal irritants’ because they can be disruptive to the domestic legal culture and may lead to unintended consequences.[345] For example, imposing legal rules from a completely different culture may trigger social disruption

[336] Zweigert (n 181) 51.
[337] Martin Gelter, Mathias Siems, 'Citations to Foreign Courts -- Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 American Journal of Comparative Law 35.
[338] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 279.
[339] Watson (n 321) 22.
[340] Alan Watson, 'Legal Transplant and Law Reform' (1976) 92 Law Quarterly 79, 81.
[341] Alan Watson, 'The Importance of "Nutshells"' (1994) 42 The American Journal of Comparative Law 1.
[342] William Twining, 'Diffusion of Law: A Global Perspective' (2004) 36 The Journal of Legal Pluralism and Unofficial Law 1.
[343] Pierre Legrand, 'What "Legal Transplants?"' in David Nelken, Johannes Feest, Rosemary Hunter (eds), *Adapting Legal Cultures* (Hart Publishing 2001).
[344] Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP Archive 1971).
[345] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (2006) 61 Modern Law Review 243.

as people in the country will not understand them. Such scholars believe that legal transplants are bound to fail if they do not consider the country's socio-economic and cultural circumstances, which makes them unsuitable.[346]

However, there is no pure legal system today, and most legal systems incorporate ideas from different jurisdictions.[347] Today's legal systems are 'blended' or 'hybrid' with elements of different legal systems. Most legal systems have already, to some extent, undergone legal transplantation. As a result, the idea of a legal transplant being an irritation to legal systems is too extreme. However, tailoring legislation to local traditions is necessary if one wants legal transplants to be successful and suitable to the country's needs. In that sense, instead of blindly borrowing legal transplants, legislators should aim to learn and adapt provisions to the cultural and socio-economic circumstances of the chosen country.[348]

Many contemporary legal scholars hold a middle position between the two opposite views. According to them, legal transplants can be equally successful and unsuccessful, depending on many factors, from proper tailoring to the context of the chosen country to implementation.[349] Legal transplants need to be adapted to the context of the selected country to be as successful as possible.[350] The adaptation process is essential for legal transplants as it determines how the new legal rules can be received in the country. Some legal scholars even argue that the legal reform process is more important than the content of the new law.[351] The main idea is that the law reform process determines how the new legislation fits in with the existing legal framework and how law norms interact.[352] It is essential to determine how new legislation can coexist with established business practices in the country, as it may create legal chaos[353] or supersede new business practices.[354] The process of law reform determines how the legal transplant will be received in the country, whether it will be rejected, partially accepted, or entirely accepted.[355]

Proponents of the middle position in the field of legal transplant have identified specific

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[346] Nicholas Foster, 'Comparative Commercial Law: Rules or Context?' in Esin Örücü, David Nelken (eds), *Comparative Law: A Handbook* (Oxford: Hart 2007) 273.
[347] Siems (n 324) ch 4.
[348] Jamie Peck, 'Geographies of Policy: From Transfer-Diffusion to Mobility-Mutation' (2011) 35 Progress In Human Geography 773, 775.
[349] Nelken (n 329) 442.
[350] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 International Journal of Constitutional Law 563.
[351] Randall Peerenboom, 'Toward a Methodology for Successful Legal Transplants' (2013) 1 The Chinese Journal of Comparative Law 4.
[352] Siems (n 324) 85-93.
[353] Rudolph B Schlesinger, Ugo Mattei, Teemu Ruskola, Antonio Gidi, *Comparative Law* (7th edn, West Academic 2009) 248.
[354] Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 120.
[355] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 The American Journal of Comparative Law 583.

conditions that should be met for the legal transplant to be successful. The primary rule is that the transplanted laws should not contradict the country's existing legislation and business practices.[356] In addition, the new law should fit not only the existing legal background of the country but also the existing legal institutions.[357] The transplanted legislation should not contradict the cultural and socio-economic environment of the country to have the desired impact.[358] It is also essential to consider different areas of the law, as some areas are more receptive to legal transplants than others.[359] For instance, it is easier to implement legislation based on legal transplants in contract law than in family law.[360] Finally, it is essential to consider each country's legal background and legal culture.[361] For example, countries from civil law backgrounds are unlikely to adhere to common law norms, and legal transplants are more successful within the same legal family.[362] However, legal transplants can work successfully across different legal families when countries aim to harmonise their laws and develop new legal institutions.[363]

This subsection defined legal transplants and established their benefits and drawbacks. The following subsections will examine two special types of legal transplants, which are the colonial legal transplant[364] and malicious legal transplant.[365] Understanding these particular types of legal transplants is essential as they influenced the legislation of many modern African countries, including OHADA member states.[366]

2.3.3.2. Colonisation and Legal Transplant

Legal transplants during colonisation refer to the transfer of law from colonisers to the colonised countries. The transfer of laws via legal transplants was a typical practice during colonisation.[367] There were different strategies used by colonial empires when transplanting their laws: the French colonial strategy and the English one.[368] The French colonial legal transplants followed a 'direct rule' of legal transplantation, which aimed to install French law in

[356] Siems (n 324) 198.
[357] Pistor (n 235) 98.
[358] Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken, Johannes Feest, Rosemary Hunter (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 79.
[359] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 The Modern Law Review 1.
[360] Ernst Levy, 'The Reception of Highly Developed Legal Systems by Peoples of Different Cultures' (1950) 25 Washington Law Review 233.
[361] Siems (n 324) 199.
[362] Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 American Journal of Comparative Law 5.
[363] T T Arvind, 'The 'Transplant Effect' in Harmonisation' (2010) 59 International and Comparative Law Quarterly 65.
[364] see s 2.3.3.2.
[365] see s 2.3.3.3.
[366] see ch 4.
[367] Siems (n 324) 205.
[368] Werner F Menski, *Comparative Law in a Global Context* (2nd edn, Cambridge University Press 2006) 447-450.

all its colonies without any variations.[369] French colonial approach aimed to achieve legal uniformity and assimilate the native population to French traditions via *mission civilsatrice*.[370] To prevent the execution of native legal traditions and customs in French colonies, the *indigénat* policy was introduced, making it illegal to stick to customary traditions and laws.[371] Meanwhile, the English colonial approach followed the 'indirect rule', which aimed to keep certain local rules of indigenous people and mix them with English laws.[372] For example, the English excluded the jury system from legal transplants so as not to give such power to the local population.[373] This difference could be associated with civil and common law features, where common law accepts the diversity of rules.[374] However, in practice, the 'direct rule' of French colonial transplants accepted local customs when they were associated with the functioning of the legal system itself.[375]

In some colonies, a few different Western countries installed their legislation in different parts of the country, leading to a mix of legislation for the colonised country.[376] For example, Dutch and English laws were transplanted into South Africa, resulting in commercial law being more English and property law being Roman-Dutch.[377] Some legal scholars believe that the Roman and English legal systems borrowed specific provisions from other legal cultures.[378] Therefore, traces of African and Mediterranean legal traditions can be found in the Roman law system.[379] As a result, the modern world has no pure legal system that has not undergone legal transplantations.

While analysing colonial legal transplants, it is not only essential to analyse how laws were transplanted, but it is also vital to determine how they relate to local legal traditions and cultures. It is essential to determine the stage of legal development of decolonised countries. There are two possible scenarios: the former colonies develop their own legal rules, which will be completely new, or the former colonies develop new legal regulations based on transplanted law from colonisers.[380] The latter means that transplanted Western laws caused

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[369] Siems (n 324) 205.
[370] Heather J Sharkey, 'African Colonial States' in Richard Reid, John Parker (eds), *The Oxford Handbook of Modern African History* (Oxford University Press 2013) 153-154.
[371] Gregory Mann, 'What Was the "Indigénat"? The 'Empire of Law' in French West Africa' (2009) 50 The Journal of African History 331.
[372] Siems (n 324) 205.
[373] Mark J Roe, 'Juries and the Political Economy of Legal Origin' (2007) 35 Journal of Comparative Economics 294..
[374] William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little: Why the West's Efforts to Aid the Rest Have Done So Much Ill And So Little Good* (Oxford University Press 2007) 243.
[375] Patrick H Glenn, *Legal Traditions of the World* (5th edn, Oxford University Press 2014) 368.
[376] Siems (n 324) 206.
[377] ibid 85-93.
[378] ibid 206.
[379] Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the 'Western Legal Tradition'' (2000) 51 Hastings Law Journal 479.
[380] Siems (n 324) 207.

the development of new types of legal transplants. Therefore, analysing the post-colonial development of laws in the former colonies is essential. OHADA countries and their colonial and post-colonial legal systems will be analysed later in this research.[381]

The influence of colonial rule on the legal traditions, culture, and behaviour of people in former colonies should also be assessed.[382] Some legal scholars believe that the role of legal transplants in Africa is overrated.[383] Several examples suggest the opposite. For example, even though Ethiopia was not colonised, the new Civil Code[384] was drafted based on French legislation.[385] Another example is when former colonies try to shift from colonial inheritance. The government of Sudan attempted to conduct legal reforms. It changed the colonial common law legal system to the French civil law system based on the Egyptian Civil Code.[386] It was unsuccessful and only added some civil law provisions to the existing legislation.[387] Therefore, even though former colonies try to shift colonial inheritance, they seem to randomly add more legal transplants to their existing legislation.

Despite the process of decolonisation, colonial legal transplants have continued to exist in a different form. Former colonies, whether willingly or unwillingly, have retained the laws transplanted during the colonial era and sometimes even adopted laws from their neighbouring countries. The current legal systems of former colonies are a mixture of domestic legal traditions, cultures, and laws transplanted from different countries. In comparison to colonial legal transplants, modern legal transplants are primarily voluntary. Modern legal transplants mainly aim to harmonise legislation for the mutual benefit of all countries.[388] This, in turn, means that nowadays, countries are increasingly carefully considering legal transplants and are interested in adopting them into their legal systems.

This subsection analysed the special type of legal transplant, colonial legal transplants. The following subsection will examine another special form of legal transplant, malicious legal transplants, which historically connects to colonial legal transplants.

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[381] see ch 4.
[382] Menski (n 369) 462.
[383] ibid.
[384] Civil Code 1960 (Ethiopia).
[385] René David, 'A Civil Code for Ethiopia: Consideration on the Codification of the Civil Law in African Countries' (1963) 37 Tulane Law Review 187.
[386] Civil Code 1949 (Arab Republic of Egypt).
[387] Abdelsalam Hassan, 'History of Law Reform in Sudan' (2008) The Project for Criminal Law Reform in Sudan 11, 4 <http://www.pclrs.com/downloads/Miscellaneous/HISTORY%20LAW%20REFORM%20FINALFeb08. pdf> accessed 10 October 2022.
[388] Glenn (n 376) 43.

2.3.3.3. Malicious Legal Transplant

The distinction between poorly designed legal transplants and malicious legal transplants is that the latter are intended to cause harm.[389] In malicious legal transplants, one of the parties recognises that legal transplants have harmful effects.[390] Legal transplants can become malicious if they are designed with harmful intent. For example, in private international law, the adoption of Anglo-Saxon commercial law in social-democratic countries in Europe is considered a malicious legal transplant.[391] Similarly, Western influence on property rights in developing countries can be harmful, as these laws often protect the interests of the elite and harm ordinary poor citizens due to income inequality and corruption.[392] The difference between malicious legal transplants and legal transplants that fit poorly in the country's context is quite blurred. It is hard to determine the initial purpose or goal of such legal transplants. Therefore, the difference between malicious legal transplants and flawed ones should be determined carefully on a case-to-case basis.[393]

There are a few factors that explain why malicious legal transplants occur. Firstly, it could be due to certain cultural and social aspects.[394] For example, regarding racial discrimination, the spread of such an idea is more vital than the norm of law itself.[395] Such a transplant can occur when ruling elites have particular intentions to impose specific standards on society. Secondly, it could result from the codification of certain cultural traditions.[396] Customs from one country, due to its codification, are often transplanted into another country as a general rule, which can have negative consequences. For example, this happens when a religious rule becomes a general rule of law that applies to all citizens in the country, including religious minorities.[397] Thirdly, the benefits of cost-saving may compel countries to adopt legal transplants quickly without proper consideration.[398] In that scenario, a donor country may offer financial investments to the transplant country for quicker adoption of legal transplants.[399] Finally, the private interest of the elite or lawmakers can also cause the adoption of malicious

[389] ibid 105.
[390] ibid.
[391] Mathias Seims, Gerhard Scnyder, 'The Ordoliberal Variety of Neoliberalism' in Suzanne J Konzelmann, Marc Fovargue-Davies (eds), *Banking Systems in the Crisis The Faces of Liberal Capitalism* (Routledge 2015) 250-268.
[392] Mathias Seims, Gerhard Scnyder, 'The Ordoliberal Variety of Neoliberalism' in Suzanne J Konzelmann, Marc Fovargue-Davies (eds), *Banking Systems in the Crisis The Faces of Liberal Capitalism* (Routledge 2015) 250-268.
[393] Siems (n 392) 108.
[394] ibid 112.
[395] ibid 106.
[396] ibid 112.
[397] Paul A Marshall, *The Talibanization of Nigeria: Sharia Law and Religious Freedom* (Center for Religious Freedom 2002).
[398] ibid 113.
[399] ibid.

legal transplants.[400] Such transplants may be supported by lawmakers, transnational groups, and private corporations intending to reduce transaction costs.[401] To some extent, intergovernmental organisations influence the development of certain legal norms in developing countries that suit the interests of certain power groups.[402]

A few factors motivate countries to adopt malicious laws. Some countries believe that new legislation represents innovation and modernisation of the legal system and that it is, therefore, preferable to stick to newly developed laws.[403] Additionally, countries might follow the general legal trend[404] and imitate what other countries with the same legal tradition are doing. The lobbying interests of certain groups, such as businesses and political parties, can influence lawmakers to accept such transplants.[405] Finally, malicious legal transplants can be used in non-democratic societies to take advantage of minorities and suppress opposition.[406]

Three different groups in the international arena can prevent occurrence of malicious legal transplants: the international organisation and third countries, civil society and businesses within the country, and lawmakers themselves.[407] The most obvious way to avoid malicious legal transplants is through interventions from intergovernmental organisations and third countries. Economic sanctions or laws with transnational effects can also be used to avoid the emergence of such transplants.[408] OHADA is an intergovernmental organisation that produces transnational laws, and therefore, it can lessen the possibility of the emergence of malicious legal transplants in its law norms. The working methods of OHADA in the adoption of new laws can work as checks and balances, which can avoid the emergence of malicious legal transplants.[409]

Economic sanctions should be used with respect to the country's sovereignty.[410] Such interventions can prevent the adoption of specific legislation, but they cannot control the

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[400] Bronwen Morgan, Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2007) 43-53.
[401] Siems (n 392) 113.
[402] Mariana Mota Prado, Michael J Trebilcock, *Advanced Introduction to Law and Development* (2nd edn, Edward Elgar Publishing 2021) iv.
[403] Trisha Greenhalgh, Glenn Robert, Paul Bate, Olympia Kyriakidou, Fraser Macfarlane, Richard Peacock, 'How to Spread Good Ideas. A Systematic Review of the Literature on Diffusion, Dissemination and Sustainability of Innovations in Health Service Delivery and Organisation' (Report for the National Co-ordinating Centre for NHS Service Delivery and Organisation R & D (NCCSDO), London 2004) 10.
[404] Siems (n 392) 114.
[405] ibid 106.
[406] ibid 114.
[407] ibid.
[408] Juliet M Moringiello, William L Reynolds, 'New Territorialism in the Not-So-New Frontier of Cyberspace' (2014) 99 Cornell Law Review 1415.
[409] see ch 3.
[410] Jodie A Kirshner, 'Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty, and the Alien Tort Statute' (2012) 29 Berkeley Journal of International Law 259.

circulation of the same idea in the country in a new shape and form. In democratic countries, certain groups of citizens can oppose the development of certain laws by raising political campaigns.[411] However, opposition is unlikely to occur in non-democratic countries, which suffer the most from the ramifications of malicious legal transplants. Legislators in liberal countries are accountable for their actions and cannot pursue their own interests. Therefore, it is expected that such malicious transplants will not be developed in any legislation and will not pass the drafting stage. All the above-mentioned indicate that the number of ways to stop malicious transplants is limited, and such transplants can be adopted even in developed countries. However, if legal reforms are conducted by an intergovernmental organisation such as OHADA, it may reduce the political sway of one of its member states.

It is widely accepted that legal transplantation is a plausible solution to adapt positively tested laws in a foreign country. However, legislators and legal scholars should be aware of the possibility of malicious legal transplants. To prevent such transplants from being adopted, legislators should identify which stage of law reform and which rule could lead to malicious outcomes.[412] Therefore, it is vital to carefully examine foreign legislation for the possibility of adoption and be aware of the harmful effects it could have on the country at the stage of designing new legislation. Legal scholars must examine not only the legal rules themselves but also the socioeconomic, cultural, and political contexts of the countries where the laws are being transplanted.

2.4. Conclusion

Legalisation in private international commercial law can be achieved via law reform. Law reforms can be conducted by implementing soft or hard law norms. To conduct warehouse receipt law reform, it is essential for OHADA to choose the form of law (soft or hard) that aligns with its working methods and current legislative framework. Soft and hard law norms are two major instruments used to legalise private international commercial law. Both hard and soft law norms have potential benefits and drawbacks and can complement one another. Soft law norms can be a basis for developing hard law norms or executing a gap-filling function. The UNIDROIT MLWR is a soft law norm that OHADA can use as a basis for the development of either a Uniform Act on Warehouse Receipts or its soft law instrument.

It is important to carefully assess which instruments are suitable for regulating particular types of social relationships. This is particularly important for OHADA as choosing a suitable form of law supports smoother implementation of the warehouse receipt law and facilitates warehouse receipt financing in its member states. Nowadays, the distinction between hard

[411] David Mead, *The New Law of Peaceful Protest* (Hart Publishing 2010).
[412] Siems (n 392) 118.

and soft law norms has become blurred, leading to hybrid legal norms. Hybrid legal norms can be either soft in nature but hard and binding in their application or vice versa. To understand the nature of legal norms, evaluating their substance and application is essential. Hybrid harmonisation in modern international commercial law can assist in achieving the desirable results by combining hard and soft law instruments. The development of a Uniform Act on Warehouse Receipts – a hard law norm based on the UNIDROIT MLWR – a soft law instrument can be an example of hybrid harmonisation. Such an approach helps to combine the benefits of soft and hard law norms while conducting warehouse receipt law reform in OHADA member states.

Soft and hard law norms are related to the process of harmonisation and unification of law, which is the ultimate goal of law reform. Harmonisation and unification of law aim to eliminate the differences between legal systems, thereby facilitating cross-country commerce and eliminating the boundaries for businesses. However, the terms harmonisation and unification are sometimes used interchangeably in modern international commercial law. One of the main aims of OHADA is to harmonise business laws in its member states. However, as the OHADA Uniform Acts are binding by nature, they essentially provide the unification of legislation in its member states. This is an example of the interchangeable use of the terms unification and harmonisation in international commercial law.

The process of unifying and harmonising legal norms in international commercial law is generally led by intergovernmental organisations with the supranational power to develop binding legal norms. Examples of such organisations are UNIDROIT and UNCITRAL. OHADA is another intergovernmental organisation with supranational power that was granted a mandate to develop and implement binding legal norms in its member states. This indicates that UNIDROIT, as well as OHADA, have the legal mandate to develop binding international commercial laws. The following chapter will assess whether OHADA is capable of developing a Uniform Act on Warehouse Receipts or a soft law norm based on the UNIDROIT MLWR.

Legal transplants can assist in harmonising and unifying legal norms through law reform. Legal transplants are the adoption of legal norms from one state to another. A legal transplant can help to better tailor a new Uniform Act on Warehouse Receipts or a soft law norm to the legal background of OHADA. However, for legal transplants to be successful, it is crucial to carefully choose legal norms that fit the legal and social background of the transplanted country. Warehouse receipt legislation from the US and France will be assessed for the possibility of further tailoring the UNIDROIT MLWR to OHADA background in a Uniform Act on Warehouse Receipts or a new soft law norm for OHADA in chapters four and five.

There are two unique types of legal transplants: colonial and malicious legal transplants. Colonial legal transplants are installed by colonisers in the colonised countries to replace

indigenous norms. Legislation in many African countries, including OHADA member states, has been heavily influenced by colonial legal transplants. The influence of colonial legal transplant on the OHADA Uniform Acts and legislation of OHADA member states will be further explored in chapter four of this PhD thesis. Malicious legal transplants are harmful legal transplants which can aim to disadvantage certain social groups in the country. This type of legal transplant should be avoided during the process of law reform. The working methods of OHADA and its legal framework will be assessed in chapter three of this PhD thesis for the possibility of avoiding the development of malicious legal transplants during warehouse receipt law reform.

This chapter established the theoretical basis for analysing the OHADA legal framework and working methods. The provisions from this chapter can aid in understanding and interpreting the nature of the OHADA Uniform Acts and working methods. The following chapter will focus on OHADA's mandate to conduct law reforms. The following chapter will analyse OHADA's working methods, the process of developing and implementing legal norms, OHADA's approach to law reform and the type of legal norms OHADA produces. The following chapter will also discuss the pros and cons of OHADA's working methods and its legal norms and assess whether OHADA can conduct warehouse receipt law reform and develop warehouse receipt legislation.

Chapter 3

3. OHADA. Uniform Acts. OHADA Structure

This chapter examines OHADA, focusing on its creation, mandate, legal norms, and working methods. Specifically, this chapter explores why OHADA was established. This chapter also evaluates the nature of the legal framework and working methods of OHADA and assesses whether OHADA is suitable for conducting warehouse receipt law reform. This chapter analyses how OHADA's historical and socio-economic backgrounds influenced the OHADA laws and its approach to law reforms. The analysis of this chapter can assist in developing a deeper understanding of the legal development of OHADA and the historical and socio-economic factors that shaped its approach to law reform. The analysis from this chapter supports a hermeneutic approach while analysing the provisions of the UNIDROIT MLWR and proposing warehouse receipt law reform. This assists in considering the broader implications of the proposed warehouse receipt law reform and tailoring warehouse receipt law to the legal, historical, and social backgrounds of OHADA and its member states. The application of the theoretical analysis from the previous chapter supports the analysis of the working methods and Uniform Acts of OHADA in this chapter.[1] This helps to answer the research questions of what particular form of law (a Uniform Act on Warehouse Receipts or a soft law norm) is suitable for warehouse receipt law reform in OHADA member states and whether OHADA is capable of conducting warehouse receipt law reform.

3.1. History and Creation of OHADA

The previous chapter established the concepts of unification and harmonisation of law,[2] and concepts of law reform and legal transplant.[3] This section focuses on the history of OHADA and its approach to law reform in private international law. It assesses OHADA's approach to law reform and its suitability for drafting and implementing warehouse receipt law norms. The institutional and regulatory frameworks of OHADA are evaluated to determine the possibility of adapting the UNIDROIT MLWR to regional needs and conducting warehouse receipt law reform. The analysis from this section develops an understanding of how the historical development of OHADA and its member states shaped its laws and legal development. This can assist in proposing warehouse receipt law reform that reflects and takes into consideration the broader context in which the law operates so that the proposed warehouse receipt law fits into the OHADA legal framework.

[1] see ch 2.
[2] see s 2.1.
[3] see s 2.2.

3.1.1. History of Unification and Harmonisation of Law in Africa

There is no one unified opinion among legal scholars regarding whether there were attempts before the colonial period to unify or harmonise laws in Africa.[4] Although there was no systematic effort in this regard, unification happened as a by-product of the population's migration during the pre-colonial period.[5] For example, when the population from Cameroon migrated to new territories in Africa, they fought with locals and imposed their own indigenous rules in that area.[6] Hence, pre-colonial harmonisation and unification of law in some parts of Africa were chaotic and unsystematic and did not follow one standardised approach.

Sharia and customary laws created a mixture of religious laws and indigenous customs and are deeply rooted in some parts of Africa.[7] Also, in some parts of Africa, the spread of Sharia laws worked as some form of harmonisation.[8] However, as customary and Sharia laws are based on religious aspects, precolonial African countries were reluctant to supersede one another.[9] For example, Sharia and customary laws regarded contractual relationships differently.[10] As a result, precolonial unification and harmonisation of law in Africa were not complete. It can be referred to as an unintended or spontaneous form of unification and harmonisation of law.[11]

Colonial harmonisation and unification in Africa were quite similar to the precolonial one. During the colonial period, the conquerors imposed legal changes on their territories, which resulted in the harmonisation and unification of law.[12] For example, France had plans to codify certain local customs and create lists of customary rules in its colonies.[13] The notion behind this was to make it easier for the coloniser to administer its colonies efficiently. Although these efforts were not successful, they did help to amend customary laws to suit the colonisers' needs and, to some extent, harmonise the rules in colonised territories.

The postcolonial period in Africa started in 1963 with the Pan-African movement, which aimed to unite all African countries.[14] After obtaining independence, these countries tried to

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[4] Jean Alain Penda Matipe, 'The History of the Harmonisation of Laws in Africa' in Claire Moore Dickerson (ed), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (GMB Publishing 2009) 9.
[5] ibid.
[6] ibid.
[7] James Norman Dalrymple Anderson, *Islamic Law in Africa* (1st edn, HM Stationery Office 1954) 215.
[8] The term Sharia law is used in the broad sense for the purpose of this chapter and includes customary laws.
[9] James Norman Dalrymple Anderson, 'Relationship between Islamic and Customary Law in Africa' (1960) 12 Journal of African Administration 228.
[10] Matipe (n 4) 9.
[11] see s 2.2.
[12] Richard Frimpong Oppong, 'Private International Law in Africa: The Past, Present and Future' (2007) 55 American Journal of Comparative Law 677.
[13] Matipe (n 4) 11.
[14] American Historical Association, 'The Pan-African Movement' (*American Historical Association,* 2022) <https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching- and-

unite their political and economic ideologies. The first attempt was to establish a common political and economic ideology, which, however, did not address legal systems and rules. Due to differences in economic and political goals, the Pan-African movements evolved and led to the establishment of the Organisation of African Unity.[15] In 2002, the Organisation of African Unity, which was initially created to fight colonisation and apartheid, evolved into the African Union, which now focuses more on economic development.[16] During that period, disagreements and different political ambitions of individual African states resulted in the creation of various regional unions and organisations.[17]

However, most regional organisations and unions in Africa, apart from OHADA, mainly focus on political and economic unity while ignoring legal integration.[18] Even though certain steps were taken to unify and harmonise laws in Africa, there was no systematic approach to the unification and harmonisation of law. Therefore, the following subsection will discuss the preconditions for the creation of OHADA, which aims to harmonise and modernise laws in its member states systematically. This helps to understand the nature of the background, working methods and legal framework of OHADA. This understanding aids in answering the research question of whether OHADA is capable of conducting warehouse receipt law reform. The hermeneutic approach will be employed in the next section to develop a deeper understanding of how historical and socio-economic conditions affected the development of OHADA's working methods and framework.

3.1.2. Creation of OHADA

Before the creation of OHADA, countries in the franc zone[19] had to apply outdated laws that were imposed on them by French colonisers.[20] These laws hampered cross-country trade and investments in local economies.[21] The economic crisis and decrease in foreign investments in Africa were other reasons for the creation of OHADA.[22] Other problems that set preconditions for the creation of OHADA were legal uncertainty, poor judicial system, judicial uncertainty in

learning-in-the-digital-age/through-the-lens-of-history-biafra-nigeria-the-west-and-the-world/the- colonial-and-pre-colonial-eras-in-nigeria/the-pan-african-movement> accessed 20 November 2022.

[15] African Union, 'About the African Union' (*African Union,* 2022) <About the African Union> accessed 10 November 2022.

[16] ibid.

[17] see s 1.1.3.

[18] see s 1.1.3.

[19] see s 1.2.

[20] Ngaundje Doris Leno, 'The Organisation for The Harmonisation of Business Law in Africa (OHADA) System: Overview of Some Benefits and Problem Areas' (2018) International Journal of Advanced Research and Publications 106.

[21] ibid.

[22] OHADA, 'History of OHADA' (*OHADA,* 2022) <https://www.ohada.org/en/history-of-ohada/> accessed 17 October 2022.

Africa,[23] and the lack of stakeholder knowledge of business laws.[24] As a result, countries in the franc zone agreed to create an OHADA working group to assess a possible solution to the problem mentioned above.

The OHADA working group proposed creating a new intergovernmental organisation with supranational power, which would benefit the economic development of the countries in the franc zone. Additionally, it would establish a single transnational legal framework, promoting economic integration and facilitating cross-country commerce.[25] The OHADA working group assessed several different types of regional integration, including soft law integration, where individual states can adopt soft laws without any obligations; objectives-based integration, where states choose themselves how to achieve and implement new rules; and hard law integration, where unified laws replace domestic legislation in member states.[26]

The OHADA working group chose a deeper form of integration based on the hard law norms, which is unification.[27] One of the reasons for that decision was that hard law integration would make it easier to implement new laws.[28] Another major reason was that hard law norms were considered highly reliable,[29] which is particularly important for the African region, where a lack of credibility is a huge issue.[30] Even though the Treaty on Harmonisation of Business Law in Africa (hereafter OHADA Treaty)[31] aims to harmonise business law in its member states, the OHADA Uniform Acts are directly applicable in its member states, even if they contradict domestic legislation, indicating that OHADA articulates with hard law norms.[32]

The creation of OHADA was partially influenced by the predominant idea of economic policies of the free market created for developing countries. This idea was supported by international organisations such as the World Bank Group and the International Monetary Fund, known as the Washington Consensus.[33] During that time, most international organisations focused on developing free markets and reducing entry costs for businesses.[34] Additionally, potential investors were hesitant to invest in the African economy due to

[23] Mohammed Baba Idris, 'Harmonisation of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects' in Claire Moore Dickerson (ed), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (GMB Publishing 2009) 22.
[24] ibid.
[25] Leno (n 20) 106.
[26] Renaud Beauchard, 'OHADA Nears the Twenty-Year Mark: An Assessment' (2013) 2 World Bank Legal Review 323, 324.
[27] Kéba Mbaye, 'L'histoire et les Objectifs de l'Ohada' (2004) 205 Les Petites Affiches 4, 6.
[28] see 2.2.2.1.
[29] see s 2.2.2.1.
[30] see s 3.1.2.
[31] OHADA Treaty.
[32] Matipe (n 4) 7.
[33] Moises Naim, 'Washington Consensus or Washington Confusion?' (2000) 118 Foreign Policy 86.
[34] Claire Moore Dickerson, 'OHADA on the Ground: Harmonising Business Laws in Three Dimensions' (2010) 25 Tulane European and Civil Law Forum 103, 105.

perceived political and legal risks.[35] In such circumstances, the creation of an intergovernmental organisation to establish a transnational legal framework aimed at attracting foreign investments was a plausible solution.

As a result, OHADA member states agreed to establish an intergovernmental organisation with supranational power, which would create a unified cross-border business legal framework.[36] In 1993, the OHADA Treaty[37] was signed, which established OHADA. By signing the OHADA Treaty, OHADA member states agreed to delegate power to the intergovernmental organisation to attract foreign investments, as the economic situation in Africa was severe after the financial crisis of the 1990s.[38] OHADA not only harmonises legislation in its member states and creates favourable conditions for foreign investments but also establishes frameworks that facilitate domestic investments.[39] Therefore, OHADA aims to contribute to economic integration in its member states and systematically unify and harmonise business laws in its member states.

The OHADA member states decided to establish an intergovernmental organisation with supranational authority to harmonise business law for the following reasons:

- To facilitate economic progress and development of the African economic zone;
- To indicate the commitment of OHADA member states to the establishment of the United African Economic Community;
- To indicate a commitment to further economic integration apart from the franc zone within the larger African region;
- To implement 'harmonised, simple, modern and adapted business laws'[40] to facilitate investments;
- To assure that harmonised laws serve the idea of legal and economic stability and development of investment climate;
- To promote arbitration for contractual dispute resolution;
- To improve legal training for legal practitioners.[41]

The approach taken by OHADA can be described as innovative because it offers an institutional framework that enables the business community to measure and manage legal risks rather than deal with legal uncertainty.[42] The OHADA law norms offer modern, coherent

[35] Idris (n 23) 22.
[36] Claire Moore Dickerson, 'Harmonising Business Laws in Africa: OHADA Calls the Tune' (2005) 44 Columbia Journal of Transnational Law 17, 19.
[37] OHADA Treaty.
[38] Claire Moore Dickerson, 'Perspectives on the Future' in Claire Moore Dickerson (ed), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (GMB Publishing 2009) 93.
[39] ibid 95.
[40] OHADA Treaty preamble.
[41] ibid.
[42] Beauchard (n 26) 326.

solutions that protect the rights of businesses in its member states. For example, the Uniform Act Organising Securities protects creditors from the risk of default of their debtors[43] and sets out the regulations for pledges.[44] The approach taken by OHADA can logically organise the business laws in Africa, making them more accessible for legal practitioners and business circles.[45] Before the creation of OHADA, legal texts were spread over different written documents, some of which were from the colonial years.[46]

This subsection analysed the unification and harmonisation of law in Africa before the creation of OHADA and the conditions that facilitated the development of OHADA. The factors mentioned above indicate the unique position of OHADA in uniting its member states and establishing one transnational legal framework. This can facilitate cross-country commerce and economic development and attract foreign investments. OHADA stands out in Africa and demonstrates the capacity to adapt the UNIDROIT MLWR to its member states' legal backgrounds and needs. The previous subsection established that the historical and socio-economic conditions of OHADA member states were one of the predominant ideas for the creation of OHADA and influenced its development. The following section will explore the OHADA Treaty and assess the OHADA mandate for the possibility of developing warehouse receipt legal norms, conducting warehouse receipt law reform and tailoring the UNIDROIT MLWR to its legal background.[47]

3.2. OHADA Treaty

The OHADA Treaty was signed in 1993 in Port Louis and entered into force in 1995.[48] The OHADA Treaty was amended, and a revised version was adopted on 17 October 2008.[49] Initially, fourteen countries signed the OHADA Treaty:[50] The Republic of Benin, Burkina Faso, the Cameroon Republic, the Central African Republic, the Islamic Federal Republic of Comoros, the Congo Republic, the Ivory Coast Republic, the Gabonese Republic, the Equatorial Guinea Republic, Mali, Niger, Senegal, Chad and Togo.[51] Later, three new states joined OHADA: the Republic of Guinea Bissau, the Republic of Guinea and the Democratic Republic of Congo.[52] To date, OHADA consists of seventeen member states, most of which

[43] Uniform Act Organising Securities (adopted 15 December 2010) ch 3.
[44] ibid ch 4.
[45] Joseph Kamga, 'L'apport du Droit de l'OHADA à l'attractivité des Investissements Etrangers dans les États Parties' (2012) 5 La Revue des Juristes de Sciences Po 43, 45.
[46] Isabelle Deschamps, 'Assessing the Organisation pour l'harmonisation en Afrique du droit des affaires's Contributions to Poverty Reduction in Africa: A Grounded Outlook' (2013) 6 The Law and Development Review 111, 116.
[47] For the discussion of supranational power, see s 2.3.1.
[48] OHADA Treaty.
[49] ibid.
[50] ibid.
[51] ibid.
[52] ibid.

are from the franc zone.[53] However, it is declared that the OHADA Treaty is open for all African states to sign regardless of their legal and cultural background.[54] This indicates the commitment of OHADA to further integration on the continent level.

In addition to restoring the legal and judicial security of economic activities to re-establish investor confidence and facilitate trade between contracting states, the OHADA Treaty has the following objectives:

- Equip OHADA member states with simple modern legal norms that are tailored to the economic situation in OHADA member states;
- Promote arbitration as an effective way of dispute resolution;
- Improve the qualification of legal practitioners in OHADA member states;
- Aim for deeper regional integration on the level of the African Economic Community.[55]

The OHADA Treaty consists of nine titles. The first title establishes general provisions, including OHADA status and the definition of business laws.[56] The second title is dedicated to the Uniform Acts, their creation, adoption, publication and implementation.[57] The third title describes the procedure for conflicts related to the interpretation and application of the Uniform Acts.[58] The fourth title describes the arbitration process for conflicts arising from contractual obligations.[59] The fifth title describes the OHADA institutions: the Conference of Heads of State and Government, the Common Court of Justice and Arbitrations, the Council of Ministers, the Permanent Secretariat, the Advanced Regional School of Magistracy (ERSUMA) and its official languages.[60] The sixth title describes the financial resources of OHADA, arbitration fees, and the annual budget of OHADA.[61] The status, immunities and privileges of OHADA and its employees are established in the seventh title.[62] The eighth title explains the process of ratification, entering into force and adherence to the OHADA Treaty.[63] Finally, the amendment and denunciation of the OHADA Treaty are described in the ninth title.[64] The OHADA Treaty establishes the working methods and legal and institutional framework of OHADA, which will be assessed further in this chapter to determine the possibility of conducting warehouse receipt law reform.[65]

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[53] see s 1.2.1.
[54] OHADA Treaty preamble.
[55] ibid.
[56] ibid title 1.
[57] ibid title 2.
[58] ibid title 3.
[59] ibid title 4.
[60] ibid title 5.
[61] ibid title 6.
[62] ibid title 7.
[63] ibid title 8.
[64] ibid title 9.
[65] see ss 1.3, 1.4.

After the revision of the OHADA Treaty in 2008, twenty-three articles of the OHADA Treaty were amended and complemented, specifically articles 3, 4, 7, 9, 12, 14, 17, 27, 31, 39, 40, 41, 42, 43, 45, 49, 57, 59, 61 and 63.[66] In addition to changes in the OHADA procedures, the revised OHADA Treaty established a new institution: the Conference of Heads of State and Government.[67] The revised OHADA Treaty also added three new working languages to the official languages of OHADA: Portuguese, Spanish and English.[68] This enabled OHADA to address the needs of its non-French-speaking member states and further strengthen its working methods.

The OHADA Treaty indicates that OHADA is not just a regional organisation focused on economic integration.[69] OHADA is an intergovernmental organisation because it was also granted supranational authority to create and enforce laws in its member states.[70] OHADA has the authority to conduct law reforms, including, for example, warehouse receipt legal reform, as outlined in the OHADA Treaty. In contrast, other regional organisations in Africa do not have mandates and supranational power to draft and implement legal norms in the business field.[71] Therefore, in addition to its unique background and position to adapt the UNIDROIT MLWR to regional needs, OHADA has a mandate to develop supranational laws binding on its member states. This singles out OHADA as an international organisation in Africa capable of tailoring the UNIDROIT MLWR to regional needs and conducting warehouse receipt law reform.

3.3. OHADA Laws. Uniform Acts

The previous sections established that OHADA has a suitable background for conducting warehouse receipt law reform. OHADA can adapt and tailor the UNIDROIT MLWR to the needs of its member states. This section assesses the OHADA laws—Uniform Acts—and identifies a type of law for warehouse receipt legal reform that fits into the legal framework of OHADA. This section also assesses how the historical and socio-economic context of OHADA member states influenced and shaped the OHADA laws and legal framework.

[66] OHADA, 'Traité Portant Révision du Traité Relatif à l'harmonisation du Droit des Affaires en Afrique' (*OHADA,* 2022) <https://www.ohada.org/en/treaty-amending-the-treaty-on-the-harmonization-of-business-law-in-africa/> accessed 10 November 2002.
[67] OHADA Treaty art 3.
[68] ibid art 42.
[69] Considering OHADA's mandate and supranational power, OHADA itself is an intergovernmental organisation. Furthermore, OHADA unites member by their legal and traditional background and not by their regional location, therefore it is debatable whether OHADA is a regional organisation, which could be a purpose for another PhD project. For better clarification and understanding in this PhD project considering OHADA mandate, it will be regarded as an intergovernmental organisation.
[70] OHADA Treaty art 1.
[71] see s 1.1.3.

3.3.1. Overview of the OHADA Uniform Acts

The primary objective of the legal framework of OHADA is to establish a unified and modern legal framework that promotes investments and favourable economic conditions.[72] OHADA focuses on harmonising and unifying business laws across its member states.[73] Due to the colonial heritage,[74] the OHADA law norms are heavily based on French civil law tradition.[75] However, the OHADA Uniform Acts also reflect the differences in legislation of its member states, including local customary traditions.[76] The OHADA Treaty was drafted to accommodate several legal traditions and address the local ways of doing business in its member states.[77] Therefore, the OHADA Uniform Acts, to some extent, reflect different legal traditions.

OHADA has been involved in various projects regarding developing regional instruments based on different international law norms. For example, OHADA, together with UNIDROIT, drafted the Uniform Act on Contract Law,[78] which is based on the UNIDROIT Principles of International Commercial Contracts.[79] Although the draft of the Uniform Act on Contract Law was presented over ten years ago, it has not yet been adopted. Some legal scholars believe this is due to the ambitious aim of replacing French business traditions with local ones based on customary law.[80] However, others argue that drafters did not consider the African socio-economic situation and heavily relied on French legal traditions.[81] When drafting and implementing the warehouse receipt law for OHADA, all the above-mentioned factors must be considered to ensure positive acceptance by its member states and stakeholders. A balance should be found between addressing local ways of doing business and the colonial French background in addressing warehouse receipt related issues in the OHADA law.

OHADA produces legal norms known as 'Uniform Acts'. The Uniform Acts are hard by nature and have a uniform automatic application among all its member states, even when they contradict the domestic legislation of each member state.[82] The Uniform Acts come into force ninety days after their official publication in the OHADA Official Gazette.[83] Member states do not need to approve the Uniform Acts through domestic procedures. As a result, new Uniform

[72] Martin Kirsch, 'Historique de l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA)' (1998) 108 Penant: Revue de Droit des Pays d'Afrique 129.
[73] OHADA Treaty art 1 - 2.
[74] see ss 1.1, 1.2.
[75] Dickerson (n 34) 31.
[76] Salvatore Mancuso, 'Trends on the Harmonisation of Contract Law in Africa' (2007) 13 Annual Survey of International & Comparative Law 157, 168.
[77] ibid.
[78] OHADA, UNIDROIT 'Preliminary Draft OHADA Uniform Act on Contract Law' (adopted 2008).
[79] UNIDROIT 'UNIDROIT Principles of International Commercial Contracts' (adopted 2016).
[80] Marcel Fontaine, 'Law Harmonisation and Local Specificities – a Case Study: OHADA and the Law of Contracts' (2008) 18 Uniform Law Review 50.
[81] Stephanie Kwemo, *L'OHADA et le Secteur Informel ; l'exemple du Cameroun* (Larcier 2012).
[82] OHADA Treaty art 10.
[83] ibid art 9.

Acts become directly applicable in all OHADA member states ninety days after their official publication. This automatic application of the OHADA Uniform Acts in its member states ensures the achievement of the desired goal of unifying and harmonising commercial laws. It also facilitates the swift implementation of warehouse receipt law and guarantees its uniform application and acceptance by all member states.

OHADA aims to expand its membership and establish a comprehensive system to attract members from the African Union.[84] One of the goals of the OHADA framework is to unite and harmonise business law across the entire African continent. However, several obstacles could impede this harmonisation of business law at the continental level for OHADA. First, since most OHADA member states are French-speaking countries, the French language has priority over other official languages of OHADA.[85] This could pose several challenges for non-French-speaking countries. For example, Cameroon, a member state of OHADA, has two official languages: English and French. However, if the translation of the OHADA Uniform Acts varies in different languages, the French version should be prioritised.[86] On the domestic level, it could create several problems for non-French-speaking countries.[87] For example, this caused a constitutional issue in Cameroon related to the violation of the rights of the English-speaking population.[88] As a result, there was a non-acceptance of the OHADA Uniform Acts in the English-speaking provinces of Cameroon.[89] Therefore, as OHADA aims to unite the whole African continent, the predominance of the French language should be excluded, giving equal authority to different translations of the OHADA Uniform Acts.[90]

Second, the OHADA Uniform Acts are closely tied to French civil tradition.[91] This raises the question of whether the legal framework of OHADA can address the needs of African common-law countries. For OHADA to be able to address the needs of common law countries in Africa, there must be a political willingness within OHADA to change its framework.[92] There were indications of a shift in approach when OHADA, in collaboration with UNIDROIT, began drafting the Uniform Act on Contract Law, based on the UNIDROIT Principles of International Commercial Contracts.[93] The UNIDROIT Principles of International Commercial Contracts

[84] ibid art 53.
[85] ibid art 42
[86] ibid.
[87] Constitution of the Republic of Cameroon 1972 (Republic of Cameroon) art 1.3.
[88] Nelson Enonchong, 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' (2007) 51 Journal of African Law 95.
[89] ibid 111.
[90] Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42 The Comparative and International Law Journal of Southern Africa 309, 318.
[91] ibid.
[92] ibid.
[93] UNIDROIT 'UNIDROIT Principles of International Commercial Contracts' (adopted 2016).

represent a blended international solution based on the world's leading legal systems,[94] incorporating civil and common law concepts.[95] Implementing the new Uniform Act on Contract Law based on the UNIDROIT Principles of International Commercial Contracts would be a significant step for OHADA to move away from its purely French legal background and attract African countries from common law families. However, the Uniform Act on Contract Law has not been enacted yet as it has encountered a few obstacles.[96] One of the major obstacles was taking into consideration the different local traditions of OHADA member states.[97] To avoid such obstacles, a new Uniform Act on Warehouse Receipts should only focus on the main features of local specificities of OHADA member states, avoiding a highly ambitious goal of addressing different customary laws of OHADA countries.[98]

Finally, the lack of the rule of law and democratic principles in OHADA member states poses significant challenges to the advancement of business law.[99] In reality, the state of the rule of law and democratic rights in OHADA member countries is quite concerning.[100] Political instability and high levels of corruption, among other issues that hinder cross-country commerce and economic development of developing countries,[101] including OHADA member states. However, it is essential to implement such principles in OHADA member states to attract foreign investments and ensure the proper enforcement of the Uniform Acts. Considering that the decisions of the Common Court of Justice and Arbitration are mandatory to all member states, these decisions can be manipulated to suit the interests of certain political and business groups under the current circumstances.[102] Similar concerns exist regarding integration at the African continent level. Despite the provisions of the Constitutive Act of the African Union,[103] the region is quite far from adhering to democratic values and rights.[104]

All the issues mentioned above related to the OHADA traditional hard law norm

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[94] Samuel Kofi Date-Bah, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa ' (2004) 2 Uniform Law Review 269.
[95] Claire Moore Dickerson, 'OHADA's Proposed Uniform Act on Contract Law' (2011) 13 European Journal of Law Reform 462.
[96] Fontaine (n 80) 62.
[97] ibid 51 – 54.
[98] ibid 57.
[99] Fagbayibo (n 90) 319.
[100] According to Freedom House, none of the OHADA member states have a 'free status' in terms of access to free civil rights and democratic social values. Freedom House, 'Countries and Territories' (*Freedom House,* 2022) <https://freedomhouse.org/countries/freedom-world/scores> accessed 27 October 2022.
[101] Ohiocheoya Omiunu, 'Special and Differential Treatment (SDT) Provisions and the Participation of Developing Countries in International Trade: A Case for Reform' (2013) 8 Nigerian Bar Journal 43, 57.
[102] Claire Moore Dickerson, 'The Cameroonian Experience under OHADA: Business Organisations in a Developing Economy' (2007) 112 Business and Society Review 191.
[103] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001).
[104] Fagbayibo (n 90) 319.

approach and the influence of French civil law background may be among the reasons for the success of its legal framework and the consistent applicability of its laws in its member states. This indicates that OHADA member states' historical and socio-economic heritage is deeply embedded into the OHADA legal framework and influenced the OHADA working methods. Adhering to the hard law uniformity can facilitate the smoother and quicker implementation of the OHADA legal norms, including warehouse receipt law.[105] The following subsection will focus on aspects related to the interpretation and enforcement of the OHADA Uniform Acts. The following subsection will also assess what type of warehouse receipt law reform suits the current legal framework of OHADA.

3.3.2. Interpretation and Enforcement of the OHADA Uniform Acts

The adoption of the OHADA Uniform Acts is automatic. This means that once adopted and officially published, new Uniform Acts become part of the domestic legislation of each member state, even if they contradict it.[106] As a result, member states are not required to draft and implement additional domestic legislation to enact new Uniform Acts. Moreover, the Uniform Acts prevail over domestic legislation in case of conflicts. Once adopted, new Uniform Acts become a part of member states' national legal systems, and national judiciary systems must comply with and apply them.[107] Therefore, once the Uniform Act that covers a particular area of law is adopted, national legislation that contradicts it loses its power and no longer applies to such matters. This simple and rigid procedure of adoption of the OHADA Uniform Acts on a national level guarantees that warehouse receipt laws will not be amended to suit specific needs within a country or rejected on a national level. This ensures the uniform application of warehouse receipt laws in all OHADA member states. Therefore, there is a high probability that warehouse receipt law reform in OHADA should be developed in the form of a Uniform Act.[108] A Uniform Act on Warehouse Receipts would fit the current OHADA legal framework and be uniformly enforced and implemented in all OHADA member states.

However, there were many concerns over the supremacy of the Uniform Acts over domestic legislation and superseding domestic legislation by the Uniform Acts.[109] The Common Court of Justice and Arbitration confirmed the supremacy of the OHADA Uniform Acts over national legislation.[110] In response to the question of the supremacy of the Uniform Acts over national legislation, the Common Court of Justice and Arbitration stated that the Uniform Acts supersede national legislation that is either similar to or contradicts them.[111]

[105] see s 4.3.
[106] OHADA Treaty art 10.
[107] Leno (n 20) 108.
[108] This recommendation will be further assessed in the following chapters.
[109] ibid 108.
[110] *Couple Karnib v General Bank of Ivory Coast* (SGBC) (2001) 002/2001 (CCJA).
[111] ibid.

Therefore, the OHADA Treaty prohibits states from enacting legislation similar to or contradicting the Uniform Acts. This ensures that similar national legal norms do not supersede a new Uniform Act on Warehouse Receipts.

The uniform application of OHADA laws is protected by the Common Court of Justice and Arbitration. Any issues related to the application of the Uniform Acts should be first reviewed in the national courts of member states.[112] The Common Court of Justice and Arbitration serves as a final appeal court for matters related to the interpretation of the Uniform Acts.[113] Additionally, the Common Court of Justice and Arbitration consults representatives from member states or the Council of Ministers[114] concerning issues arising from interpreting and enforcing the Uniform Acts.[115] In the proceedings, either party can directly appeal to the Common Court of Justice and Arbitration, or the national courts' ruling on appeal can refer a case to the Common Court of Justice and Arbitration.[116]

The enforcement of the judgment of the Common Court of Justice and Arbitrations requires a connection between national court systems and the Common Court of Justice and Arbitration. Therefore, once a case is accepted for an appeal by the Common Court of Justice and Arbitration, any proceedings in the national court regarding that case must be suspended till the Common Court of Justice and Arbitration either declares a lack of jurisdiction or passes the judgment.[117] However, hearings in the Common Court of Justice and Arbitration do not suspend enforcement of the decision under the appeal.[118] The declaration of lack of jurisdiction may be raised by the Common Court of Justice and Arbitration itself or by one of the parties of the case to appeal.[119] The Common Court of Justice and Arbitration should rule on the case after thirty days of receiving objectives from the defendant party.[120]

If a party involved in an appeal to a national court seeks to appeal jurisdictional issues, that party must apply to the Common Court of Justice and Arbitration within two months.[121] The Common Court of Justice and Arbitration then makes a decision.[122] If the Common Court of Justice and Arbitration finds an error in the decision of the National Court of Appeal, it declares the National Court's decision void.[123] All hearings in the Common Court of Justice and Arbitration are in open court, in the presence of all the parties to appeal, with the mandatory

[112] OHADA Treaty art 13.
[113] ibid art 14.
[114] For the discussion of the main function of the Council of Ministers, see s 3.4.2.
[115] ibid art 14.
[116] ibid art 15.
[117] ibid art 16.
[118] ibid.
[119] ibid art 17.
[120] ibid.
[121] ibid art 18.
[122] ibid.
[123] ibid.

assistance of counsels.[124] Decisions made by the Common Court of Justice and Arbitration are final and can be enforced similarly to decisions made by the national courts.[125] If national courts have ruled differently on the same matter, their decisions are not enforceable as they contradict the decision of the Common Court of Justice and Arbitration.[126]

The judicial protection by the Common Court of Justice and Arbitration ensures the uniform interpretation and enforcement of a Uniform Act on Warehouse Receipts. As the decisions of the Common Court of Justice and Arbitration supersede the decisions of national courts on the same matter, the uniformity in the interpretation and application of a new Uniform Act on Warehouse Receipts is guaranteed. Therefore, implementing the warehouse receipt legal norms in the form of a Uniform Act on Warehouse Receipts fits into the legal framework of OHADA.

3.3.3. Uniform Acts in Force

Since its establishment, OHADA has been actively involved in drafting and implementing commercial laws. Ten OHADA Uniform Acts are currently in force. This section discusses and analyses the OHADA Uniform Acts and their connection to a new Uniform Act on Warehouse Receipts.

The first Uniform Act was adopted by OHADA in 1997; it was the Uniform Act Organising Securities.[127] In 2010, the Uniform Act Organising Securities was revised and replaced with a new version.[128] The Uniform Act Organising Securities establishes definitions of pledge[129] and personal security interests.[130] This directly connects with warehouse receipts as for warehouse receipt financing to work efficiently, it should be backed up by security interests legislation. These definitions are particularly relevant to a Uniform Act on Warehouse Receipts and should be considered while drafting it.[131]

Apart from establishing definitions, the Uniform Acts Organising Securities provides norms regarding the registration of security interests of personal property, pledges over tangible and intangible assets, general and special lines,[132] and mortgages.[133] The Uniform Act Organising Securities covers essential aspects of warehouse receipt law, including security rights in warehouse receipts and registration of such rights.[134] Therefore, it is

[124] ibid art 19.
[125] ibid art 20.
[126] ibid.
[127] Uniform Act Organising Securities (adopted 17 April 1997).
[128] Uniform Act Organising Securities (adopted 15 December 2010).
[129] ibid art 1.
[130] ibid art 4.
[131] see ch 4.
[132] Uniform Act Organising Securities (adopted 15 December 2010) title 2.
[133] ibid title 3.
[134] UNIDROIT, 'Note on Security Rights in Warehouse Receipts' (Study LXXXIII – W.G.4 – Doc. 5, Rome February 2022).

important for further unification and harmonisation of laws in OHADA member states to draft a Uniform Act on Warehouse Receipts in accordance with the Uniform Act Organising Securities.

In 1997, the Uniform Act on Commercial Companies and the Economic Interest Groups was adopted.[135] In 2014, the Uniform Act on Commercial Companies and Economic Interest Groups[136] was revised, and a new version was adopted. The Uniform Act Commercial Companies and the Economic Interest Groups covers general aspects of the creation,[137] operation,[138] and transformation of commercial companies[139] and specific provisions for different types of commercial companies.[140] Even though the Uniform Act on Commercial Companies and the Economic Interest Groups is not directly applicable to a new Uniform Act on Warehouse Receipts, it sets preconditions and regulates essential aspects for the establishment and operation of business companies in OHADA member states.

The third Uniform Act adopted by OHADA in 1997 was the Uniform Act on General Commercial Law.[141] Similar to the Uniform Act Organising Securities, the Uniform Act on General Commercial Law was revised in 2010.[142] The Uniform Act on General Commercial Law establishes definitions and legal status of merchants and entrepreneurs,[143] provisions concerning the registration of businesses and securities[144] in national[145] and regional registries,[146] provisions regarding regulation of leases,[147] and provisions regulating commercial sale contracts.[148] Book Eight of the Uniform Act on General Commercial Law is particularly relevant to a Uniform Act on Warehouse Receipts as it covers aspects of sales of securities and negotiable instruments,[149] transfer of ownership[150] and risks.[151] In addition to revising the Uniform Act on General Commercial Law in 2010, OHADA adopted the Uniform Act on Cooperatives.[152] The Uniform Act on Cooperatives covers the general principles of the functioning of cooperatives and their legal status. Unlike the Uniform Act on General

[135] Uniform Act on Commercial Companies and the Economic Interest Groups (adopted 17 April 1997).
[136] Uniform Act on Commercial Companies and the Economic Interest Groups (adopted 30 January 2014).
[137] ibid pt 1. book 1.
[138] ibid pt 1 book 2.
[139] ibid pt 1 book 5.
[140] ibid pt 2.
[141] Uniform Act on General Commercial Law (adopted 17 April 1997).
[142] Uniform Act on General Commercial Law (adopted 15 December 2010).
[143] ibid book 1.
[144] ibid book 2.
[145] ibid book 3.
[146] ibid book 4.
[147] ibid book 6.
[148] ibid book 8.
[149] ibid art 236.
[150] ibid book8 title 4 ch 1.
[151] ibid book 8 title 4 ch 2.
[152] Uniform Act on Cooperatives (adopted 15 December 2010).

Commercial Law, the Uniform Act on Cooperatives does not closely connect and overlap with a Uniform Act on Warehouse Receipts.

In 1998, OHADA adopted two new Uniform Acts, which are the Uniform Act Organising Collective Proceedings for Clearing of Debts[153] and the Uniform Act on Simplified Debts Collection Procedures and Enforcement Proceedings.[154] The Uniform Act Organising Collective Proceedings for Clearing of Debts was revised in 2015 and replaced by the Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities.[155] The Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities contains legal norms regarding insolvency and pre-insolvency procedures.[156] The Uniform Act on Simplified Debts Collection Procedures and Enforcement Proceedings establishes several debt collecting and enforcement procedures, including an injunction to pay,[157] restitution of specific personal property,[158] sequestration,[159] garnishee proceedings,[160] and attachment of real property.[161] These two Uniform Acts work in coordination and regulate bankruptcy procedures and debt collection and enforcement procedures in OHADA member states. Even though these two Uniform Acts are not directly applicable to a new Uniform Act on Warehouse Receipts, the Uniform Act on Simplified Debts Collection Procedures and Enforcement Proceedings regulates the procedure of attachment of stored goods in a warehouse under a prior claim.[162]

In 1999, OHADA adopted the Uniform Act on Arbitration.[163] The Uniform Act on Arbitration was revised in 2017, and a new version of the Uniform Act on Arbitration was adopted.[164] Simultaneously with the revision of the Uniform Act on Arbitration, OHADA adopted the Uniform Act on Mediation.[165] The Uniform Act on Arbitration and the Uniform Act on Mediation provide alternative dispute resolution procedures in OHADA member states. The adoption of the Uniform Act on Mediation, which is based on the UNCITRAL Model Law on International Commercial Conciliation,[166] further indicates that OHADA has had a positive

[153] Uniform Act Organising Collective Proceedings for Clearing of Debts (adopted 10 April 1998).
[154] Uniform Act on Simplified Debts Collection Procedures and Enforcement Proceedings (adopted 10 April 1998).
[155] Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities (adopted 10 September 2015).
[156] ibid art 1.
[157] Uniform Act on Simplified Debts Collection Procedures and Enforcement Proceedings (adopted 10 April 1998) book 1 part 1.
[158] ibid book 1 pt 2.
[159] ibid book 2 pt 2.
[160] ibid book 2 pt 4.
[161] ibid book pt 8.
[162] ibid book 2 pt 6.
[163] Uniform Act on Arbitration (adopted 11 March 1999).
[164] Uniform Act on Arbitration (adopted 23 November 2017).
[165] Uniform Act on Mediation (adopted 23 November 2017).
[166] UNCITRAL 'Model Law on International Commercial Conciliation' (adopted 19 November 2002).

experience in developing Uniform Acts based on international soft law norms.[167] This demonstrates OHADA's experience in collaborating with intergovernmental organisations and suggests that this positive experience can be applied to developing a new Uniform Act on Warehouse Receipts. OHADA's previous success in incorporating soft law instruments into hard law norms suggests that it can use this experience to use a soft law norm – the UNIDROIT MLWR - as a basis for developing a hard law norm – a Uniform Act on Warehouse Receipts.

In 2000, OHADA adopted the Uniform Act on the Organisation and Harmonisation of Companies Accounting.[168] In 2017, the Uniform Act on the Organisation and Harmonisation of Companies Accounting was revised and replaced by the Uniform Act on Accounting Law and Financial Information.[169] The Uniform Act on Accounting Law and Financial Information introduced a new accounting framework based on international accounting standards. The Uniform Act on Accounting Law and Financial Information aims to replace the outdated accounting framework and align the OHADA member states' accounting framework with the international accounting standards.[170] This alignment is expected to attract foreign businesses and investments.[171]

In 2003, OHADA adopted the Uniform Act on the Contract for the Carriage of Goods by Road.[172] The Uniform Act on the Contract for the Carriage of Goods by Road covers provisions concerning contracts of carriage of goods, including consignment notes,[173] rights and obligations of the sender[174] and carrier.[175] The Uniform Act on the Contract for the Carriage of Goods by Road closely pertains to aspects related to the transportation of goods rather than the storage of goods, such as warehouse receipt relationships. However, it covers essential aspects of the delivery of goods stored in a warehouse and the liabilities of the sender and transport companies.

To date, ten Uniform Acts regulate commercial relationships in OHADA member states. Among all the Uniform Acts in force, the Uniform Act Organising Securities and the Uniform Act on General Commercial Law closely connect with a Uniform Act on Warehouse Receipts. Therefore, when drafting a Uniform Act on Warehouse Receipts, these two Uniform Acts should be considered to ensure that the new warehouse receipt law does not contradict them

[167] see s 1.1.4
[168] Uniform Act on the Organisation and Harmonisation of Companies Accounting (adopted 23 March 2000).
[169] Uniform Act on Accounting Law and Financial Information (adopted 26 January 2017).
[170] Vincent Tachouola, Donatien Avelé, 'The Adoption of the New Reform of the OHADA Uniform Act on Accounting Law and Financial Reporting in Accordance with IFRS: Realism or Mimetism?' (2019) 6 African Journal of Accounting, Auditing and Finance 365.
[171] ibid.
[172] Uniform Act on the Contract for the Carriage of Goods by Road (adopted 23 March 2003).
[173] ibid ch 2.
[174] ibid ch 3.
[175] ibid ch 4.

or create legal uncertainty and confusion.

The previous sections established the form of warehouse receipt law reform for OHADA and how it can fit into the current legal framework of OHADA. It was recommended that OHADA implement a new Uniform Act on Warehouse Receipts. The following section will focus on the institutional structure and main working bodies of OHADA. It will also answer the research question of whether the working methods of OHADA will support the implementation and enforceability of a Uniform Act on Warehouse Receipts.

3.4. OHADA Structure

To achieve its main goals, OHADA established an institutional framework comprising judicial and legislative institutions for drafting and interpreting the Uniform Acts. Initially, OHADA comprised four institutions: the Common Court of Justice and Arbitration, the Council of Ministers, the Permanent Secretariat, and the Advanced Regional School of Magistracy (ERSUMA).[176] Following the revision of the OHADA Treaty in 2008, a new body was added: the Conference of Heads of State and Government.[177] All the OHADA institutions work in cooperation with each other. The Permanent Secretariat, the Common Court of Justice and Arbitration and the Advanced Regional School of Magistracy (ERSUMA) are permanent institutions of OHADA,[178] while the Council of Ministers and the Conference of Heads of State and Government operate on a rotating basis.[179]

To provide a more comprehensive understanding of the information, each of the following subsections focuses on a particular OHADA institution and its function: the Common Court of Justice and Arbitration, the Council of Ministers, the Permanent Secretariat and the Advanced Regional School of Magistracy (ERSUMA), and the Conference of Heads of State and Government. The following subsection will evaluate whether the working methods of OHADA can facilitate the development and implementation of a new Uniform Act on Warehouse Receipts.

3.4.1. The Common Court of Justice and Arbitration

The Common Court of Justice and Arbitration was established to ensure uniform application and enforcement of the OHADA Uniform Acts. The Common Court of Justice and Arbitration was granted supranational power to enhance the legal certainty and independence of the judicial system in OHADA countries. One of the main reasons for the creation of the Common Court of Justice and Arbitration was the problem of the reliability of the national courts in

[176] OHADA Treaty title 5.
[177] ibid.
[178] ibid.
[179] ibid art 27.

OHADA member states.[180] Several factors affected domestic judicial systems in OHADA member states, including the bureaucracy of judicial systems, inconsistent domestic legislations, incompetent judicial staff and long court processes.[181] As a solution, the Common Court of Justice and Arbitration was delegated the authority to interpret and supervise the implementation of the OHADA Uniform Acts. This delegation of power aims to address the abovementioned issue and build trust in the judicial system in OHADA member states. Therefore, the creation of the Common Court of Justice and Arbitration, to some extent, was influenced by the historical and socio-economic situation in OHADA member states. This further illustrates how the OHADA working methods were developed to address the historical and socio-economic challenges of its member states.

The Common Court of Justice and Arbitration has two main functions. Firstly, it operates as a high appeal court for all the judgments of the appeal national courts related to the Uniform Acts.[182] Secondly, it serves as an international arbitration forum for OHADA member states and appoints arbitrators.[183] However, the role of the Common Court of Justice and Arbitration as an arbitration centre remains unclear and underdeveloped.[184] As a Supreme Court of Appeal, the Common Court of Justice and Arbitration monitors the uniform application of the Uniform Acts in all OHADA member states.[185] The Common Court of Justice and Arbitration also interprets and explains the OHADA Uniform Acts.[186] Member states and the Council of Ministers may seek an official interpretation of the OHADA Uniform Acts from the Common Court of Justice and Arbitration.[187] This function of the Common Court of Justice and Arbitration directly supports implementing and enforcing a Uniform Act on Warehouse Receipts.

One of the parties involved in the court decision can initiate the appeal procedure in the Common Court of Justice and Arbitration.[188] Alternatively, a party from the court decision can challenge the jurisdiction of the national appeal courts, or national courts can refer a case to the Common Court of Justice and Arbitration if the national court lacks jurisdiction.[189] However, national courts and parties involved in the proceedings are hesitant to transfer cases related to business proceedings to the Common Court of Justice and Arbitration.[190] Parties of the

[180] Fagbayibo (n 90) 314.
[181] ibid.
[182] OHADA Treaty art 14.
[183] ibid art 21.
[184] Dickerson (n 34) 56.
[185] OHADA Treaty art 13-18.
[186] ibid art 14.
[187] ibid.
[188] Ibid art 15.
[189] ibid.
[190] Dickerson (n 34) 57-58.

proceedings that are not situated in Côte d'Ivoire[191] are quite reluctant to appeal to the Common Court of Justice and Arbitration due to financial reasons associated with travelling.[192] Additionally, national Supreme Courts view the Common Court of Justice and Arbitration as their competitor, which could deprive them of interesting business cases.[193] This is particularly relevant as OHADA continues expanding its commercial jurisdiction by adopting new Uniform Acts, potentially leaving national Supreme Courts without work.[194] This issue connects with the issue of national sovereignty and the fear of countries losing it,[195] which is one of the main drawbacks of hard law instruments.[196]

The appeal proceedings at the Common Court of Justice and Arbitration are open to the public, and all parties must attend the appeal court hearings.[197] The appeal decision of the Common Court of Justice and Arbitration is final and should be enforced by member states in the same manner as decisions of national courts.[198] However, one major drawback is that enforcing the decisions of the Common Court of Justice and Arbitration is highly difficult, even though OHADA laws are quite coherent and precise.[199] This happens due to the overlap of appeal procedures in national courts and the Common Court of Justice and Arbitration.[200] Some legal professionals believe that the Common Court of Justice and Arbitration can only hear cases related to the interpretation of the Uniform Acts, excluding all other matters that arise from OHADA laws.[201]

Other legal scholars argue that the Common Court of Justice and Arbitration replaces national Supreme Courts.[202] Therefore, if a case is appealed to a national court and falls under the jurisdiction of the Common Court of Justice and Arbitration, the national court should refer it to the Common Court of Justice and Arbitration. In practice, national courts do refer cases to the Common Court of Justice and Arbitration when they lack jurisdiction.[203] Additionally, the Common Court of Justice and Arbitration often overrule decisions of national appeal courts on the grounds of lack of jurisdiction when national courts fail to identify it and refer the case to the Common Court of Justice and Arbitration.[204]

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[191] The Common Court of Justice and Arbitration has a permanent location - Côte d'Ivoire. To participate in the appeal hearings, appellants are required to travel and participate in hearings in person.
[192] ibid 57-58.
[193] ibid 57.
[194] ibid.
[195] Fagbayibo (n 90) 315.
[196] see s 2.2.2.1.
[197] OHADA Treaty art 19.
[198] ibid art 20.
[199] Dickerson (n 34) 62.
[200] ibid.
[201] ibid 58.
[202] Leno (n 20) 110.
[203] *Standard Chartered Bank S A v Sinju Paul and Others* (2005) 32/CC (Cameroon).
[204] *Bamba Fetique v Adia Yego Therese* (2004) 031/2004 (Côte d'Ivoire), *Muvrielle Corinne Christel Koffi et Sahouot Cedric Koffi v Société ECOBANK* (2005) 006/2005 (Côte d'Ivoire).

The Common Court of Justice and Arbitration is composed of nine judges.[205] The judges are elected for seven years and cannot be re-elected for a second term.[206] The Council of Ministers can increase the number of judges.[207] In 2014, the Council of Ministers raised the number of judges to thirteen in response to an increase in the number of cases in the Common Court of Justice and Arbitration.[208] The President and two Vice Presidents of the Common Court of Justice and Arbitration are elected from its members for three and a half years and cannot be re-elected for the second term.[209] The President of the Common Court of Justice and Arbitration appoints the registrar-in-chief, the secretary general, who serves an administrative function, and other court officers on the advice of the registrar-in-chief and the secretary general.[210]

The Council of Ministers elects judges of the Common Court of Justice and Arbitration by secret ballot from a list presented by member states.[211] Each state can only nominate up to two candidates.[212] Each state must present a list of its nominated candidates four months before the election.[213] Only one judge from one member state can be elected.[214] Two members of the Common Court of Justice and Arbitration can be chosen from qualified legal practitioners with fifteen years of professional experience or lecturers in law with fifteen years of professional experience.[215] Other members of the Common Court of Justice and Arbitration must be chosen from candidates who are qualified national judges or judicial officers with fifteen years of professional experience.[216] One-seventh of the Common Court of Justice and Arbitration judges should be re-elected yearly.[217]

The function of the Common Court of Justice and Arbitration is governed by the Rules of Procedure of the Common Court of Justice and Arbitration, first published in 1996 and revised in 2014,[218] and the Rules of Arbitration of the Common Court of Justice and Arbitration, first published in 1999 and revised in 2017.[219] These rules regulate the organisation of the Common Court of Justice and Arbitration, dispute proceedings, and the court's authority in

[205] OHADA Treaty art 31.
[206] ibid.
[207] ibid.
[208] OHADA, 'Composition of the Common Court of Justice and Arbitration: A New Qualitative and Quantitative Step' (*OHADA,* 2022) <https://www.ohada.org/en/regulations-and-decisions/> accessed 1 December 2022.
[209] OHADA Treaty art 37.
[210] ibid art 39.
[211] ibid art 32.
[212] ibid.
[213] ibid art 33.
[214] ibid art 31.
[215] ibid.
[216] ibid.
[217] ibid.
[218] The Rules of Procedure of the Common Court of Justice and Arbitration, 001/2014/CM (30 January 2014).
[219] Arbitration Rules of the Common Court of Justice and Arbitration, 04/2017/AU (23 November 2017).

arbitration matters.

The function and main aims of the Common Court of Justice and Arbitration are to increase trust in judicial procedures in OHADA member states and ensure the uniform application of the OHADA Uniform Acts across its member states. The Common Court of Justice and Arbitration guarantees uniform application and interpretation of a new Uniform Act on Warehouse Receipts. Furthermore, the Common Court of Justice and Arbitration mitigates the shortcomings of national courts in OHADA member states and enhances credibility and trust in a Uniform Act on Warehouse Receipts among stakeholders, including potential investors and financial institutions.

This subsection discussed the working methods and main functions of the OHADA Common Court of Justice and Arbitration. This subsection also explained the role and function of the Common Court of Justice and Arbitration in enforcing a Uniform Act on Warehouse Receipts. This subsection identified how social-economic and historical conditions of OHADA member states shaped OHADA working methods. The following subsection will focus on the working methods and functions of the main decision-making body of OHADA, the Council of Ministers. The following subsection will also discuss how the Council of Ministers can support the development of a new Uniform Act on Warehouse Receipts.

3.4.2. The Council of Ministers

The Council of Ministers can be considered the main decision-making body of OHADA that has supranational power.[220] The Council of Ministers meets at least once a year, convened by its president or at the request of one-third of member states.[221] The Council of Ministers comprises each member state's Ministers of Finance and Justice.[222] Member states preside over the Council of Ministers yearly in alphabetical order.[223] The Permanent Secretariat assist the president of the Council of Ministers[224] and proposes an agenda for the Council of Ministers.[225]

The Council of Ministers has several main functions, including the adoption of new Uniform Acts,[226] the election of the members of the Common Court of Justice and Arbitration,[227] the regulation, appointment and function of the Permanent Secretariat,[228] the

[220] Paulin Houanye, Sibao Shen, 'Investment Protection in the Framework of the Treaty of Harmonising Business Law in Africa (OHADA)' (2013) 4 Beijing Law Review 1, 2.
[221] OHADA Treaty art 28.
[222] ibid art 27.
[223] ibid.
[224] ibid.
[225] ibid art 29.
[226] ibid art 8.
[227] ibid art 32.
[228] ibid art 40.

regulation of the functioning and organisation of the Advanced Regional School of Magistracy (ERSUMA),[229] the regulation of the annual fees that member states pay,[230] the approvement of the annual budget of OHADA,[231] and the adoption of revisions and amendments to the OHADA Treaty.[232] In case of any doubts regarding the interpretation or implementation of the OHADA Treaty[233] or the OHADA Uniform Acts, the Council of Ministers seeks clarification from the Common Court of Justice and Arbitration.[234] The Council of Ministers also has the authority to lift the diplomatic privileges and immunities of civil servants, OHADA employees, judges of the Common Court of Justice and Arbitration, and appointed arbitrators.[235] The Council of Ministers is the main body of OHADA that can propose warehouse receipt law reform and initiate the development and adoption of a new Uniform Act on Warehouse Receipts.

The Council of Ministers adopts new Uniform Acts by a unanimous vote of the delegates from OHADA member states.[236] The Uniform Acts are considered adopted only if two-thirds of representatives from the member states are present and voted.[237] Other decisions of the Council of Ministers are deemed valid only if the absolute majority of the representatives are present and voted.[238] Revisions or amendments of the OHADA Treaty follow the same procedure as the initial treaty adoption.[239] During voting, each country has one vote,[240] which avoids the domination of states in the voting process.[241] The unanimous voting process of the Council of Ministers and the allocation of the votes among member states guarantee that the adoption of a Uniform Act on Warehouse Receipts will be according to democratic procedures and will not be swayed by the interests of certain political groups.

However, the process of adopting Uniform Acts has been widely criticised for only including representatives from governments (Ministers of Finance and Justice) while excluding business representatives, local communities, and academics.[242] The rationale behind this is that reaching an agreement is quite challenging. However, including all the above groups can strengthen OHADA's position and make its laws more beneficial and attractive for the business community. Therefore, it is recommended that OHADA amend the working process of the Council of Ministers and invite members from the business, academic and local communities

[229] ibid art 41.
[230] ibid art 43.
[231] ibid art 45.
[232] ibid art 61.
[233] ibid.
[234] ibid art 14.
[235] ibid art 49.
[236] ibid art 8.
[237] ibid.
[238] ibid art 30.
[239] ibid art 61.
[240] ibid art 30.
[241] Leno (n 20) 109.
[242] ibid.

to the process of adoption of new Uniform Acts, which assists in tailoring its legal norms to regional needs. This is particularly relevant to a new Uniform Act on Warehouse Receipts as it allows to further address local businesses' needs.

The structure of OHADA has also been criticised for being highly hierarchical and representing the Western approach to decision-making.[243] However, OHADA member states favoured the Western approach over traditional or customary ones to suit the interests of foreign investors, who prefer a more familiar approach.[244] As a result, the choice of the Western approach was dictated by the willingness to attract investors from the West and suit their needs. This again further indicates that OHADA working methods were influenced by the combination of historical and socio-economic conditions of its member states. However, the rigidity of the OHADA structure and delegation of legislative functions to certain government officials create opportunities for lobbying their interests. If OHADA aims to create favourable business conditions and attract foreign investments, it should protect commercial transactions and business groups from influence by local political and other influential groups.[245] Delegating legislative roles to Ministers of Justice and Finance may affect OHADA's desirable results and cause a lack of trust among certain business groups.

Despite high criticism of rigidity and non-democratic delegation of power, the OHADA approach balances national sovereignty issues with the delegation of power to a supranational body.[246] A comparison can be made with the European Union, which is another successful international organisation with supranational power. Both organisations use certain structures aimed at protecting the interests of national governments.[247] It is natural for intergovernmental organisations to prioritise the interests of national governments, but they should also consider the interests of the business community and locals.

As mentioned earlier, inviting representatives from local business communities can mitigate the weaknesses of OHADA. It also allows to address the local ways of doing business in the OHADA Uniform Acts. Additionally, inviting businesses, academics, and local communities creates an open environment for adopting new Uniform Acts and reduces the political lobbying and influence of certain political groups on the process. As a result, the process of adopting new Uniform Acts, including a new Uniform Act on Warehouse Receipts, is balanced in terms of taking into consideration the interests of different communities and is beneficial for all.

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[243] Dickerson (n 34) 59.
[244] Jacqueline Lohoues-Oble, 'L'Apparition d'un Droit International des Affaires en Afrique' (1999) 3 Revue Internationale de Droit Comparé 543, 544-547.
[245] Dickerson (n 34) 60.
[246] Fagbayibo (n 90) 315.
[247] ibid.

This subsection discussed the working methods and functions of the main decision-making body of OHADA. This subsection also discussed potential issues related to the working methods of the Common Court of Justice and Arbitration and the Council of Ministers. It was also established how these issues could affect the adoption of a Uniform Act on Warehouse Receipts. The following subsection will analyse the main functions and working methods of the Permanent Secretariat, the main executive body of OHADA. The following subsection will also discuss how the working methods of the Permanent Secretariat can support the development of a new Uniform Act on Warehouse Receipts.

3.4.3. The Permanent Secretariat

The Permanent Secretariat is responsible for coordinating and organising the functioning of all other OHADA institutions.[248] The Permanent Secretariat does not intervene with OHADA member states to avoid influence from political or economic interest groups.[249] The Permanent Secretary is the head of the main executive body of OHADA, appointed by the Council of Ministers for a four-year term.[250] The Council of Ministers determines and regulates the functioning of the Permanent Secretariat and the Permanent Secretary.[251] The Permanent Secretary works in assistance with three directors: the Director of Legal Affairs and Communication, the Director of Human Resources, Material and General Administration, and the Accounting and Finance Director.[252] The primary function of the directors is to assess the legislation in member states and propose an efficient way of harmonising it.[253] This means that the directors of the Permanent Secretariat can identify the need for warehouse receipt law reform and propose the development of a Uniform Act on Warehouse Receipts.

One of the main functions of the Permanent Secretariat is to draft Uniform Acts in cooperation with the member states' officials.[254] In addition, the Permanent Secretariat prepares the yearly program for the harmonisation of business law,[255] assisting the Council of Ministers in adopting new Uniform Acts[256] and publishing adopted versions of the Uniform Acts in the OHADA Gazette.[257] The Permanent Secretariat circulates drafted versions of the Uniform Acts to the governments of the member states and the Common Court of Justice and

[248] OHADA Treaty art 40.
[249] Leno (n 20) 109.
[250] OHADA Treaty art 40.
[251] ibid.
[252] OHADA, 'Institutions' Officials' (*OHADA,* 2022) <https://www.ohada.org/en/institutions-officials/> accessed 1 December 2022.
[253] Leno (n 20) 109.
[254] OHADA Treaty art 6.
[255] OHADA Treaty art 11.
[256] ibid art 40.
[257] OHADA, 'Roles and Responsibilities of the Permanent Secrétary' (*OHADA,* 2022) <https://www.ohada.org/en/roles-and-responsibilities-of-the-permanent-secretary/> accessed 1 December 2022.

Arbitration for review.[258] After receiving recommendations from member states and the Common Court of Justice and Arbitration, the Permanent Secretariat finalises the draft versions of the new Uniform Acts and proposes them for adoption at the next meeting of the Council of Ministers.[259] Therefore, the Permanent Secretariat can propose warehouse receipt law reform to harmonise legal norms in the field of warehouse receipts in OHADA member states and draft a Uniform Act on Warehouse Receipts.

The Permanent Secretariat has adopted a practice of seeking unofficial public responses through 'national commissions' to address the OHADA rigid structure and delegation of power.[260] These national commissions were established in member states to seek improvements in legislation.[261] National commissions participate in drafting Uniform Acts at a national level and consult with public and private sector representatives.[262] National commissions consist of legal professionals and work in cooperation with professional bodies. For example, in 2022, national commissions held a session with professional accounting bodies to discuss the draft of an accounting system for nonprofit entities.[263] These collaborative efforts with the national commissions can mitigate the shortcomings of OHADA and incorporate the voices and needs of local communities into new Uniform Acts. This practice can help to further tailor a Uniform Act on Warehouse Receipts to the needs of local businesses. This could be seen as an example of how the changing socio-economic circumstances of OHADA member states further shape and influence the working methods of OHADA.

The lack of financial resources is a major obstacle to the Permanent Secretariat's functioning, which hinders the effectiveness of its work in drafting new Uniform Acts.[264] This, in turn, affects the main goals of OHADA - harmonisation of legislation in its member states and integration on a regional level. However, OHADA is a relatively new intergovernmental organisation that constantly collaborates with and seeks support from international organisations, such as the World Bank Group.[265] Therefore, there is a chance that such an issue can be resolved in the future.

This subsection analysed the working methods and functions of the OHADA Permanent

[258] OHADA Treaty art 7.
[259] ibid.
[260] Dickerson (n 34) 61.
[261] ibid.
[262] OHADA, 'OHADA in Nutshell. Stakeholders' (*OHADA,* 2022) <https://www.ohada.org/en/stakeholders/> accessed 10 December 2022.
[263] OHADA, 'Plenary Assembly of the OHADA National Commissions (Douala, 27th to 29th July 2022) The Accounting System for Non-profit Entities under Elaboration' (*OHADA,* 2022) <https://www.ohada.org/en/plenary-assembly-of-the-ohada-national-commissions-douala-27th-to- 29th-july-2022-the-accounting-system-for-non-profit-entities-under-elaboration/> accessed 1 December 2022.
[264] Fagbayibo (n 90) 316.
[265] see s 3.5.2.3.

Secretariat and how it can assist in adopting a new Uniform Act on Warehouse Receipts. It was also established how the working methods of OHADA, in particular the functioning of the Permanent Secretariat, adapted to the socio-economic realities of OHADA and its member states. The following subsection will focus on the OHADA educational body - the Advanced Regional School of Magistracy (ERSUMA) - and its primary function in facilitating OHADA legal reforms. The following subsection will also outline the main functions and working methods of the educational body of OHADA – the Advanced Regional School of Magistracy (ERSUMA) - and how it can facilitate the development and implementation of a Uniform Act on Warehouse Receipts.

3.4.4. The Advanced Regional School of Magistracy (ERSUMA)

The Advanced Regional School of Magistracy (ERSUMA) was established to address the lack of sufficient training for legal professionals in OHADA member states.[266] The primary role of the Advanced Regional School of Magistracy (ERSUMA) is to provide further education for legal professionals in OHADA member states.[267] Apart from offering legal training, the Advanced Regional School of Magistracy (ERSUMA) can also provide training for businesses and academic staff.[268] The Advanced Regional School of Magistracy (ERUSMA) is also a centre for promoting legal research in Africa.[269] The Advanced Regional School of Magistracy (ERSUMA) cooperates with the Common Court of Justice and Arbitration and the Supreme Courts of OHADA member states to ensure the unified application of the OHADA Uniform Acts.[270] The function of the Advanced Regional School of Magistracy (ERSUMA) can mitigate the issues related to the lack of awareness of OHADA law norms in its member states.[271]

The Advanced Regional School of Magistracy (ERSUMA) is financially and administratively independent and maintains international status.[272] The Advanced Regional School of Magistracy (ERSUMA) operated under the control of the Permanent Secretariat.[273] The Council of Ministers is empowered to regulate the functioning and can change the goal and the name of the Advanced Regional School of Magistracy (ERSUMA).[274] The Advanced Regional School of Magistracy (ERSUMA) is governed by a Director General appointed by the Council of Ministers for a four-year term.[275] The work of the Advanced Regional School of

[266] Leno (n 20) 109.
[267] OHADA Treaty art 41.
[268] Fagbayibo (n 90) 316.
[269] OHADA, 'Higher Regional School of Magistracy (ERSUMA). Missions and Responsibilities' (*OHADA,* 2022) <https://www.ohada.org/en/missions-and-responsibilities/> accessed 5 December 2022.
[270] ibid.
[271] see s 3.3.1.
[272] OHADA, 'ERSUMA in a Nutshell' (*OHADA,* 2022) <https://www.ohada.org/en/ersuma-in-a- nutshell/> accessed 3 December 2022.
[273] OHADA Treaty art 41.
[274] ibid.
[275] ibid.

Magistracy (ERSUMA) can support the implementation of a new Uniform Act on Warehouse Receipts by providing legal training and explaining the potential benefits of the warehouse receipt system to legal practitioners and scholars in OHADA member states.

One of the major criticisms of the Advanced Regional School of Magistracy (ERSUMA) connects with the lack of financing, which affects its recognition even among legal practitioners in OHADA member states.[276] For example, practising judges in Cameroon were unaware of OHADA until the first Uniform Act was enforced.[277] However, one of the functions of the Advanced Regional School of Magistracy (ERSUMA) is to educate legal practitioners and create awareness and understanding of the OHADA laws. Another major criticism connects with the lack of common law professors at the Advanced Regional School of Magistracy (ERSUMA), which results in a lack of training for common law practitioners.[278] This is particularly relevant to Cameroon as the country has a dual legal system (common and civil law).[279] This further indicates a strong influence of OHADA member states' cultural, historical and socio-economic heritage on the OHADA working methods. It is recommended that OHADA introduce training in the English language for practitioners from different legal and language backgrounds. This increases the attractiveness of the OHADA Uniform Acts, including a new Uniform Act on Warehouse Receipts, and attracts foreign investors from different legal and language backgrounds.

This subsection discussed the OHADA educational body and how it can facilitate warehouse receipt legal reform in OHADA member states. The following section will discuss the relatively new diplomatic body of OHADA, the Conference of Heads of State and Government.

3.4.5. The Conference of Heads of State and Government

The Conference of Heads of State and Government is the highest authority of OHADA. It was created in 2008 following the revision of the OHADA Treaty.[280] The primary function of the Conference of Heads of State and Government is to facilitate political dialogue among OHADA member states and address political concerns.[281] The Conference of Heads of State and Government consists of the head officials of state and government of OHADA member states.[282] The country that presides over the Council of Ministers simultaneously presides over the Conference of Heads of State and Government. The countries preside over the

[276] Dickerson (n 34) 59.
[277] ibid.
[278] Leno (n 20) 109.
[279] see s 1.2.1.
[280] OHADA Treaty.
[281] Leno (n 20) 108.
[282] OHADA Treaty art 27.

Conference of Heads of State and Government on a rotating basis for a year.[283]

The Conference of Heads of State and Government is convened either at the President's request or at the request of one-third of OHADA member states to address issues related to the OHADA Treaty.[284] The Conference of Heads of State and Government can proceed with discussion only if two-thirds of representatives from member states are present.[285] The decisions are made unanimously by an absolute majority of votes from state representatives.[286] The political function of the Conference of the Heads of State and Government can further enhance the attractiveness of the OHADA Uniform Acts in the regional and international arena. Furthermore, through its diplomatic function, the Conference of the Heads of State and Government can attract new member states and financial resources to OHADA, increasing the overall efficiency and effectiveness of OHADA and its bodies. This, in turn, facilitates warehouse receipt law reform and promotes a new Uniform Act on Warehouse Receipts.

This section discussed the OHADA institutions and their main functions. This section also discussed how the OHADA working methods can assist in conducting warehouse receipt law reform and adopting a Uniform Act on Warehouse Receipts. It was established in this section that OHADA working methods reflect and are shaped by the historical, socio-economic and cultural background of OHADA member states. The following section will discuss the pros and cons of the OHADA regulatory and institutional frameworks.

3.5. Benefits and Problems of OHADA Regulations and Institutions

This section assesses the benefits and issues of the OHADA regulations and institutions. The first subsection discusses the positive sides of OHADA and its achievements. This section explains how OHADA can facilitate the adoption of a Uniform Act on Warehouse Receipts. This section also discusses the problems of OHADA and how these challenges can be mitigated. Overall, this section answers the research question of whether OHADA is capable of conducting warehouse receipt law reform and developing a new Uniform Act on Warehouse Receipts or a soft law instrument.

3.5.1. Benefits of OHADA Regulations and Institutions

Since its creation in 1993, OHADA has enacted several Uniform Acts to replace outdated legislation in OHADA member states.[287] This is considered a great achievement for such a

[283] ibid.
[284] ibid.
[285] ibid.
[286] ibid.
[287] see s 3.4.3.

young intergovernmental organisation. The OHADA Uniform Acts offer a modern and comprehensive framework that provides innovative solutions to issues faced by OHADA member states.[288] For example, the Uniform Act on General Commercial Law establishes the basis for the operation of businesses and establishes provisions regarding merchants' status,[289] financial leases,[290] and agency.[291] Moreover, the Uniform Act on General Commercial Law introduced rules related to commercial sales contracts.[292] When the Uniform Act on General Commercial Law was adopted in 1997, none of the OHADA member states adopted the CISG.[293] There were no codified laws to regulate commercial sales contracts in OHADA member states at that time.[294] Therefore, the introduction of regulations to govern commercial sales contracts based on the CISG[295] is an indication of the ability of OHADA to address business issues in its member states innovatively. This experience of OHADA demonstrates its ability to successfully adopt a soft law norm - the UNIDROIT MLWR - and develop a hard law norm - a Uniform Act on Warehouse Receipts.

Furthermore, although OHADA provides a new legal framework, it does not always replace domestic legislation and judicial precedents in member states. Instead, the OHADA Uniform Acts allow for some flexibility for countries where national legal traditions and norms can coexist with the OHADA Uniform Acts. Only provisions of national laws that contradict the Uniform Acts or cover the same issue should be revoked, ensuring uniformity of law.[296] Hence, even though OHADA operates with hard law norms (Uniform Acts), it allows for flexibility (hybrid law approach)[297] for countries to govern issues related to the Uniform Acts that are not directly covered by them. This aspect of OHADA can make a Uniform Act on Warehouse Receipts more attractive to local businesses, as it can be combined with the national laws to address issues related to warehouse receipt relationships not covered by a Uniform Act on Warehouse Receipts. As a result, this hybrid law approach can help to fill or complement provisions of a new Uniform Act on Warehouse Receipts with the national laws of OHADA member states.[298]

The OHADA Uniform Acts are designed to provide a comprehensive understanding of the law and avoid ambiguity and legal confusion.[299] To ensure that OHADA laws are innovative

[288] Beauchard (n 26) 328.
[289] Uniform Act on General Commercial Law (adopted 17 April 1997) book 1.
[290] ibid book 6.
[291] ibid book 7.
[292] Uniform Act on General Commercial Law (adopted 15 December 2010) book 8.
[293] CISG.
[294] Mancuso (n 76) 168.
[295] ibid.
[296] Charles Manga Fombad, 'Some Reflections on the Prospects for the Harmonisation of International Business Laws in Africa: OHADA and Beyond' (2013) 59 Africa Today 51, 66.
[297] see 2.2.2.3.
[298] ibid.
[299] Leno (n 20) 111.

and address issues faced by OHADA member states, OHADA keeps revising and updating its Uniform Acts. For example, in 2010, OHADA introduced a revised version of the Uniform Act on General Commercial Law.[300] Inspired by the 'auto-entrepreneur' status in France,[301] OHADA introduced the status of an entrepreneur.[302] Furthermore, by amending the current Uniform Acts, adopting new ones and systematising law, OHADA makes it easier for legal practitioners to access the Uniform Acts, contributing to the efficiency of executing the law.[303] This approach contributes to the elimination of legal uncertainty and lowers the number of disputes that arise from conflicts of application of national legislation.[304] As a result, the legal framework of OHADA looks attractive to international investors and contributes to enhancing economic advancements in its member states. Thus, nine out of seventeen OHADA member states improved their ranking and scored higher than the regional average rank on the ease of doing business in the 2019 World Bank Doing Business Report.[305] The adoption of a new Uniform Act on Warehouse Receipts can further increase the attractiveness of OHADA and the economic development of its member states.

OHADA develops and adopts modern, simple, and reliable business laws in its member states, identifies areas for improvement, and suggests steps individual countries can take to modernise certain areas of business laws.[306] For instance, OHADA identified the need for harmonisation of labour law in its member states, as national legislation does not address issues of transnational matters related to labour migration.[307] To initiate the drafting of a Uniform Act related to labour law, OHADA has begun the process of consultation at the regional level with the Economic and Monetary Community of Central Africa.[308] Therefore, OHADA not only identifies areas for future harmonisation and unification of law but also provides consultations with other regional organisations in Africa to address the issues concerning future law reforms in the business field. Hence, the OHADA system and working method help the organisation to be flexible and reactive to practical challenges and changes in the field of business, especially in comparison with how African countries address such issues solely.

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[300] Uniform Act on General Commercial Law (adopted 17 April 1997).
[301] Beauchard (n 26) 329.
[302] Uniform Act on General Commercial Law (adopted 17 April 1997) book 1.
[303] Séverine Menétrey, David Hiez, 'Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organisation for the Harmonisation of Business Law in Africa (OHADA) and Law and Development' (2015) 8 Law and Development Review 433, 439.
[304] ibid.
[305] World Bank Group, 'Doing Business 2019. Training for Reform. Regional Profile. Organisation for the Harmonisation of Business Law in Africa (OHADA)' (Doing Business 16th Edition, Washington DC 2019) 4.
[306] Fombad (n 296) 66.
[307] OHADA, 'Harmonisation of Labor Law' (*OHADA,* 2023) <https://www.ohada.org/en/harmonization- of-labor-law/> accessed 20 January 2023.
[308] ibid.

One of the major advantages of the legal framework of OHADA is its independent judicial system. Through the Common Court of Justice and Arbitration, the OHADA judicial system ensures uniform application of its legal norms at the highest level among its member states. The Common Court of Justice and Arbitration offers independent judicial support that is less likely to be affected by corruption issues.[309] This, in turn, increases investors' trust and confidence.[310] This advantage of OHADA is particularly significant, especially in comparison with the situation that individual countries faced before the creation of OHADA.[311]

OHADA established the Common Court of Justice and Arbitration to build trust in the judiciary system among its member states.[312] This provided foreign investors with legal certainty in case of disputes. Since 2011, some economies in OHADA member states scored top marks in starting a business, accessing credits, enforceability of contracts and dealing with insolvency according to the indicators of the World Bank Report 'Doing Business'.[313] Additionally, it was indicated that over five years, OHADA implemented around 95 reforms in the business field and was the most reform-driven block of countries over a period between 2015 and 2016.[314] For example, the adoption of the revised version of the Uniform Act Organising Securities introduced new types of collateral, such as intellectual property rights[315] and future assets.[316] The revised version of the Uniform Act on General Commercial Law simplified the procedure of starting a company.[317]

OHADA member states have shown varying performances on different indicators, which indicates the potential for sharing business experiences and improvement.[318] Warehouse receipt legal reform and the adoption of a new Uniform Act on Warehouse Receipts can further improve OHADA's performance and attractiveness to foreign investors. Working in connection with the Uniform Act on General Commercial Law, a Uniform Act on Warehouse Receipts can enable smallholder farmers to register their businesses quickly and gain access to financing. The potential benefits of warehouse financing can encourage farmers to leave the informal economy[319] so that they can fruitfully exploit all the benefits of the warehouse receipt system.[320] Thus, the warehouse receipt law reform can address the socio-economic circumstances of

[309] Fombad (n 296) 66.
[310] ibid.
[311] see s 3.1.2.
[312] Leno (n 20) 111.
[313] World Bank Group, 'Doing Business dans les Etats Membres de l'OHADA 2017' (Doing Business Report, Washington DC 2017).
[314] World Bank Group, 'Reports. Doing Business' (*WBG,* 2022) <https://archive.doingbusiness.org/en/reports/regional-reports/ohada> accessed 1 December 2022.
[315] Uniform Act Organising Securities (adopted 15 December 2010) title 2 ch 5 s 4.
[316] ibid title 2 ch 4.
[317] Uniform Act on General Commercial Law (adopted 15 December 2010) book 2 chapter 1 s 2.
[318] World Bank Group (n 313).
[319] see s 1.1.1.
[320] see s 6.2.

OHADA member states by opening access to finance and encouraging small-scale businesses to participate in a formal economy. Access to finance encourages smallholder farmers to leave the informal economy and, at the same time, opens new opportunities for small-scale agricultural businesses.[321]

For a Uniform Act on Warehouse Receipts to work efficiently, it is essential for OHADA to have security rights laws in place. The Uniform Act Organising Securities establishes a security transaction framework, which aims to eliminate risks for lenders, including banks and investors in OHADA member states.[322] The Uniform Act Organising Securities created the preconditions and framework for the adoption of a new Uniform Act on Warehouse Receipts. The secured transaction framework of OHADA will make the adoption of a Uniform Act on Warehouse Receipts smoother and quicker. As a result, the implementation of a Uniform Act on Warehouse Receipt can further strengthen the legal framework of OHADA and increase its attractiveness to foreign investors.

OHADA is one of the few intergovernmental organisations in Africa that has attempted to unite two different legal families - civil and common law - under a legal framework.[323] This process is still ongoing, but it represents an important step towards demonstrating how two different legal families can coexist within a regulative framework. Using the example of Cameroon, a bijural country, the OHADA legal framework illustrates a positive example of how the common law part of Cameroon can adhere to regulations designed for civil law countries. OHADA not only aims to bridge the gap between two different legal systems but also seeks to incorporate local legal traditions and business practices into its Uniform Acts.[324] Therefore, the OHADA Uniform Acts represent a blended approach influenced by French law, English common law norms and local customary law to some extent.[325]

The main advantage of OHADA is that it creates legal certainty and, as a result, favourable conditions for foreign investors through innovative business laws. The accomplishments of OHADA demonstrate its ability to conduct warehouse receipt legal reform and adopt a Uniform Act on Warehouse Receipts. Additionally, numerous reports by the World Bank Group and the International Finance Corporation indicate the positive impact of the legal framework of OHADA on businesses in its member states and their economic development and investment climate.[326] Therefore, OHADA has profound experience in implementing

[321] George Rapsomanikis, 'The Economic Lives of Smallholder Farmers' (Food and Agriculture Organisation of the UN, Rome 2015) 13-27.
[322] Uniform Act Organising Securities (adopted 15 December 2010).
[323] Fombad (n 296) 65.
[324] Robert Nemedeu, 'OHADA : de l'harmonisation à l'unification du droit des affaires en Afrique' (2005) Intervention au CRDP (faculté de droit de Nancy) 2005 9.
[325] Mancuso (n 76) 168.
[326] World Bank Group, 'Doing Business dans les Etats Membres de l'OHADA 2017' (Doing Business Report, Washington DC 2017), International Finance Corporation, 'International Finance Corporation's

business laws solely and in cooperation with other intergovernmental organisations. OHADA is capable of adopting the UNIDROIT MLWR and implementing a new Uniform Act on Warehouse Receipts.

This subsection discussed the main benefits of the OHADA regulatory framework and its working methods. It was also established that the OHADA working and legal framework are influenced by OHADA member states' backgrounds (social, historical, and cultural). It established that OHADA is a viable candidate for adopting the UNIDROIT MLWR as a hard law norm - a Uniform Act on Warehouse Receipts.

3.5.2. Challenges of OHADA

OHADA is a relatively young international organisation that faces several challenges in promoting its legislation and facilitating African integration. While these challenges may be resolved as the organisation progresses, it is essential to discuss and assess how they affect the achievement of its main goals and could impede the adoption of a Uniform Act on Warehouse Receipts. The major challenges that OHADA faces include integration, interpretation, institutional, implementation, and enforceability challenges. These challenges will be discussed in separate subsections for better clarification.

3.5.2.1. Integration Challenges

The OHADA Uniform Acts should cover all the areas of business regulation to work efficiently. However, for example, there is no Uniform Act on Contract Law in OHADA member states, which is an essential part of the business relationship. OHADA and UNIDROIT have been working on the draft of the Uniform Act on Contract Law and have presented a preliminary draft of the Uniform Act on Contract Law.[327] It has not yet been adopted for several reasons.[328] As a result, certain aspects of contract law in OHADA member states are still covered by domestic legislation. This means that foreign investors have to use a mixture of the modern OHADA Uniform Acts and unharmonised and outdated domestic legislation.[329] This situation undermines the goals of OHADA because instead of eliminating legal uncertainty, it creates a conflict of laws in OHADA member states. However, OHADA is actively working on the adoption of new Uniform Acts to address various business issues. The adoption and implementation of a new Uniform Act on Warehouse Receipts can strengthen the legal

OHADA Investment Climate Program (2007-2017). An Impact Assessment of OHADA Reforms: Uniform Acts on Commercial, Company, Secured Transactions, and Insolvency' (An Independent Evaluation by ECOPA and Economisti Associati, Washington DC 2018), World Bank Group, 'Doing Business 2019. Training for Reform. Regional Profile: Organisation for Harmonisation of Business Law in Africa (OHADA)' (Doing Business 2019, Washington DC 2019).

[327] Preliminary Draft OHADA Uniform Act on Contract Law (adopted July 2007).

[328] Fontaine (n 80).

[329] Leno (n 20) 111.

framework of OHADA and improve its overall efficiency.

Another integration problem connects with the issue of integrated judicial systems of OHADA member states. There is no simplified recognition and enforcement procedure for decisions of national courts covered by the OHADA Uniform Acts in other member states.[330] The OHADA Treaty states that decisions of the Common Court of Justice and Arbitration are directly applicable and enforceable in member states as decisions of domestic courts.[331] However, there are no rules or procedures for enforcing a domestic judgment applying Uniform Acts in other member states.[332] This lack of clarity regarding the application and enforceability of court decisions for transnational matters needs to be addressed by OHADA. To avoid this issue, national courts apply domestic legislation excluding the application of the OHADA Uniform Acts, which undermines its efforts to harmonise business laws.

The enforceability issue can impact the enforcement of a Uniform Act on Warehouse Receipts. To address this, OHADA can adopt an approach similar to the one taken in the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[333] This approach grants that a court decision from one state that is a signatory to the convention is enforceable in another state that signed the convention. This approach would increase legal certainty and ensure the enforceability of court decisions related to warehouse receipt relationships in all OHADA member states.

This subsection discussed the integration challenges of OHADA and identified how such challenges can affect the adoption of a Uniform Act on Warehouse Receipts. The following subsection will focus on challenges related to the interpretation of the OHADA Uniform Acts.

3.5.2.2. Interpretation Challenges

As OHADA aims to harmonise laws in Africa and create a deeper level of regional cooperation and integration, it should address different legal traditions and families. However, so far, the OHADA Uniform Acts have prioritised the views and traditions of French-speaking African states from civil law countries. Even though French, English, Spanish and Portuguese are claimed as working languages of OHADA, the French language still has priority over others.[334] This creates a problem of applicability and enforceability of the OHADA Uniform Acts in common law countries. For example, a judge from Cameroon rejected the application of the OHADA Treaty on the ground that the Treaty is French by nature and lacks execution in common law

[330] Beauchard (n 26) 331.
[331] OHADA Treaty art 20.
[332] Beauchard (n 26) 331.
[333] Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (adopted 2 July 2019, entered into force 1 September 2023).
[334] OHADA Treaty art 42.

countries.[335] OHADA's adherence to French civil law tradition and the French language further indicates the strong influence of OHADA member states cultural and historical background on the OHADA Unform Acts and its legal framework. However, in commercial cases, external courts reject the application of national laws of OHADA member states and confirm the predominance of OHADA supranational laws and their uniform applicability. For example, the Paris Court of Appeal dismissed the application of the national law of Cameroon. The Paris Court of Appeal ruled that if a legal relationship is governed by the OHADA Uniform Acts, the OHADA Uniform Acts must be applied under the OHADA Treaty.[336] This demonstrates that even courts in non-member states of OHADA recognise the supernational nature of the OHADA Uniform Acts.

Some legal scholars believe that the problem of interpretation could be partially solved by including a definition section in the Uniform Acts so that the main terms are explained.[337] The Common Court of Justice and Arbitration encountered similar problems when the court declined its jurisdiction due to the wrong interpretation of provisions of the Uniform Acts.[338] To avoid the problem of misinterpretation and mistranslation, the practice of co-drafting could be adopted to address legal diversity in the African region.[339] Co-drafting, together with the inclusion of the interpretation and definition sections in the OHADA Uniform Acts, including a Uniform Act on Warehouse Receipts, can help countries from non-civil law backgrounds to understand the terms and provisions of OHADA laws and make it easier to adhere to them.

The previous subsections discussed the integration and interpretational challenges of OHADA and how these challenges can be addressed. The following subsection will focus on the challenges related to the structure and working methods of OHADA.

3.5.2.3. Institutional Challenges

The institutional challenges of OHADA are closely connected with the issues of underfinancing. Although each state has to pay certain fees to OHADA, this funding is considered insufficient, resulting in underfinanced OHADA institutions.[340] As a result, the Advanced Regional School of Magistracy (ERSUMA) is unable to offer training in English to practitioners from English-speaking countries due to a lack of financial resources.[341] Similarly,

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[335] *Akiangan Fombin Sebastian v Fotso Joseph and Others* (2000) unreported (Cameroon).
[336] ETAT DU CAMEROUN Pris en la personne de Monsieur le Ministre des Forêts et de la Faune v SPRL PROJET PILOTE GAROUBE (2018) CA Paris 16/25484 (France).
[337] Leno (n 20) 112.
[338] *SOCOM SARL Ltd v SGBC* (2003) (CCJA).
[339] Valérie Dullion, 'When was Co-drafting 'Invented'? On History and Concepts in Legal Translation Studies' (2022) <https://www.tandfonline.com/doi/full/10.1080/0907676X.2022.2105156> accessed 3 December 2022.
[340] Leno (n 20) 113.
[341] see s 3.4.4.

the Common Court of Justice and Arbitration remains understaffed due to insufficient funds, leading to an inability to address the rising number of new cases.[342] OHADA sought financial support and grants from intergovernmental organisations to address this challenge. In 2018, the World Bank Group proposed to allocate a grant of fifteen million dollars for OHADA.[343] However, this is not a permanent solution, and budget problems should be discussed among member states. The issue of underfinancing can hinder the adoption and implementation of a Uniform Act on Warehouse Receipts. For example, due to the lack of financial resources, the Advance Regional School of Magistracy (ERSUMA) may not be able to provide training regarding the interpretation and enforcement of a new Uniform Act on Warehouse Receipts to English-speaking legal professionals, potentially deterring investors and foreign businesses.

The location of the Common Court of Justice and Arbitration presents an institutional challenge for OHADA.[344] Practitioners in OHADA member states are reluctant to appeal to the Common Court of Justice and Arbitration due to its specific location.[345] Reluctance from legal practitioners from OHADA member states to appeal to the Common Court of Justice and Arbitration can have a negative impact on the enforcement of a Uniform Act on Warehouse Receipts as national courts of OHADA member states have to rule on the issues related to warehouse receipt relationship applying their national legal norms. These national court decisions will not necessarily be based on the uniform application of a new Uniform Act on Warehouse Receipts, as national courts can interpret and apply warehouse receipt law differently. This issue can again decrease trust in the OHADA judicial system among legal practitioners and businesses. This can affect the enforcement of a Uniform Act on Warehouse Receipts. This issue could be addressed by establishing OHADA circuit courts or permanent courts in each member state.[346] However, circuit courts may be preferable over permanent courts as the latter could lead to interpretation issues.

This subsection discussed OHADA's challenges related to its working methods and structure of OHADA. How these challenges could affect the adoption and implementation of a Uniform Act on Warehouse Receipts was established. The following subsection will focus on the OHADA challenges related to the implementation and enforcement of its Uniform Acts.

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[342] see s 3.4.1.
[343] World Bank Group, 'Project Paper on a Proposed Additional Regional Grant in the Amount of SDR 10.5 Million (US$15 Million Equivalent) to he Organisation for the Harmonisation of Business Law in Africa for an Improved Investment Climate within the Organisation for the Harmonisation of Business Laws in Africa (OHADA) Project' (Project Paper Report No PAD2693, Washington DC 18 May 2018).
[344] Marc Frilet, 'Legal Innovation for Development: The OHADA Experince' (2013) 4 World Bank Legal Review 335, 340.
[345] see s 3.5.1.
[346] Leno (n 20) 113.

3.5.2.4. Implementation and Enforceability Challenges

Uniform Acts on the domestic level should replace similar or contradictory provisions of domestic legislation.[347] To make Article 10 of the OHADA Treaty effective, member states should review all national legislation related to the enacted Uniform Acts and repeal or exclude any contradictory or similar provisions.[348] However, even though some countries have assessed domestic legislation on possible contradictions with the OHADA Uniform Acts, these countries have not repealed such legal norms.[349] Consequently, the OHADA Uniform Acts coexist with similar domestic norms, leading to legal uncertainty and ambiguity. A parallel could be established with the post-colonial situation in OHADA member states, where the legal norms were contradictory.[350] This could potentially indicate that post-colonial heritage still affects OHADA member states' working methods. This issue can affect the enforcement of a new Uniform Act on Warehouse Receipts and create legal ambiguity when different rules govern the same issues related to warehouse receipts.

Uniform implementation of the OHADA laws connects with the institutional challenges. The key to uniform implementation is enforceability, which requires an integrated judicial system.[351] This means that the judgements of the Common Court of Justice and Arbitration should be fully accepted and enforced in all member states, regardless of their legal traditions and language.[352] Achieving this is only possible if OHADA member states show their willingness to change and their dedication to align domestic legislation with the OHADA Uniform Acts. Situations, when there are inconsistencies in domestic legislation and the OHADA Uniform Acts, create legal uncertainty and ambiguity regarding which legal norms are applicable to a particular situation. This increases legal risks for businesses and financial institutions. Therefore, it is recommended that OHADA member states review their domestic legislation and repeal domestic laws that govern similar issues or contradict the Uniform Acts in force. This can increase legal certainty and ensure consistent application of the OHADA Uniform Acts, including a Uniform Act on Warehouse Receipts.

The consistent application of the OHADA Uniform Acts is the main goal of the organisation. However, OHADA member states are also members of different regional organisations and unions, such as the Economic Community of West African States (ECOWAS).[353] There is a possibility of contradiction between the OHADA Uniform Acts and

[347] OHADA Treaty art 10.
[348] Beauchard (n 26) 332.
[349] ibid 332.
[350] see s 3.1.
[351] ibid.
[352] ibid.
[353] see s 1.1.3.

the policies and rules of other regional organisations.[354] This could create challenges in implementation, application, and enforcement. However, it is important to note that the Economic Community of West African States (ECOWAS) does not have supernational power, and its policies are not binding for its member states.

Another implementation challenge of the OHADA Uniform Acts is the issue of enforcement and criminal sanctions in case of non-compliance.[355] It stated that the Uniform Acts may include provisions of criminal sanctions.[356] However, the criminal offences related to the enforcement of the OHADA Uniform Acts are regulated by domestic legislation, which creates a problem of unharmonised penalties and definitions of criminal offences.[357] Criminal sanctions in case of non-compliance should also be harmonised as they are a part of the harmonised legal environment. Therefore, it is recommended that OHADA assess the possibility of harmonising criminal laws in its member states related to non-compliance with the Uniform Acts.

OHADA legal norms are enforced by member states according to their domestic legislation. This contradicts the concept of deep harmonisation and uniform implementation of the OHADA Uniform Acts. Even if the OHADA laws are enforceable on a national level, variations in the domestic legislation of its member states and how the OHADA Uniform Acts are enforced in each member state create legal implications for foreign investors.[358] This issue is further aggravated by cultural and historical differences in the domestic legal norms of OHADA member states.[359] This may result in legal uncertainty and an increase in the cost of doing business in OHADA member states. In turn, it affects the implementation and enforcement of the Uniform Acts, including a new Uniform Act on Warehouse Receipts. Therefore, the issue of enforcement of the OHADA transnational legal norms needs to be addressed by OHADA.

3.6. Conclusion

The analysis from this chapter established the common historical and socio-economic background of OHADA member states. The initial development of OHADA was influenced by the common socio-economic status of OHADA member states.[360] It was established in this chapter that certain historical and socio-economic factors influenced the OHADA working

[354] Beauchard (n 26) 330.
[355] Frilet (n 343) 340.
[356] OHADA Treaty art 5.
[357] Frilet (n 343) 340.
[358] Houanye (n 220) 2.
[359] see s 3.1., n 80 – the difference in local legal specificities in OHADA member states hindered the adoption and implementation of a new Uniform Act on Contract Law.
[360] see s 3.1.

methods, legal framework and legal norms.[361] To be positively accepted by stakeholders in OHADA member states, the proposed warehouse receipt law should reflect the wider context (historical and socio-economic) of warehouse receipt law reform. The analysis from this chapter will be taken into consideration in chapter four to tailor the provisions of the UNIDROIT MLWR to the OHADA background.

One of the major goals of OHADA is to facilitate economic development and attract business investments in its member states.[362] Multiple reports from intergovernmental organisations indicate that OHADA member states steadily improved their scores in the field of doing business and attracting foreign investments.[363] The adoption and implementation of the warehouse receipt law can further facilitate economic development and attract investments in OHADA member states. The implementation of a new Uniform Act on Warehouse Receipts will enable OHADA to address the integration challenges it currently faces.[364] Adopting a Uniform Act on Warehouse Receipts will enable OHADA to expand its legal regulation to more business areas.

Secondly, OHADA has already successfully adopted and implemented the Uniform Act Organising Securities[365] and the Uniform Act on General Commercial Law.[366] These two Uniform Acts are closely related to warehouse receipt financing. They provide essential definitions and regulate aspects related to the warehouse receipt relationship.[367] This demonstrates OHADA's expertise in conducting legal reforms and its ability to conduct warehouse receipt law reform. By adopting a new Uniform Act on Warehouse Receipts, OHADA can ensure that it does not contradict the current business regulations in its member states and that it fits into the current legislative framework. Moreover, a new Uniform Act on Warehouse Receipts can logically fit into the current legal base of OHADA regulation.

The OHADA institutional structure is designed to prevent corruption. Unlike the individual governments of OHADA member states, OHADA institutions are less likely to be affected by power groups from member states.[368] The Council of Ministers adopts new Uniform Acts by unanimous vote to avoid political sway from member states' governments.[369] To ensure that the interests of business groups and other stakeholders are considered, the Permanent Secretariat created public consultation bodies with national commissions while drafting new

[361] see ss 3.1, 3.2., 3.3.
[362] see ss 3.1., 3.2.
[363] see s 3.5.1.
[364] see s 3.5.2.1.
[365] Uniform Act Organising Securities (adopted 15 December 2010).
[366] Uniform Act on General Commercial Law (adopted 15 December 2010).
[367] see s 3.3.3.
[368] see s 3.4.
[369] see s 3.4.2.

Uniform Acts.[370] Therefore, the OHADA institutional framework is suitable for drafting and adopting warehouse receipt law. It is more beneficial for OHADA member states if warehouse receipt law reform is conducted by OHADA in comparison if countries solely develop legislation concerning warehouse receipt relationships.

OHADA has successfully adopted and implemented ten Uniform Acts to date.[371] In addition, OHADA has a positive experience in conducting law reform in cooperation with intergovernmental organisations, such as UNIDROIT,[372] or based on international instruments developed by intergovernmental organisations.[373] This expertise and positive previous experience will allow OHADA to adopt a new Uniform Act on Warehouse Receipts successfully. OHADA can tailor the UNIDROIT MLWR to the needs of its member states. A parallel could be drawn with the Uniform Act on Mediation,[374] which is based on the UNCITRAL soft law instrument.[375] This positive experience makes OHADA a unique intergovernmental organisation in the African region to conduct warehouse receipt law reform.

OHADA established the Common Court of Justice and Arbitration to ensure the uniform application of the Uniform Acts. The Common Court of Justice and Arbitration not only ensures the uniform application of the OHADA Uniform Acts but also functions as a Supreme Court for OHADA member states, ruling on matters concerning the Uniform Acts.[376] The Common Court of Justice and Arbitration is an institution in OHADA that guarantees equality in the application of the OHADA Uniform Acts. The creation of the Common Court of Justice and Arbitration addressed the issue of trust and corruption in OHADA member states.[377] Even though there are questions about the uniform application of the OHADA Uniform Acts in its member states, the Common Court of Justice and Arbitration ensures their supremacy. Therefore, the OHADA judicial system supports the adoption and implementation of a new Uniform Act on Warehouse Receipts, which can increase acceptance and trust among all stakeholders.

The adoption and implementation of a Uniform Act on Warehouse Receipts cannot be successful without awareness and acceptance by legal practitioners and stakeholders. The Advanced Regional School of Magistracy (ERSUMA) can ensure that legal practitioners gain a comprehensive understanding of the warehouse receipt law and are adequately equipped to handle it.[378] This can guarantee the acceptance of a Uniform Act on Warehouse Receipts and its effective implementation. While the Advanced Regional School of Magistracy

[370] see s 3.4.3.
[371] see s 3.3.3.
[372] see s 3.3.1.
[373] see s 3.3.3.
[374] Uniform Act on Mediation (adopted 23 November 2017).
[375] see s 3.3.3.
[376] see s 3.4.1.
[377] see s 3.1.
[378] see s 3.4.4.

(ERSUMA) mostly provides training in the French language due to insufficient funding,[379] OHADA has adopted other working languages[380] and has started discussing issues of insufficient funds.[381]

Finally, a new Uniform Act on Warehouse Receipts developed in coordination with the Uniform Act Organising Securities[382] and the Uniform Act on General Commercial Law,[383] which can further harmonise business regulation in OHADA member states. However, a new Uniform Act on Warehouse Receipts may contradict certain provisions of domestic legislation. Even though the Uniform Acts are directly applicable in OHADA member states without the process of domestic approval,[384] it would be beneficial for the harmonisation of legislation in member states if contradictory national provisions are revoked so that there is no ambiguity and legal confusion. OHADA is a relatively young intergovernmental organisation, and it faces several challenges, which connect with its recent creation and a short period of functioning. However, OHADA's achievements indicate its capacity to conduct warehouse receipt law reform solely and in cooperation with intergovernmental organisations.

[379] see s 3.5.2.3.
[380] see s 3.2.
[381] see s 3.5.2.3.
[382] Uniform Act Organising Securities (adopted 15 December 2010).
[383] Uniform Act on General Commercial Law (adopted 15 December 2010).
[384] OHADA Treaty art 10.

Chapter 4

4. Development of Personal Property Rights in Civil Law Countries

Warehouse receipt financing connects with personal property rights. Different legal traditions classify and address issues related to personal property rights differently. OHADA member states, which have similar French civil law backgrounds, address these issues in their unique ways.[1] Civil law countries derived their norms related to personal property rights from Roman law, which evolved over time and profoundly influenced the legislation of modern civil law countries, including OHADA member states. This chapter analyses the influence of Roman law on the civil law tradition of the French-speaking African countries, particularly focusing on the classification of property rights in Roman law and its connection to the classification of property rights in civil law countries, including OHADA member states.[2] This chapter also discusses the concept of ownership and methods of acquiring ownership in Roman law and how they influenced the approach of modern civil law countries in addressing ownership issues related to warehouse receipt relationships.[3] This chapter establishes the difference between ownership and possession in Roman law and how it influenced the legislation of modern civil law countries, including OHADA member states. This chapter also discusses the connection between real securities and warehouse receipt financing in the OHADA Uniform Acts and the influence of Roman law on it.[4] Finally, the chapter discusses how the theories of legal evolution and path dependency can affect the development of the OHADA Uniform Acts.[5] This chapter further assesses the recommendation for OHADA to develop a Uniform Act on Warehouse Receipts.[6]

Understanding how Roman law influenced the legislation of OHADA member states allows the researcher to understand better the nature of the OHADA Uniform Acts and why they were developed in a certain way. Comparative analysis of Roman law and the OHADA Uniform Acts helps to understand how civil law countries, including OHADA member states, address issues of ownership and real securities, which can assist in developing a Uniform Act on Warehouse Receipts for OHADA. The analysis from this chapter further complements the analysis from chapter three in developing a broader understanding of OHADA's working methods, legal framework and approach to law reform in the historical and socio-economic contexts. In particular, this chapter helps to develop an understanding of the legal evolution of civil law in the context of OHADA member states. This analysis provides insights regarding the influence of the historical evolution of civil law norms on the current OHADA legal

[1] see s 4.1.
[2] see s 4.2.1.
[3] see ss 4.1.2, 4.1.3.
[4] see s 4.2.
[5] see s 4.3.
[6] see ch 3.

framework. This analysis also assists in understanding the influence of OHADA member states historical, cultural and socio-economic background on the OHADA legal framework and working methods. This analysis further assists in tailoring the UNIDROIT MLWR to the legal and socio-economic background of OHADA and its member states.

The application of the legal evolutionary theory and the path dependency theory can help to understand the legal choices OHADA made. It also can assist in answering the research questions of how a new Uniform Act on Warehouse Receipts can be developed and how it can fit into the legal framework of OHADA. This chapter further assesses the recommendation from chapter three that warehouse receipt law reform should be conducted in OHADA in the form of unification, and a hard law norm – a new Uniform Act on Warehouse Receipts – should be developed. This chapter also answers the research questions of what form of law is beneficial for warehouse receipt legal reform for OHADA and whether legal transplants can assist in further tailoring the UNIDROIT MLWR to the legal background of OHADA member states. The hermeneutic approach helps to assess what legal transplants are suitable for OHADA and do not contradict the socio-economic, historical and cultural background of OHADA member states. This chapter starts with an analysis of the history of how Roman law was established and settled in OHADA member states.

4.1. The Connection between Roman Law and Civil Law in Africa

The civil law tradition was heavily influenced by Ancient Roman law, and it was embedded in the legislation of African countries through colonisation.[7] Despite the differences in legislation in modern civil law countries, certain fundamental elements remain the same and are deeply rooted in the legislation of each civil law country.[8] The fundamental element of unity among civil law countries is that they emerged from the same sources and have a similar classification of legal institutions, which they adapted to their needs and backgrounds.[9] However, despite the common element, legal norms in civil law countries took different paths and developed differently.

As a result of a natural evolution of civil law systems, two main subcategories emerged: Romanistic-Latin or French and German.[10] Countries belonging to the Romanistic-Latin or French civil law group followed the private law tradition derived from 'Code Napoleon'.[11] During the process of colonisation via colonial legal transplant,[12] France expanded its civil law

[7] see s 4.2.
[8] George Mousourakis, *Comparative Law and Legal Traditions: Historical and Contemporary Perspectives* (Springer 2019) 197.
[9] ibid 238.
[10] ibid, Konrad Zweigert, Hein Kötz, *An Introduction To Comparative Law* (3rd edn, Oxford University Press 1998) 68-75.
[11] Mousourakis (n 8) 238, Civil Code 1804 (France).
[12] see s 2.3.3.2.

traditions to North and Sub-Saharan Africa and French Guiana.[13] Former French colonies in North Africa include Morocco, Algeria and Tunisia; in West Africa - Senegal, Togo, Ivory Coast, - Mauritania, Mali, Niger, the Central African Republic and Chad; and in Eastern Africa - Madagascar and Djibouti (Image 4.1).[14]

Image 4.1. African Colonies[15]

Additionally, the former Belgian colonies—Congo, Rwanda, and Burundi — should be included in the list, as they followed French civil legal traditions.[16] The French Civil Code[17] influenced the Portuguese Civil Code[18] and the Spanish Civil Code,[19] which were later spread via colonial legal transplant[20] to colonised territories. Among the former Portuguese colonies in Africa are Angola, Mozambique and Guinea Bissau.[21] Among the former Spanish colonies in Africa is Equatorial Guinea.[22] The influence of the French civil law tradition in the former colonies depends on the degree to which they adhere to French legal culture and the influence of local customs and traditions.[23] In North Africa, the French civil law tradition is mixed with Islamic law and is deeply embedded in modern legislation.[24] Therefore, at the start of this

[13] Mousourakis (n 8) 239.
[14] United Nations, 'List of Former Trust and Non-Self-Governing Territories' (*United Nations,* 2023) <un.org/dppa/decolonization/en/history/former-trust-and-nsgts> accessed 20 March 2023.
[15] Klaus Boehnke, Erhabor Sunday Idemudia, 'Gathering the Data' in Klaus Boehnke, Erhabor Sunday Idemudia (ed), *Psychosocial Experiences of African Migrants in Six European Countries A Mixed Method Study* (Springer 2020) 147.
[16] ibid.
[17] Civil Code 1804 (France).
[18] Civil Code 1867 (Portugal).
[19] Civil Code 1889 (Spain).
[20] see s 2.3.3.2.
[21] United Nations (n 14).
[22] ibid.
[23] Mousourakis (n 8) 240, see 2.3.3.2.
[24] ibid.

chapter, it is important to explore the Roman law tradition and how it influenced legislation in civil law countries in Africa, particularly those that followed the French legal tradition.

The similarities among civil law countries are particularly noticeable in the private law of property and obligations.[25] In Roman law, the property law and the law of obligations were covered together under the sections called 'Law of Things'.[26] By 'things', Ancient Roman jurists meant different types of property, including physical property, intangible rights and obligations.[27] This part of Roman law is particularly relevant to warehouse receipts as it explains provisions of law that stand behind the civil law tradition of treating personal property rights. Therefore, this chapter is dedicated to the history of the development of property rights in the Roman Empire and the connections between legislation in civil law countries and the Roman Empire. The connection between French civil law and the OHADA Uniform Acts are also established. In particular, the connection is made between the Uniform Act on General Commercial Law,[28] the Uniform Act Organising Securities,[29] provisions of the French Civil Code, and OHADA member states civil law legislation.[30] Furthermore, this chapter discusses the influence of Roman and French law on the legislation of OHADA countries, the theoretical problems of legal development, and the theory of path dependency in law.

In this PhD research, it is essential to understand how the legal background of OHADA has influenced the development of the Uniform Acts and working methods. Understanding why certain OHADA Uniform Acts are designed in a particular way and how OHADA operates can assist in tailoring a Uniform Act on Warehouse Receipts to fit within the current OHADA legal and institutional frameworks. This ensures quick implementation and minimal resistance from its member states. The previous chapter established the institutional framework and working methods of OHADA and provided insights into how warehouse receipt legal reform in OHADA can be conducted and developed. It was established that it is possible to develop a hard law norm – a Uniform Act on Warehouse Receipts – for OHADA, which fits into its current legal framework. Therefore, to obtain the broader picture and fully understand the legislative framework of OHADA, it is essential to understand the evolution of the development of the OHADA Uniform Acts in a wider context (historical and cultural). This understanding can help to further support the recommendation from chapter three regarding the proposed warehouse

[25] Alan Watson, *The Making of the Civil Law* (Harvard University Press 1981) 1.
[26] Ernest Metzger, 'Roman Law', in Y Kasai, V Cazzato (eds) Koten no Chosen, Tokyo: Chisen Shokan' (2020) 2020, 14 <https://ssrn.com/abstract=3680599> accessed 30 May 2023.
[27] Rafael Domingo, 'The Law of Property in Ancient Roman Law' (2017) <https://ssrn.com/abstract=2984869 > accessed 23 February 2023 1.
[28] Uniform Act on General Commercial Law (adopted 15 December 2010).
[29] Uniform Act Organising Securities (adopted 15 December 2010).
[30] Certain basic provisions adopted from Roman law are assumed under OHADA legal norms but are legally covered on the national level (under Civil Codes) of each OHADA member state. Therefore, for this PhD, as it is impossible to provide examples of each country as it will overburden the body of the thesis, examples from different OHADA member states will be given.

receipt law reform for Property Law in the Roman Empire

A warehouse receipt is a document that ascertains the ownership rights of property stored in a warehouse.[31] Therefore, the legal provisions regarding warehouse receipts must be consistent with OHADA member states' legislation regarding property rights and ownership. To understand how ownership rights are addressed in OHADA countries, it is vital to analyse the development and evolution of related legal norms. This can provide a broad perspective and understanding of why certain rules are designed in a certain way. Ultimately, this understanding aids in developing a new Uniform Act on Warehouse Receipts in a manner that does not contradict the provisions regarding ownership and property rights in OHADA member states.

This section explores how Roman law addressed property rights and obligations. This section also explains the difference between ownership and possession in Roman law and analyse different obligations and agreements in the Roman Empire. In the Roman Empire, the term 'property' (things, *res*) covered anything that could be owned and had an economic value.[32] To understand the modern classification of property in civil law countries, including OHADA member states, it is essential to understand the classification of property in Roman law and the difference between certain types of property. This analysis can assist in establishing whether and how Roman law influenced the classification of property rights in OHADA countries and understand the nature of different property rights in civil law countries, including OHADA member states. This helps to obtain a broader picture and understand the provisions of the OHADA Uniform Acts regarding personal property rights in a deeper context (historical and cultural).

4.1.1. Classification of Property in Roman Law

It is important to understand the classification of property (things) in Roman law in connection to the warehouse receipt relationship, as it provides insights into how civil law countries treat personal property rights and address issues of personal property rights. This understanding helps to comprehend the notion behind each rule in the OHADA Uniform Acts and aids in designing a new Uniform Act on Warehouse Receipts that aligns with the legal framework of OHADA. Furthermore, this helps to understand the provisions of OHADA laws and its member states regarding property rights in the broader context (historical and cultural). Therefore, this subsection discusses the classification of property in Roman law.

Initially, Roman private law recognised three main categories of property: things,

[31] UNIDROIT, 'Draft Model Law on Warehouse Receipt' (Study LXXXIII – W.G.6 – Doc. 2, Rome 2023) art 1.
[32] Paul J du Plessis, 'Property' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015).

persons and actions.[33] This classification, with some modifications, continues to exist in civil law countries.[34] For example, the French Civil Code consists of Book I 'Persons', Book II 'Property and Various Modifications of Ownership', Book III 'Various Ways How Ownership is Acquired' and Book IV 'Securities'.[35] Provisions regarding property - 'things' - covered property rights in Roman law. Therefore, in this subsection, the development of the provisions regarding 'things' is analysed and discussed. The term 'thing' or *res* had a broader meaning in Roman law and defined everything that could be an object of legal rights, including physical objects or rights to certain physical objects.[36] With the development of Roman law, the classification of property changed.[37] The most important classifications of properties in Roman law are discussed below.

The concept of *res* in Roman law changed over time, expanding from describing physical objects to encompassing the broader notions of economic value.[38] This evolution was evident in the classification of property, which distinguishes between *res corporales* and *res incorporales*.[39] The main difference between these two categories was that *res corporales* referred to tangible things, such as land and gold.[40] Whereas, *res incorporales* referred to things that did not have a physical form and could not be touched, such as obligations.[41] *Res incorporales* were rights that derived from the rights regarding *res corporales*. For example, the warehoused goods constitute *res corporales,* and obligations of the warehouse operator to securely store warehoused goods constitute *res incorporales.* This classification constitutes nature and forms the basis of legislation in many civil law countries in the modern world. In OHADA member states, the provisions regarding obligations are addressed separately under special sections of the Uniform Acts. For example, the Uniform Act on General Commercial Law has special provisions regarding the obligation of the parties of commercial sale.[42]

According to another classification, there were things that could be owned by private individuals and things that could not be owned privately.[43] Several types of things could not be owned privately in Roman law: *res communes* – things that belonged to all men, such as air and the sea; *res publicae* – things that belonged to the states; *res universitatis* – things for public use, such as streets and theatres; *res nullius* – things that did not belong to anyone,

[33] Gaius Institutes 1.8 (G.Inst.), Justinian Institutes 1.2.12 (J.Inst.).
[34] Max Radin, 'Fundamental Concepts of the Roman Law' (1925) 13 California Law Review 207.
[35] Civil Code 1804 (France).
[36] Andrew Stephenson, *A History of Roman Law* (Little, Brown and Company 1912) 376.
[37] Paul J du Plessis, *Borkowski's Textbook on Roman Law* (4th edn, Oxford University Press 2010) 151.
[38] ibid 151.
[39] G.Inst. 2.12.
[40] ibid 2.13.
[41] ibid 2.14.
[42] Uniform Act on General Commercial Law (adopted 15 December 2010) book 8 ch 2 title 3.
[43] G.Inst. 2.10 - 2.11.

including animals and things with the divine nature.[44] This classification distinguished the personal property rights of individuals from other types of property rights. This classification can be applied to OHADA countries, as each OHADA member state has certain types of property prohibited from commercial use. For example, in Mali, the transfer and manufacture of small arms and light weapons are banned.[45] In Comoros, rivers and roads are considered public and cannot be owned privately.[46] Additionally, the Civil Code of Comoros establishes that certain things do not belong to anyone and are common to all,[47] such as forests and fishery.

Another classification of property in Roman law differentiated things as movable- *res mobiles* - *and* immovable - *res immobiles* - that could and could not be transferred without destroying or damaging them.[48] The difference between movable and immovable properties laid in their physical nature, purpose, or legal relation to another object.[49] Examples of immovable property included land and buildings, which could not be separated from the land. The OHADA Uniform Act Organising Securities follows this classification, with provisions regarding the pledge of movable property (machines and vehicles) addressed in a separate section,[50] and provisions regarding mortgages – immovable property – addressed separately.[51] Additionally, the Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings contains special rules regarding the seizure of tangible movable property.[52] The classification of property into movable and immovable property is deeply embedded in the civil law legislation of many countries, including the OHADA Uniform Acts, and is a key factor in identifying property not only in civil law but also in common law countries.

In Roman law, movable things were categorised as fungibles and non-fungibles.[53] Fungible things could be measured or counted, such as oil, wine and silver.[54] Non-fungibles were things that were valued for their individual worth rather than their quantity.[55] A similar

[44] Plessis (n 32) 153.
[45] ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials (adopted 14 June 2006, entered into force 29 September 2009) art 3. Mali is an OHADA member state but simultaneously a member of the Economic Community of West African States. As a result, the conventions and treaties of ECOWAS are mandatory to abide by their provisions (Treaty of Economic Community of West African States (adopted 24 July 1993, entered into force 24 July 1993) art 5).
[46] Civil Code 1975 (Comores) art 538.
[47] ibid art 714.
[48] Radin (n 34) 378.
[49] Domingo (n 27) 3.
[50] Uniform Act Organising Securities (adopted 15 December 2010) title 2 ch 4 s 4.
[51] ibid title 3.
[52] Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings (adopted 10 April 1998) book 2 pt 2 ch 3.
[53] Plessis (n 32) 154.
[54] ibid.
[55] Domingo (n 27) 3.

classification of movable things divided movable things into consumable and inconsumable.[56] Consumable things lost their form and value by usage (oil, wine), while inconsumable things retained their form and value even with usage.[57] To some extent, this classification still has relevance to the OHADA Uniform Acts. For example, the Uniform Act Organising Securities emphasises how provisions regarding the pledge of raw and agricultural materials should be addressed.[58] Additionally, the Uniform Act Organising Securities outlines special provisions regarding the pledge of fungibles.[59]

The most important classification of property rights in Roman law divided things into *res mancipi* and *res nec mancipi*.[60] *Res mancipi* included important things in Roman households and were stated in the special lists.[61] Examples of *res mancipi* were Italic land, slaves, domestic animals, and rustic servitudes not attached to urban estates.[62] All other things, for example, gold and jewellery, were considered *res nec mancipi*.[63] The conveyance of title of *res mancipi* required a formal deed, whereas conveyance of *res nec mancipi* could be done simply through transfer and delivery of the property.[64] In the OHADA Uniform Acts, certain property rights also have special status, and special conditions apply upon their transfer. For example, under the Uniform Act Organising Securities, only registered real property can be mortgaged,[65] which indicates a special status and special rules for the transfer of real property rights in OHADA and its member states. This classification still exists to some extent in the legislation of modern civil law countries, as real property rights have a special status and require special procedures for their conveyance.

The analysis of this subsection indicates that the classification of property rights from Roman law, with some changes deeply embedded into the legislation of civil law countries, including OHADA member states. This indicates the influence of the historical background of OHADA member states on the development of modern domestic legislation related to the property rights of OHADA member states and the OHADA Uniform Acts. The classification of property affects the rules regarding property rights in civil law countries, including the notion of ownership and possession. A warehouse receipt is a document of title that confirms the ownership rights to the stored goods and the transfer of the rights of possession of such goods.[66] Rules regarding ownership and possession of different property types vary in civil

[56] Radin (n 34) 379.
[57] ibid 379.
[58] Uniform Act Organising Securities (adopted 15 December 2010) art 120.
[59] ibid art 101 – 102.
[60] Plessis (n 37) 154.
[61] ibid 155.
[62] G.Inst. 4.14a.
[63] Plessis (n 37) 155.
[64] ibid.
[65] Uniform Act Organising Securities (adopted 15 December 2010) art 192.
[66] Crawford M Bishop, 'Warehouse Receipts as Collateral' (1926) 2 Washington Law Review 23, 23.

and common law countries. As mentioned earlier, civil law countries derived their rules from the Roman law system,[67] which to some extent still exists in the legislation of many civil law countries, including OHADA member states. Therefore, the following subsection will analyse the notion of ownership and possession in Roman law and how different types of property (things) could be owned and possessed. The following subsection will also establish the connection between ownership and possession in Roman law, the OHADA Uniform Acts, and the legislation of its member states. The hermeneutic approach will assist in analysing and developing an understanding of the provisions of OHADA Uniform Acts and domestic legislation of OHADA member states related to property ownership and possession in the deeper context, including cultural and historical contexts.

4.1.2. Ownership and Possession in Roman Law

In Roman law, the concept of ownership was referred to as *dominium*, granting the owner nearly absolute rights over the property.[68] The absolute ownership of *dominium* transferred to the legislation of modern civil law systems, including the property law of African countries.[69] The *dominium* gave the owner full control over the property, with restrictions that could only be imposed by legal norms or the nature of the property.[70] The *dominium* encompassed the owner's rights to use the property – *jus utendi*, enjoy the ownership – *jus fruendi*, and the rights to destroy the property – *jus abutendi*.[71] However, the *dominium* as an exclusive and full right existed only concerning two of the most important types of property in Ancient Rome: slaves and land.[72] The exclusiveness and extent of *dominium* varied depending on the object of ownership and the owner.[73] Similarly, ownership is treated in OHADA member states. For example, in Burkina Faso, the ownership rights give a person almost absolute rights to enjoy and transfer the property unless it is prohibited by law.[74]

In certain situations, the absolute property right, *dominium,* could be restricted under Roman law.[75] For example, in Ancient Rome, to build a structure taller than the surrounding buildings, one needed to acquire a servitude, a specific permission from surrounding properties, as such a building could limit daylight access to the surrounding buildings.[76] The

[67] see s 4.1.
[68] Andrew M Riggsby, *Roman Law and the Legal World of the Romans* (Cambridge University Press 2010) 137.
[69] Mieke van der Linden, 'Dominium' in Mieke van der Linden (ed), *The Acquisition of Africa (1870-1914): The Nature of International Law* (Brill 2016).
[70] Domingo (n 27) 4.
[71] Helen Scott, 'Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments' (2011) 2011 Acta Juridica 23, 24. Radin (n 34) 382.
[72] Radin (n 34) 210.
[73] ibid.
[74] Civil Code 1804 (Burkina Faso) art 544.
[75] David Johnston, *Roman Law in Context* (Cambridge University Press 1999) 68-76.
[76] Alan Rodger, *Owners and Neighbours in Roman Law* (Oxford: Clarendon Press 1972) ch 2.

main form of ownership in the Roman Empire was *ex iure Quiritium*, which gave Roman citizens almost absolute rights over Italian land.[77] Apart from Roman citizens, non-Roman citizens with status *ius commercii* (the right to trade and perform commercial activities) could acquire ownership over Italian land and movable property.[78] Individuals could hold land outside Italy (provincial land) according to the laws of the nations.[79] In some OHADA member states, certain restrictions regarding ownership of property similar to Roman law exist. For instance, in Togo, only citizens, French citizens, foreign governments or persons who obtained citizenship can acquire property rights over real property.[80] In Benin, for example, only citizens can purchase real property, and foreigners can purchase urban land only if an international agreement or a treaty permits it.[81]

In Ancient Rome, to acquire *dominium* over property, a person had to satisfy three main conditions: they had to have a status of *commercium*, the type of property should be allowed for private ownership, and the property should be acquired in a certain way.[82] *Commercium* meant that only citizens or persons who obtained citizenship could acquire *dominium* in Ancient Rome.[83] Similarly, for example, Togo and Benin, OHADA member states, have similar rules regarding ownership rights.[84] *Dominium* could be acquired only over privately owned property. For example, *dominium* could not be acquired over *res communes*, as they belonged to everyone at the same time. Similar rules exist in Guinea-Bissau, an OHADA member state, where land cannot be owned privately and belongs to the government.[85]

Finally, the thing should be acquired using the appropriate mode of conveyance. For example, the title over *res mancipi* could be passed only by *mancipatio* or *cessio*.[86] *Mancipatio* was a procedure of transference of *dominium* over *res mancipi* to the transferee with an unconditional and immediate effect.[87] *Mancipatio* was an exclusive and strict form of conveyancing rights over expensive and the most valuable things in Roman society. Similarly, in many modern civil law countries, special types of property require specific formal procedures. Most modern civil law countries recognise the special status of real property rights and their high value, and as a result, require special formal methods for the conveyance of

[77] Allan Chester, Johnson Frank, Frost Abbott, *Municipal Administration in the Roman Empire* (Princeton University Press 1926) 5.
[78] Domingo (n 27) 4.
[79] Georgy Kantor, 'Property in Land in Roman Provinces' in Tom Lambert, Georgy Kantor, Hannah Skoda (eds), *Legalism: Property and Ownership* (Oxford University Press 2017).
[80] Land Tenure Law No 60-26 05/08/1960 (Togo).
[81] Land Code 2013 (Republic of Benin) art 14.
[82] Plessis (n 37) 156.
[83] ibid.
[84] see n 76, 77.
[85] Land Act No. 5/98 (Guinea-Bissau).
[86] G.Inst. 4.18.
[87] Plessis (n 37) 179.

such property (registration) to protect the rights of owners.[88] The OHADA Uniform Acts also recognise the special status of real property and require registration of such rights. For example, under the Uniform Act Organising Securities real property rights should be registered to be subject to a mortgage.[89] *Cessio* was a method of conveyancing *dominium* over *res mancipi* or *res nec mancipi* in a magistrate, involving a transferor and transferee.[90] In essence, *cessio* was a form of voluntary transfer of ownership from a debtor to a creditor in a magistrate.[91] The OHADA Uniform Acts also recognise *cessio*. For example, the Uniform Act Organising Securities contains special provisions regarding the assignment of debts as a security.[92]

The distinction between possession and ownership was significant in Roman law. Possession referred to factual control over a property, while ownership was a legal right over the property.[93] In general, a person held possession and ownership of the property simultaneously. However, there were instances where a person held only possession of the property. Possession was considered legal when a person acquired it legally without malicious actions and in good faith.[94] By good faith, Roman law meant that a person possessing property believed nobody else had a right over it.[95] This differentiation between possession and ownership persists in the legislation of many modern civil law countries. For example, the French Civil Code recognises possession as the enjoyment of the property[96] and ownership as the right to enjoy and transfer the property.[97] Similarly, the Burkina Faso Civil Code also recognises possession as the enjoyment of the property[98] and ownership as a right to enjoy and dispose of the property.[99] The OHADA Uniform Acts follow Roman law tradition and also differentiate possession from ownership. For instance, the Uniform Act Organising Securities introduces a possessory lien, which enables the creditor to lawfully possess the property until the debtor pays back, even though the debtor remains the property owner.[100]

The right of ownership in the Roman Empire was protected by *vindication*, which enabled the owner to reclaim their property from anyone who was in possession of it, regardless of

[88] Luz M Martínez Velencoso, 'Transfer of Immovables and Systems of Publicity in the Western World: an Economic Approach' (2013) 6 Journal of Civil Law Studies 142.
[89] Uniform Act Organising Securities (adopted 15 December 2010) art 192.
[90] G.Inst. 4.24 - 4.27.
[91] Roger J Gobel, 'Reconstructing the Roman Law of Real Security' (1961) 36 Tulane Law Review 29.
[92] Uniform Act Organising Securities (adopted 15 December 2010) title 2 ch 3 s 2 sub-s 1.
[93] Scott (n 71) 26.
[94] Radin (n 34) 383.
[95] ibid.
[96] Civil Code 1804 (France) art 2228.
[97] ibid art 544-546.
[98] Civil Code 1804 (Burkina Faso) art 2228.
[99] ibid art 544.
[100] Uniform Act Organising Securities (adopted 15 December 2010) art 67.

how the possession was acquired.[101] The *vindication* could be used to protect and acquire possession of both movable and immovable property from the factual possessor.[102] *Vindication* allowed the factual possessor to be displaced by the proof of ownership by the owner. Similar rules exist in OHADA member states. For example, the Civil Code of Comores states that if a person possesses and uses somebody else's materials to craft a new object, the owner of the materials has a right to reclaim the newly created thing.[103]

Dominium over property in Roman law was distinct from possession in the sense that a person could maintain *dominium* over the property even if the person did not wish to retain it.[104] In contrast, possession would disappear as soon as the person decided not to possess it.[105] In Roman law, ownership was about holding a title, while possession was about factual control. The owner could also be a possessor, but the owner and the actual possessor were often different individuals. For example, the possessor of the warehouse receipt is the owner of the warehoused goods, and the warehouse itself is the possessor of the warehoused goods. The importance of possession was dictated by the system of law in the Roman Empire, where proof of possession was a problematic issue.[106] The OHADA Uniform Act Organising Securities also distinguishes factual possession from ownership title and allows, under the title retention clause, to withhold the ownership title as a guarantee for a loan,[107] whereas the property remains in the physical possession of the debtor.[108]

Roman law recognised three types of possession: natural - *detentio*, civil - *usucapio* and legal possession - *praetorian*.[109] Natural possession was simply factual possession and physical control over the property.[110] An example of natural possession would be the warehouse holding the warehoused goods for the warehouse receipt holder. Civil possession required a factual possessor of the property to acquire ownership through continuous possession for a certain period of time.[111] For instance, in Burkina Faso, continuous use of servitudes for thirty years will enable the possessor to obtain the title over it.[112] The so-called legal or *interdictal* possession was the possession that was protected in Roman law by

[101] Scott (n 71) 26.
[102] Richard Gamauf, Herbert Hausmaninger, *A Casebook on Roman Property Law* (10th edn, Oxford University Press 2003) ch 4.
[103] Civil Code 1975 (Comores) art 570.
[104] Radin (n 34) 211.
[105] ibid.
[106] Plessis (n 37) 172.
[107] Uniform Act Organising Securities (adopted 15 December 2010) art 71.
[108] A title retention clause is a provision in the contract of sale of goods that allows the seller to keep ownership rights over the goods until certain contractual obligations are fulfilled (Gerard McCormack, Secured Credit Under English and American Law (Cambridge University Press 2014), ch. 6).
[109] Domingo (n 27) 6.
[110] ibid.
[111] ibid.
[112] Civil Code 1804 (Burkina Faso) art 690.

possessory interdicts.[113] This type of protection differed from legal protection as the possession rights were established via edict, which extended the law.

This subsection established the difference between ownership and possession in Roman law and that OHADA countries have similar concepts of ownership and possession. It was also established that the historical background of OHADA member states heavily influenced the modern legislation of OHADA member states related to property ownership and possession, as well as the OHADA Uniform Acts. In Roman law, different types of property required special ceremonies and procedures to obtain ownership rights, depending on the type of property. Therefore, the following subsection will analyse different modes of acquiring property rights in Roman law and compare them with the legislative provisions regarding obtaining ownership rights in OHADA member states. This will help to understand the mechanics of warehouse receipt financing and understand what provisions should be included in a new Uniform Act on Warehouse Receipts to address the needs of OHADA member states.

4.2.3. Modes of Acquiring Ownership in Roman Law

Understanding differences between different modes of acquiring ownership in Roman law can aid in understanding the scope and legal consequences of acquiring property, which still exists today in civil law countries, including OHADA member states. This assists in developing an understanding of the provisions of the OHADA Uniform Acts related to acquiring ownership in the broader socio-economic and historical context. This helps to tailor the provisions of the UNIDROIT MLWR to the background of OHADA member states. The classification of modes of acquiring property rights that are discussed in this chapter is based on the modern civil law interpretation, which still exists today in civil law tradition.[114]

In Roman law, a person could acquire ownership and possession in two ways: original and derivative.[115] The original mode of acquiring ownership did not require the involvement of the previous owner of the property.[116] In contrast, in the derivative mode, the ownership could be acquired from the previous owner only.[117] This classification of modes of acquiring ownership was rooted in the heart of Roman law and, through the years with some amendments were established in modern civil systems.[118] Derivative modes of acquiring

[113] Plessis (n 37) 172.
[114] ibid 178.
[115] ibid.
[116] Ernest Metzger, *Companion to Justinian's "Institutes"* (Bristol Classical Press 1999) 49-65.
[117] ibid.
[118] Plessis (n 37) 178.

ownership in Roman law included *mancipatio*,[119] *cessio in iure,*[120] *usucapio*,[121] *adjudication*,[122] and *traditio*.[123] Original modes of acquiring ownership included *occupatio*,[124] *accessio*,[125] *specification.*[126]

4.2.3.1. Derivative Modes of Acquiring Ownership

This subsection discusses and analyses derivative modes of acquiring ownership rights in Roman law. In Roman law, derivative modes of acquiring property rights were connected with obtaining ownership rights over things that already had an owner. Derivative modes of acquiring ownership rights included *mancipatio*, *cessio in iure, usucapio*, *adjudication*, and *traditio.*[127]

Mancipatio was a mode of acquiring ownership that primarily applied to *res mancipi* in Roman law.[128] *Res mancipi* referred to things with a special status in Roman law, with the closest equivalent in modern civil law being real property.[129] *Mancipatio* was a type of sale contract in which two parties agreed to transfer the ownership rights over the thing but not necessarily the thing itself.[130] The effect of the transfer of ownership was immediate and unconditional.[131] Fraud and duress could not be a reason for a *mancipatio* to be considered void, provided that *mancipatio* was performed according to the rules.[132] However, if the person who transferred the thing lacked the title over it, the title could not be transferred, as a person could not give what they did not have.[133] *Mancipatio* was created to provide special protection to the economically valuable things in Roman society.[134] This concept could be compared to the modern transfer of ownership rights over real property in civil law countries, where the transfer is considered completed only after registration and does not require the transfer of property itself.[135] Land registration rules also exist in OHADA countries. For example, in Mali, the real property rights must be registered.[136] Additionally, under the OHADA Uniform Act

[119] G.Inst. 2.22 - 2.27.
[120] ibid 2.24 - 2.27.
[121] ibid 2.40 - 2.61.
[122] ibid 4.39 - 4.44.
[123] ibid 2.66 - 2.69.
[124] ibid.
[125] ibid 2.73 - 2.78.
[126] ibid 2.79.
[127] see s 4.1.3.
[128] Plessis (n 37) 178.
[129] see s 4.2.1.
[130] G.Inst. 1.119.
[131] Plessis (n 37) 179.
[132] ibid.
[133] ibid.
[134] Alan Watson, 'The Evolution of Law: The Roman System of Contracts' (1984) 2 Law and History Review 1, 2.
[135] European Land Registry Association, 'Legal effects of Registration' (*ELRA,* 2023) <https://www.elra.eu/contact-point-contribution/latvia/legal-effects-of-registration-11/#:~:text=Civil%20law%20states%20that%20only,of%20the%20right%20in%20rem.> accessed 10 September 2023.
[136] Order N° 00-027/P-RM of 22nd March 2000 (with amendments 12 February 2002) (Mali).

Organising Securities, real property must be registered to be used as collateral for a loan.[137]

Another derivate mode of acquiring property rights in Roman law was *cessio in iure*. *Cessio in iure* was a formal public procedure for transferring property or a symbolic part of it from one party to another.[138] *Cessio in iure* could be used for transferring property rights over *res mancipi* or *res nec mancipi.* As in *mancipatio,* the transfer through *cessio in inure* was unconditional and immediate, and fraud and duress could not be a reason for the transfer of ownership to be declared void. However, *cessio in iure* was considered cumbersome and less appropriate than *mancipato* for transferring rights over *res mancipi*.[139] Therefore, c*essio in inure* was primarily used to transfer ownership rights over incorporeal things, such as servitudes.[140] Practically, *cessio in iure* was considered and used as the most appropriate method for the formation, transfer, and termination of incorporeal property rights.[141] The public nature of *cession in iure* over intangible property served to verify the transfer of such property rights.[142] Intangible servitude rights were considered economically valuable for Roman society and required special protection and verification of their transfer. A parallel could be drawn with the other intangible rights, such as intellectual property rights, in modern civil law countries.[143] In that sense, the OHADA Uniform Act Organising Securities requires registration for the pledge of intangible assets subject to publicity, including intellectual property rights.[144]

In Roman law, *traditio* (delivery) was a common and widely used in practice way of transferring property rights over *res nec mancipi*.[145] The transfer of property rights in *traditio* occurred by transferring the thing itself from one party to another.[146] *Traditio* was used to transfer ownership and possession rights over movable property. Two conditions had to be fulfilled for *traditio* to be successful: the delivery of the thing had to be done with an appropriate intention.[147] Delivery meant that the transferee was granted possession over the thing, which in most cases meant physical control over the property.[148] Intention meant that not only the transfer of possession but also the transfer of ownership was intended by both parties of *traditio*.[149] A prominent example of *traditio* in modern civil law countries is a contract of sale. Similar rules regarding contracts of sale exist in the OHADA Uniform Act on General

[137] Uniform Act Organising Securities (adopted 15 December 2010) art 192.
[138] G.Inst. 4.24.
[139] Alan Watson, *Roman Law and Comparative Law* (University of Georgia Press 1991) 46.
[140] Plessis (n 37) 180.
[141] Joseph Anthony, Charles Thomas, *Textbook of Roman Law* (Reprint edition edn, North-Holland Publishing Co 1976) 156.
[142] Russ Ver Steeg, 'The Roman Law Roots of Copyright' (2000) 59 Maryland Law Review 522, 544.
[143] ibid 545.
[144] Uniform Act Organising Securities (adopted 15 December 2010) art 50, 126.
[145] Plessis (n 37) 181.
[146] G.Inst. 4.18 - 4.19.
[147] Plessis (n 37) 181.
[148] ibid.
[149] ibid 182.

Commercial Law.[150] For instance, in the contract of sale, the acceptance of delivery by the buyer results in the transfer of ownership of the title over sold goods from the seller to the buyer.[151]

In Roman law, *usucapio* (prescription) was the form of acquiring ownership by a possessor who factually possessed the property over a certain period in good faith.[152] To obtain ownership through *usucapio,* the possessor had to meet three major requirements: the possession had to be acquired in good faith, the property must not be stolen from an actual owner, and the possession must be continuous for the required period of time.[153] *Usucapio* is the mode of acquiring ownership, which operates today in many modern civil law countries. For example, the French Civil Code recognises different types of prescriptions and establishes different periods of limitations (from ten to thirty years).[154] National norms of OHADA countries also have similar provisions. For instance, the Civil Code of Burkina Faso recognises prescriptions under certain conditions of law for different periods of time.[155] Some authors consider *usucapio* to be the original mode of acquiring property rights.[156] However, as the property in question has a previous title owner, it is more practical to consider *usucapio* as a derivative mode of acquiring property rights.

Finally*, adjudicatio* was a mode of acquiring property rights over a thing by a judge's order.[157] *Adjudicatio* was based on the notion that judges could grant a title over the property in question to one of the parties of the dispute.[158] *Adjudicatio* gave the judge the authority to grant unconditional property rights.[159] *Adjudicatio* exists with some adjustments in the legal systems of modern civil law countries, where the property in question will be acquired by one of the parties of the dispute. The OHADA Uniform Acts also contain such provisions. For example, the Uniform Act Organising Securities enables the creditor to obtain ownership over the collateral regarding clearing the debt via the court order.[160]

4.2.3.2. Original Modes of Acquiring Property Rights

This subsection focuses on the original modes of acquiring property rights in Roman law.[161] In Roman law, the original modes of acquiring property rights allowed a person to obtain

[150] Uniform Act on General Commercial Law (adopted 15 December 2010).
[151] Uniform Act on General Commercial Law (adopted 15 December 2010) art 275.
[152] 'The Operation of Usucaption in Roman Law' (1920) 1 Law Coach 23.
[153] Gamauf (n 102) ch 3.
[154] Civil Code 1804 (France) book 3 title 20.
[155] Civil Code 1804 (Burkina Faso) art 2219.
[156] Plessis (n 37) 184.
[157] G.Inst. 4.39 - 4.44.
[158] ibid 4.42.
[159] Albert Kocourek, 'The Formula Procedure of Roman Law' (1922) 8 Virginia Law Review 434.
[160] Uniform Act Organising Securities (adopted 15 December 2010) art 104.
[161] see s 4.1.3.1.

ownership over a thing on two conditions: if a person had possession of the thing and the thing did not have a previous owner. Among the original modes of acquiring property rights in Roman law were *occupatio*, *accessio*, and *specification.*

In Roman law, the concept of *occupatio* enabled the first person who acquired possession of the property to become the owner of the thing that did not have a previous owner.[162] According to Roman law, property would be considered ownerless if it never had an owner - *res nullius* - or if the previous owner executed a right and intention to cease their ownership rights - abandoned property.[163] *Res nullius* were things that had never been owned, such as wild animals and birds.[164] Abandoned property could be obtained via occupation if the owner of such a property intentionally abandoned it and stopped caring about its destination.[165] In that sense, an abandoned thing became *res nullius* as it lost its owner.[166] Similar rules exist in the legislation of OHADA member states. For example, the Civil Code of Equatorial Guinea allows for the acquisition of ownership over wild animals, fish, and abandoned furniture items through occupation.[167]

Accessio regulated the rules regarding inseparably attached things, where one thing was inseparably connected to another and could not be separated without destroying the initial functionality of the thing.[168] Generally, ownership of the whole thing was determined based on the principle or main thing.[169] *Accessio* is a way of acquiring ownership that could only apply to inseparable things.[170] The main example can be that the landowner owns the buildings on it.[171] In Roman law, when a movable thing was attached to another movable thing, there was no general rule to identify the principal thing.[172] Instead, a test was used to assess the proportionate value of each thing to determine the principal thing.[173] This rule is deeply rooted in the modern legislation of many civil law countries. For example, according to the French Civil Code, if two things are attached to each other and cannot be separated without losing the initial function of the movable property, the object with the greatest value is considered the principal one.[174] Similar rules exist in the legislation of OHADA countries. For example, according to the Civil Code of Comoros, if two things are inseparable, the owner of the principal

[162] F S Ruddy, 'Res Nullius and Occupation in Roman and International Law' (1968) 36 University of Missouri at Kansas City Law Review 274.
[163] Plessis (n 37) 190.
[164] G.Inst. 4.67 - 4.69.
[165] J.Inst. 2.1.47.
[166] Plessis (n 37) 192.
[167] Civil Code 1889 (Equatorial Guinea) art 610.
[168] Plessis (n 37) 192.
[169] G.Inst. 4.73 - 4.78.
[170] Plessis (n 32) 193.
[171] G.Inst. 4.73.
[172] Plessis (n 37) 196.
[173] ibid.
[174] Civil Code 1804 (France) art 569.

thing will be considered the owner of the whole thing.[175] The principal thing is regarded as the thing to which the other one was attached to complement it.[176]

Specificatio allowed acquiring ownership over things that were made from another person's materials.[177] In the Roman Empire, there was some confusion among jurists about the appropriate method for acquiring ownership rights because *specificatio* and *accessio* were quite similar.[178] The compromised rule was that the new thing created belonged to a creator if it was impossible to separate materials from their original form.[179] The rule of *specificatio,* with some changes, persists in the property law of civil and common law countries.[180] Similar rules exist in OHADA member states. For example, according to the Civil Code of Equatorial Guinea, the creator of the new thing obtains ownership of the created thing, provided they compensate the owner of the materials for the cost of those materials.[181]

The analysis of different modes of acquiring property rights indicates that many rules from the Roman Empire, with some changes, still exist in the contemporary legislation of civil law countries, including OHADA member states and the OHADA Uniform Acts. This suggests that the influence of Roman law on the classification of property and the acquisition of property rights in civil law countries, including OHADA countries, is tremendous even today. The analysis of this section indicates that Roman law influenced the legislation of OHADA member states and the OHADA Uniform Acts. The analysis from this section assisted in developing an understanding of the provisions of OHADA Uniform Acts related to modes of obtaining property rights in their historical context. This can help to further tailor the UNIDROIT MLWR to the background of OHADA and its member states.

4.2.4. Obligations and Contracts in Roman Law

This subsection discusses obligations and agreements in Roman law, their classification and how Roman law influenced provisions concerning obligations and agreements in OHADA member states. The understanding of how Roman law influenced provisions regarding obligations and contracts in civil law countries, including OHADA member states, can help to understand the influence of OHADA member states historical background on OHADA Uniform Acts and modern domestic legislation of OHADA member states related to obligations and contracts. This can assist in tailoring a Uniform Act on Warehouse Receipts so that it does not contradict the current OHADA Uniform Acts in force and the national legal norms of OHADA

[175] Civil Code 1975 (Comores) art 566.
[176] ibid 567.
[177] G.Inst. 2.79.
[178] Anna Plisecka, 'Accessio and Specificatio Reconsidered' (2006) 74 The Legal History Review 45.
[179] J.Inst. 2.1.25.
[180] Yun-Chien Chang, 'An Economic and Comparative Analysis of Specificatio (The Accession Doctrine)' (2014) 39 European Journal of Law and Economics 225, Ernest G Lorenzen, 'Specification in the Civil Law' (1925) 35 Yale Law Journal 29.
[181] Civil Code 1889 (Equatorial Guinea) art 383.

member states.

In Roman law, an obligation was a legally binding agreement that required a person to perform in a certain way according to the law.[182] Under Roman law, obligations could arise from contractual agreements or through wrongful actions known as delicts.[183] Contractual obligations arose from the nature of the contract and the actions of the contracting parties.[184] On the other hand, obligations from delicts arose as a consequence of wrongful or harmful actions, which resulted in a duty to compensate the victim.[185] In Roman law, obligations were seen as a duty of one person to compensate and the right of another person to legally enforce the duty (*actio in personam*) and receive compensation (damages).[186] As a result, Roman law treated obligations as property - *res incorporalis,*[187] taking into account the side of a victim.[188] Obligations were initially considered rights that only pertained to the parties involved (*actio in personam*) and did not affect third parties. However, in the late Roman Republic, obligations could affect third parties and be enforced against lawful heirs.[189]

Initially, all obligations in Roman law were classified into two main categories: unilateral and bilateral.[190] Bilateral obligations required two parties to be bound by the obligations, such as in a contract of sale.[191] Unilateral obligations were one-sided obligations, primarily related to delicts.[192] This classification of obligations created a basis for the development of contractual obligations and the modern theory of contract law.[193] Under the OHADA Uniform Acts, commercial sale contracts are examples of bilateral contracts,[194] while autonomous guarantee contracts are examples of unilateral contracts.[195] A warehouse receipt is another example of bilateral obligation, where a warehouse operator is obliged to store the warehoused goods safely, take reasonable care of such goods and deliver the goods upon request to the holder of the warehouse receipt. Whereas the depositor of the goods is obliged to pay storage fees and comply with the terms of the storage agreement.

Another classification in Roman law recognised *bonae fidei* obligations and *stricti iuris* obligations.[196] *Stricti iuris* are unilateral obligations that were applied and enforced based on

[182] J.Inst. 3.13.
[183] Plessis (n 37) 249.
[184] ibid.
[185] ibid.
[186] G.Inst. 4.1 - 4.3.
[187] see s 4.1.1.
[188] G.Inst. 2.14.
[189] Plessis (n 37) 250.
[190] Arnaldo Biscardi, 'Some Critical Remarks on the Roman Law of Obligations' (1977) 12 Irish Jurist 371.
[191] Plessis (n 37) 250.
[192] Biscardi (n 192) 373.
[193] Watson (n 139) 19.
[194] Uniform Act on General Commercial Law (adopted 15 December 2010) book 8.
[195] Uniform Act Organising Securities (adopted 15 December 2010) title 1 ch 2.
[196] Plessis (n 37) 250.

the exact literal meaning of the contracts, regardless of the contractual parties' intentions.[197] Whereas *bonae fidei* were bilateral obligations, where persons were obliged to each other on the rule of 'good faith',[198] avoiding strict technicalities.[199] Under the OHADA Uniform Acts, lease contracts are examples of *bonae fidei* contracts,[200] and autonomous guarantee contracts are examples of *stricti iuris* contracts.[201]

In the late Roman Empire, classifications of obligations were based on the source of obligation and were recognised as arising from contracts, quasi-contracts, delicts and quasi-delicts.[202] Contractual obligations in Roman law constituted all the agreements between individuals that could be enforceable by law.[203] Roman law recognised four types of contracts: consensual contracts, oral contracts, contracts *re* and written contracts (contracts *litteris*).[204] Consensual contracts were simple agreements related to sale,[205] renting, hiring,[206] or partnership[207] and did not require any particular form.[208] Similarly, under the OHADA Uniform Act On General Commercial Law, there are no strict requirements for the contractual forms of leases for professional use.[209] Oral contracts in the Roman Empire required the pronunciation of particular words to create an obligation between the contracting parties.[210] The OHADA Uniform Act on General Commercial Law recognises intermediary contracts that can also be created orally.[211] Contracts *re* in Roman law required agreement and a transfer of property - *res* - to create legal obligations.[212] Examples of contracts *re* included loan and deposit contracts.[213] Similarly, the pledge contract could be considered as a contract *re* under the OHADA Uniform Act Organising Securities.[214] In the early Roman Republic, contracts *litteris* referred to contracts with the recorded financial transactions in the ledger.[215] In the late Roman Republic, contracts *litteris* meant contracts with a written acknowledgement of the terms.[216] The OHADA Uniform Act Organising Securities similarly has a strict requirement for the form

[197] Riggsby (n 68) 123.
[198] see s 4.1.2.
[199] Riggsby (n 68) 125.
[200] Uniform Act on General Commercial Law (adopted 15 December 2010) art 113.
[201] Uniform Act Organising Securities (adopted 15 December 2010) art 41.
[202] Plessis (n 37) 252.
[203] Riggsby (n 68) 121.
[204] Plessis (n 37) 252.
[205] ibid 260.
[206] ibid 274.
[207] ibid 285.
[208] Riggsby (n 68) 122.
[209] Uniform Act on General Commercial Law (adopted 15 December 2010) art 103.
[210] Plessis (n 37) 289.
[211] Uniform Act on General Commercial Law (adopted 15 December 2010) art 176.
[212] Peter Birks, 'Contracts Re ' in Eric Descheemaeker, Peter Birks (eds), *The Roman Law of Obligations* (OUP Oxford 2014).
[213] Riggsby (n 68) 133.
[214] Uniform Act Organising Securities (adopted 15 December 2010) title 2 ch 4.
[215] G.Inst. 3.133.
[216] Peter Birks, 'The Contract Litteris and the Rôle of Writing Generally' in Eric Descheemaeker, Peter Birks (eds), *The Roman Law of Obligations* (OUP Oxford 2014).

of a contract of the pledge of debt, which must be in writing.[217]

Obligations arising from quasi-contacts in Roman law consisted of three categories involving a quasi-implicit contract.[218] This group of obligations included *negotiorum gestio* and *condictio indebiti*.[219] *Negotiorum gestio* involved obligations arising from a situation when one person acted on behalf of another without the authority to do so.[220] Similar provisions exist in the legal norms of many modern civil countries. For example, under the French Civil Code, provisions regarding quasi-contracts cover situations where one party acts voluntarily on behalf of another person.[221] In OHADA member states, similar provisions exist as well. For example, in Burkina Faso, provisions regarding quasi-contracts are similar to those in French legislation.[222] *Condictio indebiti* were obligations arising from wrongful payment or transfer of *res* to another person (unjustified enrichment), which could be mitigated by restitution.[223] The provisions of Roman law on unjustified enrichment are deeply embedded into the modern legislation of many civil and common countries.[224] For example, European Union member states have a special report on regulation on unjust enrichment,[225] and English law has cases regarding unjust enrichment and restitution.[226] Similarly, under the French Civil Code, a person who mistakenly received something that does not belong to them must return it.[227] Similarly, under the Civil Code of Comoros, a person must return what they received by mistake and what does not belong to them.[228]

Obligations arising from delicts combined obligations arising from wrongful actions resulting in damages to a person, their family, or their property and as a result of which such a person was entitled to compensation.[229] In Roman law, the primary purpose of delict was to punish the person who committed the wrongdoing and compensate the victim.[230] The aim of penalising the person who committed the wrongdoing dated back to the early stages of Roman

[217] Uniform Act Organising Securities (adopted 15 December 2010) art 127.
[218] Plessis (n 37) 311.
[219] Bruce W Frier, 'Quasi-Contract' in Bruce W Frier (ed), *A Casebook on the Roman Law of Contracts* (OUP USA 2021).
[220] Ernest G Lorenzen, 'Negotiorum Gestio in Roman and Modern Civil Law' (1928) 13 Cornell Law Review 190.
[221] Civil Code 1804 (France) book 3 title 4 ch 1.
[222] Civil Code 1804 (Burkina Faso) book 3 title 4 ch 1.
[223] J.Inst. 3.14.1.
[224] Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Clarendon Press 1996) 834.
[225] Regulation (EC) No 864/2007 of the European Parlament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] L 199/40 (European Union).
[226] *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12 (England).
[227] Civil Code 1804 (France) art 1376.
[228] Civil Code 1975 (Comores) art 1376.
[229] Plessis (n 37) 317.
[230] Adriaan Johan, Boudewijn Sirks, 'Delicts' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015).

law, where there was no difference between criminal and civil wrongdoings.[231] The obligations arising from delicts are an essential part of modern civil law systems. For example, the French Civil Code imposes a duty to compensate the wrongful act on the person who committed it.[232] The German Civil Code is closely related to Roman delict as it specifies wrongful acts as damage to a person, their freedom, or their property.[233] Similar rules exist in the OHADA Uniform Acts. For example, under the Uniform Act on General Commercial Law, intermediaries are obliged to compensate damages resulting from improperly executing their duties.[234]

Quasi-delicts were four special cases in Roman law, including things that hung or suspended,[235] things that were poured or thrown away,[236] damage from shippers, innkeepers and stable keepers,[237] and unjust judges.[238] The rationale behind such delicts was that a person in charge was trusted to keep the property safe.[239] Quasi-delict obligations evolved over time and, with some changes, can still be found in modern civil legislation. For example, the French Civil Code imposes responsibility on a person under quasi-delicts for the actions of another person that the person is responsible for or the things that are in the person's control and custody.[240] Similarly, the OHADA Uniform Act on General Commercial Law provides, for example, that a carrier is liable for damages or loss of goods which are in his possession under a contract of shipment.[241]

This subsection established the meaning of obligation in Roman law and the different types of obligation in the Roman Empire. This subsection also established a connection between Roman law and legal norms of modern civil law countries, including OHADA Uniform Acts. The analysis from this subsection indicates that the Roman law tradition of contracts and obligations is deeply embedded in the legislation of many civil law countries, including OHADA member states and the OHADA Uniform Acts. This subsection further established that the historical heritage of OHADA member states heavily influenced the OHADA legal framework.

4.2.5. Real Securities in Roman Law

This subsection focuses on how Roman law addressed the real security relationship. The main reason for that is that real securities closely connect with warehouse receipt financing and it helps to understand how provisions regarding real securities have evolved in civil law countries,

[231] Plessis (n 37) 317.
[232] Civil Code 1804 (France) art 1382.
[233] Civil Code 1900 (Germany) s 823.
[234] Uniform Act on General Commercial Law (adopted 15 December 2010) art 187.
[235] J.Inst. 4.5.1.
[236] ibid.
[237] ibid 4.5.3.
[238] ibid 4.5.
[239] Plessis (n 37) 352.
[240] Civil Code 1804 (France) art 1384.
[241] Uniform Act on General Commercial Law (adopted 15 December 2010) art 205.

including OHADA member states. Real securities are closely connected with the warehouse receipt relationship, as the mechanics in the warehouse receipt relationship are the same. Therefore, it is essential to analyse how real securities were addressed in the Roman Empire, as it can provide insights into real securities mechanisms in modern civil law countries, including OHADA member states. This understanding can assist in developing a new Uniform Act on Warehouse Receipts, ensuring it aligns with the current legal framework of OHADA. Furthermore, this understanding can help to propose warehouse receipt law reform, which reflects OHADA member states historical, cultural and socio-economic circumstances.

Real securities allow the personal property owner to use the property as collateral to secure a debt.[242] This enables the creditor to claim the payment by means of the secured property.[243] To a certain extent, the right to real security is connected to the proprietary interest and possessory rights over the property.[244] Real securities follow the property and enable the creditor to obtain payment of the debt out of the property.[245] In warehouse receipt financing, a depositor uses their goods as collateral to secure a loan, and the warehouse operator can use the warehoused goods to claim payments in certain conditions. Therefore, it is essential to understand the mechanics of real securities in OHADA member states.

The secured property in real security can be either tangible or intangible.[246] In Roman law, three types of real securities were recognised: *fiducia*, *pignus* and *hypotheca*.[247] *Fiducia* was an agreement between the borrower and lender in which the borrower agreed to transfer the ownership rights and generally possession over the property to the lender.[248] The transfer of property rights in *fiducia* required formal procedure, either *mancipatio* or *cessio in iure*.[249] The borrower under *fiducia* could regain their property if they repaid the lender. However, the lender could alienate the property (sell it or pledge it) if the borrower failed to pay back the lender.[250] This means that one of the major disadvantages of *fiducia* for a borrower was the risk of losing ownership rights over the property. However, the lender had a right to reclaim his property upon repayment via *actio fiduciae* if the creditor refused to restore it or alienate it to third parties.[251] Many civil law countries have modern variations of *fiducia,* which is similar to

[242] Peter Birks, 'Security' in Bernard Rudden, F H Lawson (eds), *The Law of Property* (Oxford University Press 2002).
[243] Chester (n 77) 411.
[244] Roderick Munday, David Fox, Baris Soyer, Andrew Tettenborn, Peter Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials* (Oxford University Press 2020) ch 24.
[245] Birks (n 244) 128.
[246] ibid 129.
[247] Radin (n 34) 412.
[248] G.Inst. 4.59-4.60.
[249] see s 3.1.3.1.
[250] Gobel (n 91) 30.
[251] ibid 34.

the concept of trust in common law countries.[252] For example, these modern variations of fiducia are covered under suretyship provisions in the French Civil Code.[253] Similar provisions regarding fiducia are covered under surety bonds provisions in the OHADA Uniform Act Organising Securities.[254]

Pignus was an agreement between two parties in which one party (the borrower) agreed to transfer movable or immovable property to the other party (the lender) as security.[255] This meant the lender would receive limited ownership and possession rights over the property.[256] *Pignus* was an evolved form of *fiducia,* free from its major disadvantages. Under *pignus*, the lender could acquire only possession rights over the property, while the borrower could preserve ownership rights.[257] The transfer of property could be done via *traditio*.[258] Even though *fiducia* was less advantageous for a borrower, it was frequently used in the Roman Empire, mainly because of the level of protection it offered the lender.[259] Generally, in *pignus*, the lender obtained possession over the property, but the borrower could remain in physical control over the property as long as they safeguarded the property.[260] If the borrower failed to repay the debt, the lender could preserve possession of the property but could not obtain ownership rights or alienate the property (via selling or pledging).[261]

However, in the late Roman Republic, additional agreements were allowed, which enabled the lender to obtain ownership rights or sell the property if the debt was not paid by a specific date.[262] This rule was designed to increase the security protection for the lender and mitigate the disadvantages of *pignus*. *Pignus* created the basis for the development of modern civil rules regarding the pledge of movable property. Similar provisions exist in the French Civil Code, where the possession of pledged collateral is transferred to the creditor or third party,[263] and the creditor may obtain a court's decision to sell the pledged property in case of failure to pay the debt by the debtor.[264] In the OHADA Uniform Act Organising Securities, similar provisions regarding the possessory pledge of tangible property exist, where the creditor or a third party acquire possession over the pledged property[265] and the debtor remains the owner

[252] Carly Howard, 'Trust Funds In Common Law And Civil Law Systems: A Comparative Analysis' (2006) 13 University of Miami International & Comparative Law Review 343, 358.
[253] Civil Code 1804 (France) book 4 title 1 ch 1.
[254] Uniform Act Organising Securities (adopted 15 December 2010) title 1 ch 1.
[255] J.Inst. 3.14.
[256] Plessis (n 37) 302.
[257] ibid.
[258] see s 3.1.3.1.
[259] Plessis (n 37) 303.
[260] ibid.
[261] ibid.
[262] ibid.
[263] Civil Code 1804 (France) art 2334.
[264] ibid art 2346.
[265] Uniform Act Organising Securities (adopted 15 December 2010) art 108.

of the pledged asset.[266]

Hypothec was designed during the late Roman Republic to mitigate the disadvantages of *fiducia* and *pignus*.[267] Unlike in *fiducia* and *pignus*, where the borrower had to lose possession and enjoyment of the property and transfer it to the lander,[268] *hypothec* enabled the borrower to retain control over the property (ownership and possession rights).[269] The lender only obtained rights to the property in case of non-payment.[270] *Hypothec* also enabled the borrower to use the property as collateral to secure multiple loans.[271] The priority of charges was determined by the time the debt was created,[272] and the borrower was obliged to inform future lenders of existing charges.[273] Provisions regarding *hypothec* exist in many modern civil law countries. For example, in the French Civil Code, a mortgage allows the use of real property as collateral to secure a debt,[274] and a mortgage can be used to secure multiple debts.[275] The priority of charges is determined by the time of their registration in the land register.[276] The OHADA Uniform Acts follow the same principles. For example, under the Uniform Act Organising Securities, a mortgage allows the use of real property as collateral to secure one or multiple debts.[277] Similar to the French legislation, the OHADA Uniform Act Organising Securities determines the mortgage's rank by the date of its registration.[278]

The previous analysis indicates that the provisions regarding real securities from Roman law had a significant impact on the development of similar provisions in modern civil law countries, including OHADA and its member states. For example, provisions where the borrower needed to safeguard the property in *pignus* transferred without changes into the French Civil Code[279] and the OHADA Uniform Act Organising Securities.[280] Additionally, the rules regarding the priority of charges related to certain mandatory automatic charges are deeply rooted in modern civil law systems. For instance, the French Civil Code contains a list of priority charges over different types of property.[281] A similar list exists in the OHADA Uniform Act Organising Securities.[282]

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[266] ibid art 95.
[267] Plessis (n 37) 303.
[268] ibid.
[269] Ross Barber, '"Fiducia" and "Hypothec"' (1978) 13 Irish Jurist 192.
[270] ibid.
[271] Fritz Schulz, *Classical Roman Law* (Oxford University Press 1951) 410 - 411.
[272] ibid.
[273] William Warwick Buckland, *A Text-Book of Roman Law: From Augustus to Justinian* (3rd edn, Cambridge University Press 2007) 480.
[274] Civil Code 1804 (France) art 2393.
[275] ibid art 2421.
[276] ibid art 2425.
[277] Uniform Act Organising Securities (adopted 15 December 2010) art 190.
[278] ibid art 195.
[279] Civil Code 1804 (France) art 1880.
[280] Uniform Act Organising Securities (adopted 15 December 2010) art 108.
[281] Civil Code 1804 (France) book 4 title 2 ch 1.
[282] Uniform Act Organising Securities (adopted 15 December 2010) ch 6.

The analysis from this section indicates that Roman law significantly influenced provisions regarding property rights, obligations and agreements in modern civil law countries, including OHADA member states. Additionally, provisions regarding real securities with some changes exist in modern civil law countries, including OHADA and its member states. Analysis from previous sections also indicates that the OHADA Uniform Acts, particularly the Uniform Act Organising Securities and the Uniform Act on General Commercial Law, follow the French civil law route, and many provisions of the OHADA Uniform Acts are similar to modern provisions of the French Civil Code. This indicates a strong influence of OHADA member states historical background on the OHADA legal framework and domestic legislation of its member states.

4.2. Legal Evolution and Legal Development

The previous sections established the connection between Roman law and civil law countries in property law.[283] This connection indicates that civil law countries, including OHADA member states, follow similar evolutionary patterns in the development of their legislation. The analysis from previous sections also established a strong influence of OHADA member states historical background on the OHADA working methods and legal framework. This raises several questions regarding legal evolution and path dependency. Therefore, this section focuses on the legal evolutionary and path dependency theories. The hermeneutic approach is employed in this section to establish how to conduct the warehouse receipt law reform so that it fits in the historical, socio-economic and cultural background of OHADA member states. This section also assesses whether following the French civil law route creates a trap for OHADA in conducting warehouse receipt legal reform or establishes favourable conditions for the smooth development and implementation of a Uniform Act on Warehouse Receipts.

4.2.1. Legal Evolution

The legal evolution theory focuses on how the doctrine of law forms, changes and shapes over time and among different legal families.[284] The main aim of the legal evolutionist scholar is to examine and explain changes, development of law and the legal system,[285] paying particular attention to the structure of legal development and the direction towards which law moves.[286] In other words, the legal evolution theory focuses on the stable element of certain legal systems and events that influence changes in legal systems and law. The legal evolutionary theory does not pay attention to particular provisions of law or judicial decisions,[287] but instead focuses on the development of the entire legal system or a part of

[283] see ss 4.1., 4.2.
[284] Allan C Hutchinson, Simon Archer 'Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory' (2001) 54 Current Legal Problems 19, 31.
[285] Geoffrey MacCormack, 'Historical Jurisprudence' (1985) 5 Legal Studies 251, 313-315.
[286] Robert W Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 103.
[287] Simon Deakin, 'The Contract of Employment: A Study in Legal Evolution' (2001) 11 Historical Studies in Industrial Relations 1, 29-33.

it.[288] Therefore, the legal evolutionary theory examines the chronological process of forming legal concepts through the creation of legal norms and judicial decisions.[289] The main subject of the legal evolutionary theory is legal change,[290] the processes of law reform and law-making.[291]

The main focus of the legal evolutionary theory is legal change and law-making, which is closely connected with comparative law.[292] This, in turn, requires involvement in the process of law-making and the comparison of different legal systems.[293] Therefore, part of the legal evolutionary theory focuses on analysing the past to explain why the legal systems are shaped in a certain way in the present.[294] The main goal of the evolutionary analysis is to provide legal scholars and lawmakers with the background behind legal tools that currently exist.[295] In the case of OHADA, the legal evolutionary theory can help to understand the provisions behind the OHADA Uniform Acts. This understanding can assist in designing a new Uniform Act on Warehouse Receipts so that it can be quickly adopted and implemented in OHADA member states.

The legal evolutionary theory also focuses on changes in law and legal systems, including why and how legal systems change and evolve from one stage to another.[296] These two main goals of the legal evolutionary theory indicate its importance to the development of legal thinking and the law-making process. Thus, the legal evolutionary theory suggests that economic background and economic development may be the predominant ideas for the development of new legislation.[297] For example, the need for transferability of warehouse receipts and the economic benefit of warehouse receipt financing led to the removal of the difference between negotiable and non-negotiable warehouse receipts, as the non-negotiable warehouse receipts can be transferred by endorsement.[298] As a result, the legal evolutionary theory can equip legal scholars with the knowledge of how legal challenges emerge and what tools are used to solve them.

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[288] Frank Wilkinson, Simon F Deakin, *The Law of the Labour Market: Industrialisation, Employment, and Legal Evolution* (OUP Oxford 2005) 31.
[289] Mauro Zamboni, 'From “Evolutionary Theory and Law” to a “Legal Evolutionary Theory”' (2008) 9 German Law Journal 515, 523.
[290] Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law - A New Approach to Law and Society* (De Gruyter 1987).
[291] Jan M Smits, 'The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory' (2002) 31 Georgia Journal of International and Comparative Law 79, 81.
[292] Zamboni (n 291) 526.
[293] ibid.
[294] Simon Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 Current Legal Problems 1, 35.
[295] Owen D Jones, 'Evolutionary Analysis in Law: An Introduction and Application to Child Abuse' (1997) 75 North Carolina Law Review 1117, 1157-1158.
[296] Csaba Varga, 'On the Socially Determined Nature of Legal Reasoning' (1994) 16 Logique et Analyse 21.
[297] Zamboni (n 291) 527.
[298] UNIDROIT, 'Background Research Paper' (Study LXXXIII – W.G.1 – Doc. 4, Rome 2020) 24 - 26.

Despite its advantages, the legal evolutionary theory has certain drawbacks. While the legal evolutionary theory analyses how certain issues were addressed in the past, it does not provide tools and mechanisms for addressing future legal challenges.[299] This lack of practical application makes it less useful for legal actors during the process of law reform.[300] However, the legal evolutionary theory has a predictive function, which allows an analysis of changes in the legal system in the past to help to explain and predict future law structures and developments.[301] The legal evolutionary theory can predict how such rules can develop in other legal systems by analysing the creation and development of certain legislation and legal systems.[302] For example, by analysing the development of warehouse receipt law, the legal evolutionary theory can predict that the economic benefits of warehouse receipt financing can influence the development of warehouse receipt legislation even in the absence of formal preconditions for developing such rules in the legal system.[303]

The predictions and explanations the legal evolutionary theory offers do not have any normative basis and only indicate the probability of the development of legislation.[304] The predictivity component of the legal evolutionary theory lacks the normative component,[305] which provides guidance and justification for the particular future development of law.[306] The directions on which legal development is based are moral normative patterns and propositions that legal practitioners should follow to lead the law and society in the 'right way' regardless of economic or political benefits.[307] By following normative patterns, legal practitioners lead and develop the law in a certain way, regardless of what predictions legal evolutionary scholars have made.[308] Therefore, the legal evolutionary theory can predict that economic development can influence the further development of legislation in OHADA member states or in other regions. However, the legal evolutionary theory cannot predict the particular way this development will evolve or a specific form of law. For example, the need to address issues related to warehouse receipt financing can drive the development of warehouse receipt legislation in OHADA countries as it can facilitate access to finance for businesses in its member states. However, the legal evolutionary theory cannot predict the particular form of such law (a new Uniform Act relates to warehouse receipts, amendments of the Uniform Act

[299] Zamboni (n 291) 527.
[300] John H Beckstrom, *Evolutionary Jurisprudence: Prospects and Limitations on the Use of Modern Darwinism Throughout the Legal Process* (Urbana 1989) 28 - 41.
[301] Hutchinson (n 286) 30.
[302] Owen D Jones, 'Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology' (2001) 95 Northwestern University Law Review 1141, 1194-1195.
[303] Zamboni (n 291) 534.
[304] John Dewey, *Theory of Valuation* (University of Chicago Press 1939) 51-52.
[305] ibid.
[306] Robert S Summers, 'Judge Richard Posner's Jurisprudence' (1991) 89 Michigan Law Review 1302, 1304 - 1305.
[307] Herbert L A Hart, *The Concept of Law* (2nd edn, Oxford University Press 1961) 132-137.
[308] Bruce Ackerman, 'Revolution on a Human Scale' (1999) 108 Yale Law Journal 2279.

Organising Securities[309] or the Uniform Act on General Commercial Law or the development of a new soft law norm).[310] The path dependency theory can help to understand the legal evolution of law and potentially 'predict' the direction of a country's future legal development.

This subsection discussed the legal evolutionary theory and how it can identify the need for warehouse legislative reform in OHADA member states. The following subsection will discuss the connection between path dependency and legal evolutionary theories in the OHADA context. The following subsection will focus on the theory of path dependency in law and how it can influence the future development of warehouse receipt law in OHADA. The application of the path dependency theory can assist in determining a particular form of law that OHADA may develop to address the need for warehouse receipt law. The application of the path dependency theory can assist in further assessing the recommendation that it is beneficial for OHADA to develop a Uniform Act on Warehouse Receipts.[311]

4.2.2. Path Dependency in Law

The legal evolutionary theory closely relates to the path dependency theory, which states that the historical development of legal norms influences future legal decisions or legislative choices.[312] The path dependency theory recognises that earlier developments in law inevitably affect later legal advancements and shape the law in a certain way.[313] The path dependency theory differs from the legal evolutionary theory as it focuses on how the historical chain of events shapes the law. The legal evolutionary theory, on the other hand, mostly concentrates on changes in legal systems and makes predictions for the future development of law in similar circumstances. The application of path dependency theory, together with the hermeneutic approach, help to understand a wider background, which influenced and shaped the OHADA legal framework and working methods.

Some social science scholars believe that a chosen path inevitably affects the future development of law and may even result in avoiding innovative development and locking in the regressed chosen path.[314] In the legal field, the path dependency predetermines the future choice of policy enacted mainly because of the way the previous laws were enacted and the process of adopting legislation itself.[315] Once the legal system is chosen and legal institutions

[309] Uniform Act Organising Securities (adopted 15 December 2010).
[310] Uniform Act on General Commercial Law (adopted 15 December 2010).
[311] see ch 3.
[312] Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2003) 86 Iowa Law Review 101.
[313] William H Sewell, 'Three Temporalities: Toward an Eventful Sociology' in Terrence J McDonald (ed), *The Historic Turn in the Human Sciences* (University of Michigan Press 1996) 262-263.
[314] Frédéric G Sourgens, 'The Virtue of Path Dependence in the Law' (2016) 56 Santa Clara Law Review 303, 305.
[315] Hathaway (n 316) 105.

are established, the chosen path will have to be followed. It is considered highly problematic to change the course of the development of law and the legal system itself once the chosen path is determined.[316] Therefore, the path dependency theory reflects and demonstrates the inflexibility and inability of the law to quickly adjust to changes. Finally, the path dependency theory states that significant changes in the law system occur only when a legal system does not have the tools to address new legal issues.[317] For example, in OHADA, the inability of individual countries to address economic problems and the lack of investments resulted in the creation of a specific transnational legal framework and the emergence of an intergovernmental organisation with supranational power – OHADA.[318]

According to supporters of the modern legal evolutionary theory, efficient rules emerge from competition and evolution.[319] According to Roe, rules that survived the long process of development are efficient, as they would not survive the evolutionary process if they were not.[320] Roman law played an important role in shaping legislation in civil countries. For example, the classification of property into movable and immovable property is deeply embedded in the civil law legislation of many countries, and it is a key factor in identifying property in civil law.[321] For instance, the French Civil Code has different provisions regarding the pledge of movable[322] and the pledge of immovable property.[323] The OHADA Uniform Acts also follow the same route: provisions concerning the pledge of movable tangible property are addressed in a separate section of the Uniform Act Organising Securities,[324] while provisions concerning the pledge of immovable property are addressed separately under the section concerning mortgages of the Uniform Act Organising Securities.[325]

The path dependency theory suggests that legal rules are developed in specific circumstances (socio-economic, cultural and historical), which may not always allow for the adoption of the most efficient rules.[326] Therefore, the evolution of legal rules does not always lead to the survival of the most efficient regulations; instead, it involves selecting the best option from the limited choices available. For example, colonisers of African countries installed certain legal traditions and norms via legal transplants.[327] In particular, in OHADA countries,

[316] ibid.
[317] ikbid.
[318] For the purpose of this research, OHADA will be considered an intergovernmental organisation as it was granted supranational power to design and implement legal norms among its member states.
[319] William M Landes, Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 147-150.
[320] Mark J Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 Harvard Law Review 641.
[321] see s 4.2.1.
[322] Civil Code 1804 (France) book 4 title 2.
[323] ibid book 4 sub-title 3.
[324] Uniform Act Organising Securities (adopted 15 December 2010) ch 5.
[325] ibid title 3 ch 6.
[326] Hathaway (n 316) 138.
[327] see s 3.1.1.

French civil law norms were embedded into the legal systems. After colonisation, in the situation of the drastic economic conditions and legal uncertainty, the creation of OHADA did not necessarily offer its member states the best option to follow French legal tradition. The choice was influenced by the necessity to facilitate quicker development of legal norms, which could easily be achieved by adhering to their French background.[328] However, for the rapid development and facilitation of law reforms, leading to economic progress and attraction of foreign investments, choosing the French civil route was the best available option at the given moment in time. It could be argued that at that particular moment, it was the only feasible option for OHADA member states to quickly develop laws that would be positively accepted by domestic businesses and enable swift implementation. Therefore, the options for OHADA member states were limited, and the path dependency influenced the further development of laws for these states.

When legal rules are based on certain traditions (path dependency) rather than designed to be efficient, it may lead to irrational or insufficient rules.[329] The notion that the most successful rules at a given moment survive does not necessarily mean that they will be the most efficient later.[330] This is not necessarily true in the context of the OHADA Uniform Acts, as the OHADA legal norms were evaluated based on their impact on the economic development of its member states and their ability to open access to financial resources for domestic businesses.[331] Between 2009 and 2015, OHADA member states experienced a 3.7 per cent increase in real income.[332] Although this is still lower than the sub-Saharan Africa average, this indicates a potential to grow for OHADA member states.[333] Additionally, the implementation of the OHADA Uniform Act Organising Securities in 2011 led to a 3.82 billion dollar credit being granted to domestic businesses in seven OHADA member states over five years.[334] Therefore, OHADA's economic development indicates that, at the given moment, OHADA countries chose the most efficient path based on the limited options available. However, this does not necessarily mean that the OHADA Uniform Acts will be the most efficient rules in the future.

It should be considered that the evolutionary process of legal rules requires a period of

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[328] Regis Y Simo, 'Law and Development a L'Africaine: Evidence from the OHADA's Harmonisation Process' (2014) 20 African Yearbook of International Law 323, 344.
[329] Oliver Wendell Holmes, *The Common Law* (New edition edn, Dover Publications Inc 1991) 35.
[330] Hathaway (n 316) 139.
[331] see s 3.1.
[332] Banque Internationale pour la Reconstruction et le Développement, 'Doing Business dans les Etats Membres de l'OHADA 2017'Washington DC 2017) 2.
[333] ibid.
[334] International Finance Corporation, 'OHADA Reforms Show Significant Impact on Private Sector Development, IFC and World Bank Find' (*IFC,* 2019) <https://pressroom.ifc.org/all/pages/PressDetail.aspx?ID=16823> accessed 20 July 2023.

adjustment during which inefficient rules may undermine efficient ones.[335] Additionally, legal systems change slower than the social environment, and as a result, there is a time lag between societal changes and the emergence of new rules that address them.[336] As a result, there is often a gap or disproportion between the social environment and the legal rules governing it.[337] The legal field is known for its slow response to address changes quickly and its tendency to prioritise traditions.[338] However, when legal rules are upheld solely due to their longstanding presence and the value of legal tradition, there is an increased risk of the emergence of outdated and irrational legal norms.[339]

The concept of traditionality in law serves a protective function by maintaining the stability of legal systems and safeguarding legal norms from being influenced by temporary insignificant changes in the social environment.[340] The tendency to adhere strictly to traditions can be seen as a potential obstacle and a barrier to harmful legal rules. For example, OHADA traditionally follows the hard law route in its legal norms – Uniform Acts, which require unconditional adherence from its member states.[341] To overcome the barrier of path dependency, there must be a need for changes in the law and an inability of the traditional legal system to address changes, leading to a rapid transformation of legal norms.[342]

In social science and legal literature, the path dependency theory is typically described negatively, which is not always the case.[343] To assess the particular example, a wide range of factors should be considered and analysed to conclude whether a particular case is a trap of path dependency or a way of positive development. As OHADA exclusively focuses on business regulation and investment,[344] it is essential to evaluate its economic development and the legal environment to assess the effectiveness of its reforms and the Uniform Acts. The economic performance and development of OHADA member states are highly valued by international organisations, such as the World Bank Group, and legal practitioners.[345] The impact of the OHADA Uniform Acts in the business field is considered significant. Therefore, at the given moment and in terms of achieving its goal, which is designing efficient, simple

[335] James G March, Johan P Olsen, *Rediscovering Institutions. Organisational Basis of Politics* (The Free Press 1989) 55.
[336] Hathaway (n 316) 140.
[337] ibid 140.
[338] Martin Krygier, 'Law as Tradition' (1986) 5 Law and Philosophy 237.
[339] Oliver Wendell Holmes, 'The Path of the Law' in Oliver Wendell Holmes (ed), *Collected Legal Papers* (Harcourt, Brace & Howe 1920) 187-194.
[340] Hathaway (n 316) 140.
[341] OHADA Treaty art 10.
[342] ibid 141.
[343] Jenny E Goldstein, Benjamin Neimark, Brian Garvey, Jacob Phelps, 'Unlocking “lock-in” and Path Dependency: A Review Across Disciplines and Socio-environmental Contexts' (2023) 161 World Development 1.
[344] OHADA Treaty preamble.
[345] see OHADA Permanent Secretariat International Finance Corporation, 'An Impact Assessment of OHADA Reforms. Uniform Acts on Commercial, Company, Secured Transactions, and Insolvency'.

modern legal business norms, it could be said that the path dependency put OHADA in an advantageous position as it enabled OHADA to quickly develop a supranational legal framework, which resulted in the significant economic development of its member states.

The success of the OHADA Uniform Acts can be attributed to its strong commitment to developing its legal norms. This commitment has led to OHADA's rapid progress and strong adherence to its legal framework in its member states. Based on the analysis in this section, it is highly problematic and economically costly for countries and international organisations, such as OHADA, to change their chosen path.[346] The approach taken by OHADA also reflects the socio-economic and historical circumstances of OHADA member states, which resulted in a positive acceptance of the OHADA Uniform Acts in its member states. Therefore, it could be concluded that the economic benefit of warehouse receipt financing will result in warehouse receipt legal reform within OHADA. This could result in the development of a new Uniform Act related to warehouse receipts. It is highly unlikely that OHADA will deviate from the chosen path and develop a new form of law, such as a soft law.

Following the same unification path in warehouse receipt legal reform can enable OHADA to further contribute to the stability of its legal framework.[347] A new Uniform Act on Warehouse Receipts will follow the OHADA legislative pattern, which most of the businesses in OHADA member states are familiar with. This will contribute to the predictability of the business environment in OHADA member states, mitigate the issues associated with uncertainty and legal risks, and allow the businesses to rely on a stable legal framework while planning long-term investments. Constantly changing business rules may drive away businesses and potential investors as it creates legal risks, instability and uncertainty. In other words, the OHADA legal framework successfully addresses the socio-economic circumstances of OHADA member states.

Furthermore, following the same legal pattern will enable OHADA to build a framework of coherent rules, where a new Uniform Act on Warehouse Receipts will efficiently function, fit into the current historical and socio-economic background of OHADA member states, and intersect with other Uniform Acts. This will result in the smooth integration of a new Uniform Act on Warehouse Receipts into the current legal framework of OHADA.[348] A new Uniform Act on Warehouse Receipts will be directly applicable in every OHADA member state, even if it contradicts national legislation.[349] On the contrary, the introduction of a soft law norm in the field

[346] see s 4.3.1.
[347] Sanneke Kuipers, 'Paths of the Past or the Road Ahead? Path Dependency and Policy Change in Two Continental European Welfare States' (2009) 11 Journal of Comparative Policy Analysis: Research and Practice 163.
[348] Adrian Kay, 'A Critique of the Use of Path Dependency in Policy Studies' (2005) 83 Public Administration 553.
[349] OHADA Treaty art 10.

of warehouse receipts in OHADA member states may result in different applications and interpretations in different member states, as soft laws can be amended and tailored by countries.[350]

Finally, following the unification path in warehouse receipt law reform can fasten the implementation of a Uniform Act on Warehouse Receipts. The legal practitioners in OHADA member states are already familiar with the OHADA Uniform Acts and their application in all member states. The positive acceptance of the OHADA Uniform Acts by the different stakeholders in OHADA member states indicates that the OHADA legal framework successfully addresses the current socio-economic circumstances of OHADA member states. The introduction of warehouse receipt legal reform in the form of a new Uniform Act on Warehouse Receipts will make it easier for legal professionals from OHADA member states to apply and interpret it as their already developed legal expertise and knowledge in applying and interpreting the OHADA Uniform Acts. The introduction of a soft law instrument in the field of warehouse receipts may create delays in the implementation and application of warehouse receipt law, as legal practitioners will require extra training and explanation of how a soft law instrument will operate in different OHADA member states.

4.3. Conclusion

The OHADA Uniform Acts are heavily influenced by the French civil law tradition, which was introduced during colonisation through colonial legal transplants in OHADA member states. French legislation is based on Roman law and still, to some extent, shares a degree of similarity with it. The legislation of OHADA member states, influenced by the French civil law norms, also displays a degree of similarity with Roman law. The OHADA Uniform Acts and the legislation of its member states share similarities with French legislation and Roman law. Therefore, the historical background of OHADA member states heavily influenced the modern legislation of OHADA and its member states. This indicates that the French civil law tradition related to warehouse receipts can be a basis for legal transplant to complement provisions of the UNIDROIT MLWR, as it fits in the OHADA legal framework and legislations of its member states and reflects the historical background of OHADA member states. The provisions of the French Commercial Code related to warehouse receipts will be analysed for the possibility of adoption in OHADA member states in the following chapter.[351]

OHADA has consistently followed a pro-Western approach in the development of its Uniform Acts since its establishment. According to the legal evolutionary and path dependency theories, once a legal path is chosen, it is highly unlikely that it will be diverted. The predictive element of the legal evolutionary theory suggests that OHADA will continue to follow the

[350] see 2.2.2.2.
[351] see ch 5.

French civil law route and the hard unification approach. The legal evolutionary theory analysis suggests that the economic benefits of warehouse receipt financing can drive warehouse receipt law reforms in OHADA member states. However, the legal evolutionary theory cannot identify a particular form of law that will emerge. The path dependency theory can complement the analysis and assist in determining a form of law that will emerge during warehouse receipt law reform in OHADA member states. According to the path dependency theory, OHADA will continue following hard route unification, and the new law related to warehouse receipts will be a Uniform Act. The hermeneutic approach that is taken suggests that warehouse receipts law reform in the form of a Uniform Act reflects the current socio-economic circumstances of OHADA member states, and the adoption of a legal transplant from French civil law reflects the historical background of OHADA member states. This further proves the recommendation from chapter three that OHADA should develop a Uniform Act on Warehouse Receipts.

Chapter 5

5. The Basis for Warehouse Receipt Legal Reform in OHADA

The previous chapter established that the economic benefits of warehouse receipt financing can be a stimulus for warehouse receipt legal reform and implementation of a new Uniform Act on Warehouse Receipts in OHADA.[1] It was recommended that warehouse receipt legal reform would result in the adoption of a Uniform Act on Warehouse Receipts.[2] This chapter focuses on the basis for a new Uniform Act on Warehouse Receipts for OHADA and discusses the possibility of adopting provisions of the UNIDROIT MLWR[3] and complementing them with legal transplants from the US and France.[4] The hermeneutic approach to research assists in assessing the legal transplants for their suitability for adoption in a Uniform Act on Warehouse Receipts. This chapter provides answers to research questions of how the UNIDROIT MLWR can be adopted by OHADA and whether it is possible to complement the provisions of the UNIDROIT MLWR with legal transplants to address the legal background of OHADA and its member states.

This analysis focuses on two different legislations from different jurisdictions and different legal systems: the French Commercial Code[5] and the US Uniform Commercial Code.[6] France and the US were chosen due to their robust warehouse receipt legislation.[7] French legislation was chosen for the assessment of the possibility of legal transplantation, as the OHADA countries and their legal framework are closely connected to French legal tradition.[8] French legislation also closely connects with OHADA's member states' historical background. The US legislation was chosen because of its long history of using warehouse receipts in agricultural finance, which has been successful in regulating agricultural market prices and addressing food shortages,[9] which is crucial for OHADA member states.[10]

The structure of this chapter is based on the analysis of the provisions of the UNIDROIT MLWR and their possible adoption in a new Uniform Act on Warehouse Receipts. The first section focuses on the analysis of the UNIDROIT MLWR and whether it is possible to adopt its provisions in a Uniform Act on Warehouse Receipts. The first section also discusses how

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[1] see s 4.3.1.
[2] see s 4.3.2.
[3] This research is based on the final draft of the UNIDROIT MLWR (https://www.unidroit.org/wp-content/uploads/2023/04/Study-LXXXIII-W.G.6-Doc.-4-Draft-Model-Law-on-Warehouse-Receipts.pdf). The final version of the UNIDROIT MLWR was adopted after the research was finished.
[4] see ss 1.2., 2.3.3.
[5] Commercial Code 1807 (France).
[6] Uniform Commercial Code 1952 (US).
[7] see s 1.1.1.
[8] see s 4.1.
[9] Jerry A Sharples, 'An Evaluation of U.S. Grain Reserve Policy, 1977-80' (Agricultural Economic Report No. 481, Washington DC 1982).
[10] see s 1.1.2.

the UNIDROIT MLWR was designed. The second section discusses the structure of the UNIDROIT MLWR and its sections. The third section assesses the content of the UNIDROIT MLWR and the possibility of complementing its provision with legal transplants. It is assessed how it is possible to adopt the provisions of the UNIDROIT MLWR in a new Uniform Act on Warehouse Receipts for OHADA.

5.1. Design of the UNIDROIT Model Law on Warehouse Receipts

This section discusses the design of the UNIDROIT MLWR and its main objectives. In November 2020, UNIDROIT, in cooperation with UNCITRAL, initiated a plan to draft a model law on warehouse receipts.[11] Experts from the Food and Agriculture Organisation of the United Nations, the International Fund for Agricultural Development, the Organisation of American States, OHADA, the United Nations Conference on Trade and Development, the World Bank Group, the US Department of States, and the private sector were invited to participate in and observe the project.[12] The project aims to establish simple and well-defined legal rules that countries, regardless of their common or civil law backgrounds, can adopt to modernise warehouse receipt legislation.[13]

The UNIDROIT MLWR is designed in a harmonised manner so that it does not contradict existing international instruments that closely connect to warehouse receipt financing regulations.[14] Therefore, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by Sea ('Rotterdam Rules')[15] is taken into consideration as it regulates the rights and obligations of parties of contracts of international carriage by sea and regulates certain provisions regarding negotiable documents.[16] For example, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by Sea governs the transfer of rights when a negotiable transport document is issued and the liability of the holder.[17] The United Nations Convention on International Bills of Exchange and International Promissory Notes[18] is also considered, as it contains provisions

[11] UNIDROIT, 'Model Law on Warehouse Receipts. Work Plan 2020-2022' (Study LXXXIII – W.G.1 – Doc. 1, Rome November 2020) 1.
It is essential to mention that the main aim of the UNIDROIT Model Law on Warehouse Receipts is to assist countries with the development of their domestic legislation in the field of warehouse receipts. The facilitation of cross-country commerce is not the main aim of the UNIDROIT Model Law on Warehouse Receipts. However, the goal of harmonisation of legal norms in the field of warehouse receipts can achieved by the UNIDROIT Model Law on Warehouse Receipts if the number of adopting states is high.
[12] ibid 2.
[13] UNIDROIT, 'Issues Paper' (Study LXXXIII – W.G.1 – Doc. 3, Rome November 2020) ss 11, 13.
[14] ibid s 21.
[15] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force).
[16] UNIDROIT (n 11) s 22.
[17] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 57, 58.
[18] United Nations Convention on International Bills of Exchange and International Promissory Notes (adopted 09 December 1988, not in force).

regarding the endorsement and transfer of international bills of exchange and promissory notes.[19] For instance, the United Nations Convention on International Bills of Exchange and International Promissory Notes regulates the consequences of inserting the words 'non-negotiable' and 'not transferable'.[20] The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade[21] is also considered, as it regulates liabilities for operators of transport terminals.[22] For example, the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade establishes the basis for the lability of operators for the loss, damage or delay in the transfer of goods.[23] The UNCITRAL Model Law on Secured Transactions[24] is also considered because it establishes and regulates a secured transaction framework and contains specific provisions connecting with 'negotiable documents'.[25] For example, the UNCITRAL Model Law on Secured Transactions covers provisions regarding the extent of security rights in a negotiable document to tangible assets.[26] Finally, the Model Law on Electronic Transferable Records[27] is also considered as it establishes provisions regarding electronic transferable records that are functional equivalents to transferable documents, such as warehouse receipts.[28]

The UNIDROIT MLWR mainly focuses on the private law aspects of electronic and paper-based warehouse receipts.[29] The scope of the UNIDROIT MLWR includes definitions of main terms, aspects of the legal status of warehouse receipts, the format of warehouse receipts, rights and obligations of contractual parties, issuance and registration of warehouse receipts, transferability and negotiability of warehouse receipts, aspects related to amendments of warehouse receipts, aspects concerning the transfer of goods and termination of storage of goods, enforcement of rights of third parties.[30] It is important to note that provisions regarding contractual rights and obligations are only covered to the extent necessary to the financial function of warehouse receipts.[31] It is established that these rights and obligations are fully covered in the guide to enactment.[32] Additionally, a guide to enactment addresses the regulatory and institutional aspects of the warehouse receipt

[19] UNIDROIT (n 11) s 23.
[20] United Nations Convention on International Bills of Exchange and International Promissory Notes' (adopted 09 December 1988, not in force) art 17.
[21] United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (adopted 19 April 1991, not in force).
[22] UNIDROIT (n 11) s 24.
[23] United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (adopted 19 April 1991, not in force) art 5.
[24] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016).
[25] UNIDROIT (n 11) s 25.
[26] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 16.
[27] UNCITRAL 'Model Law on Electronic Transferable Records' (adopted 13 July 2017).
[28] UNIDROIT (n 11) s 26.
[29] ibid s 27.
[30] UNIDROIT, 'Issues Paper' (Study LXXXIII – W.G.4 – Doc. 2, Rome March 2022) s 31.
[31] ibid s 32.
[32] ibid.

relationship.[33]

5.2. Structure of the UNIDROIT Model Law on Warehouse Receipts

The UNIDROIT MLWR comprises six chapters covering the private law aspects of warehouse receipt relationships.[34] Chapter I 'Scope and General Provisions' covers the scope of the UNIDROIT MLWR;[35] definitions of the terms 'depositor', 'electronic records', 'holder' of the warehouse receipt, 'negotiable' and 'non-negotiable' warehouse receipts, 'protected holder', 'storage agreement', warehouse operator';[36] explanations of the notions of 'control of an electronic warehouse receipt'[37] and 'party autonomy';[38] and provisions regarding the interpretation of the UNIDROIT MLWR.[39] Chapter II 'Issue and Contents of a Warehouse Receipt. Alteration and Replacement' covers aspects of obligations to issue a warehouse receipt;[40] the obligations of the depositor to have the authority to store the goods;[41] mandatory and additional information that should be included in a warehouse receipt,[42] including storage agreement;[43] provisions regarding amendments,[44] loss or destruction,[45] and change of medium of a warehouse receipt.[46] Chapter III 'Transfer and Other Dealings in Negotiable Warehouse Receipts' covers provisions regarding the means of transfer of negotiable warehouse receipts,[47] the definition of a 'protected holder of a negotiable warehouse receipt',[48] provisions regarding the general rights of a transferee of a negotiable warehouse receipt,[49] provisions regarding rights of the protected holder of a negotiable warehouse receipt,[50] provisions regarding third-party effectiveness of a security right,[51] and aspects regarding representations and grantees by a transferor of a negotiable warehouse receipt.[52]

Chapter IV 'Rights and Obligations of the Warehouse Operator' covers provisions regarding the duties of the warehouse operator to care[53] and keep goods separate;[54]

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[33] UNIDROIT (n 11) s 29.
[34] UNIDROIT (n 30) s 29.
[35] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL Forty-first session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 1.
[36] ibid art 2.
[37] ibid art 3.
[38] ibid art 4.
[39] ibid art 5.
[40] ibid art 6.
[41] ibid art 7.
[42] ibid art 9, 10.
[43] ibid art 8.
[44] ibid art 12.
[45] ibid art 13.
[46] ibid art 14.
[47] ibid art 15.
[48] ibid art 17.
[49] ibid art 16.
[50] ibid art 18.
[51] ibid art 19.
[52] ibid s D.
[53] ibid art 24.
[54] ibid art 25.

provisions regarding warehouse receipt operator rights to lien;[55] provisions regarding the obligation of the warehouse receipt operator to deliver the goods;[56] provisions regarding partial delivery of the goods by the warehouse operator;[57] an option to split the warehouse receipt upon the request of the holder of the warehouse receipt;[58] conditions that excuse the warehouse operator from the duty to deliver the goods,[59] and provisions regarding termination of storage by the warehouse operator.[60] Chapter V 'Pledge Bonds'[61] covers provisions regarding the issue and form,[62] effect,[63] transfer and other dealings of a pledge bond,[64] rights and obligations of the warehouse operator regarding pledge bonds.[65] Chapter V is an optional chapter that states can adopt if they aim to implement a double warehouse receipt system, which consists of two separate documents.[66] Chapter VI 'Electronic Warehouse Receipts' sets out provisions regarding electronic warehouse receipts as equivalent to paper-based warehouse receipts.[67] Finally, Chapter VII 'Application of This Law' covers provisions regarding entering into force, amendments, and repeal of the warehouse receipt law.[68]

The content of the UNIDROIT MLWR is designed to provide a holistic private law framework for regulating warehouse receipt relationships. The UNIDROIT MLWR covers both negotiable and non-negotiable warehouse receipts, as well as electronic and paper-based warehouse receipts.[69] This section established the structure and scope of the UNIDROIT MLWR. The following section will focus on the content of the UNIDROIT MLWR and how provisions of the UNIDROIT MLWR can be adopted in a new Uniform Act on Warehouse Receipts for OHADA.

5.3. Content of UNIDROIT Model Law on Warehouse Receipts

To understand the nature of the UNIDROIT MLWR, it is essential to define certain terms and establish the classification of different types of warehouse receipts. This helps to better

[55] ibid art 26.
[56] ibid art 27.
[57] ibid art 28.
[58] ibid art 29.
[59] ibid art 30.
[60] ibid art 31.
[61] The provisions regarding pledge bonds target countries with a double warehouse receipt system, which are interested in implementing a dual warehouse receipt system, which consists of a warehouse receipt and a pledge bond. This chapter may be excluded from adoption by countries that are not interested in implementing such a system (ibid 15).
[62] ibid art 33.
[63] ibid art 34.
[64] ibid art 35.
[65] ibid art 36.
[66] UNIDROIT, 'Draft Guide to Enactment of the UNCITRAL/UNIDROIT Model Law on Warehouse Receipts' (Study LXXXIIIA – W.G.1 – Doc. 2, Rome November 2023) s 190.
[67] ibid ch VI.
[68] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 37-38.
[69] UNIDROIT (n 30) s 29-30.

understand the terminology used in the UNIDROIT MLWR. Warehouse receipts are generally categorised as negotiable and non-negotiable. Negotiable warehouse receipts can be transferred 'to the bearer' or 'to the order of' a specific person.[70] In comparison, non-negotiable warehouse receipts can only be transferred by assignment.[71] The negotiability of warehouse receipts is directly linked to their transferability – a negotiable warehouse receipt can be transferred from one person to another. Non-negotiable warehouse receipts are considered less risky for warehouse operators as they provide better protection against fraud.[72] However, the growing popularity of electronic warehouse receipts suggests that negotiable warehouse receipts will displace non-negotiable warehouse receipts.[73]

Warehouse receipts can also be classified as single and double warehouse receipts. A single warehouse receipt consists of a single document and is generally used in common law countries.[74] A double warehouse receipt consists of two separate documents: a certificate of deposit and a warrant or a pledge bond.[75] Double warehouse receipts are commonly used in civil law countries.[76] A certificate of deposit represents contractual obligations between the depositor and the warehouse operator and confirms the ownership rights over the stored goods.[77] A pledge bond or a warrant establishes the security rights on the warehouse receipt.[78] In practice, a single warehouse receipt system is more convenient for commercial transactions.[79] Additionally, in many civil law countries with double warehouse receipt systems, both parts of double warehouse receipts are transferred together.[80] Some civil law countries even prohibited the circulation of the second part of double warehouse receipts (warrant or pledge bond) in exchange markets, for example, Colombia.[81]

5.3.1. Scope and General Provisions

This subsection discusses the provisions of Chapter I, 'Scope and General Provisions,' of the UNIDROIT MLWR and establishes how these provisions can be adopted in a Uniform Act on Warehouse Receipts for OHADA. This subsection also discusses the possibility of legal transplants from the US and France to complement the provisions of the UNIDROIT MLWR.

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[70] E B Kixmiller, 'Warehouse Receipt as Bank Collateral' (1910) 27 The Banking Law Journal 713.
[71] ibid.
[72] Frank Hollinge, Lamon Rutten, Krassimir Kirakov, 'The Use of Warehouse Receipt Finance in Agriculture in Transition Countries' (FAO Investment Centre Working Paper, Rome 2009) 7.
[73] ibid 26.
[74] Marek Dubovec, Adalberto Elias, 'A Proposal for UNCITRAL to Develop a Model Law on Warehouse Receipts' (2017) 22 Uniform Law Review 716, 723.
[75] ibid.
[76] ibid.
[77] ibid.
[78] ibid.
[79] ibid.
[80] ibid.
[81] Reglamento de Funcionamiento y Operación de la BMC Bolsa Mercantil de Colombia S.A. (25 de mayo de 2022) (Colombia) art 3.8.2.1.2. s 6.

The hermeneutic approach is applied in this section to assess how provisions of the UNIDROIT MLWR can be complemented with the legal transplants to fit into the historical and socio-economic background of OHADA member states.

Article 1 of the UNIDROIT MLWR defines a warehouse receipt and outlines the scope of application of the UNIDROIT MLWR.[82] The definition of a warehouse receipt in the UNIDROIT MLWR is created to be suitable for systems with both single and double warehouse receipts.[83] This definition can be adopted by OHADA as it suits any country, regardless of its legal background. However, since the UNIDROIT MLWR is a soft law norm[84] meant to be adaptable to the needs of countries with civil and common law backgrounds, this provision could be further tailored to suit the civil law backgrounds of OHADA member states. Tailoring the definition of a warehouse receipt to the legal background of OHADA member states can make it comprehensible for stakeholders and legal practitioners in OHADA countries. As most legal systems accept only one form of paper-based warehouse receipts (single or double),[85] and most civil law countries adopt a double warehouse receipt system,[86] this provision can be adjusted to align with the needs of OHADA member states.[87]

Since OHADA member states are from the same French civil law background,[88] it is possible to complement the provisions of the UNIDROIT MLWR with the provisions from the French Code de Commerce and adopt a system of double warehouse receipts, where a warrant is attached to the issued warehouse receipt.[89] This reflects the historical background of OHADA member states in addressing warehouse receipt financing. However, the evaluation of experience from developing countries suggests that introducing a sophisticated double warehouse receipt system may not be appropriate and may not provide the expected results.[90] In many countries, double warehouse receipt systems are considered inefficient.[91] In practice,

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[82] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 1.
[83] UNIDROIT, 'Summary Report' (Study LXXXIII – W.G.5 – Doc. 6, Rome January 2023) ss 8-9.
[84] see s 2.2.2.2.
[85] The difference between single and double warehouse receipts mostly exists regarding paper-based warehouse receipts. Electronic warehouse receipts almost erase this difference as the warrant (second part of a warehouse receipt in a double warehouse receipt) is transferred as a part of the warehouse receipt (UNIDROIT (n 65) s 9). There are some jurisdictions where both double and single warehouse receipts are equally functional. For example, in Ukraine and Kyrgyzstan, single and double warehouse receipts coexist simultaneously. (UNIDROIT, 'Background Research Paper' (Study LXXXIII – W.G.1 – Doc. 4, Rome November 2020) 10).
[86] Dubovec (n 74) 722.
[87] see s 4.1.
[88] ibid.
[89] Commercial Code 1807 (France) art L522-25.
[90] Höllinger (n 72) 32. (For example, Ukraine introduced a double warehouse receipt system but in practice, both parts are circulated and held together).
[91] UNIDROT, 'Note on Inclusion of Rules Governing Security Rights in Warehouse Receipts in the Model Law' (Study LXXXIII – W.G.5 – Doc. 4, Rome November 2022) s 11. For example, in Bulgaria and Ukraine, in practice, due to an undeveloped market system, both parts of double warehouse receipts are transferred and held together. (Höllinger (n 71) 32).

the double receipt is not separated, and both parts of such warehouse receipts are transferred together.[92] Moreover, a single warehouse receipt document is more suitable for transaction purposes and obtaining credits.[93] In that case, the US approach can be adopted at the initial stage of the implementation, where a warehouse receipt is a single document.[94] However, considering the historical adherence of civil law countries to a double warehouse receipt system, further research is required to assess the possibility and viability of adopting a single warehouse receipt system in OHADA member states.

A proposed warehouse receipt law reform for OHADA is a paper-based warehouse receipt reform. A proposed reform focuses on the development of a paper-based warehouse receipt system, while an electronic warehouse receipt system can be adopted by OHADA later once the paper-based warehouse receipt financing is established in its member states. The implementation of electronic warehouse receipt law reform can address the issues related to the use of double warehouse receipts.[95] However, the difference between single and double warehouse receipts is blurred in the electronic warehouse receipt system.[96] Therefore, implementing the electronic warehouse receipt system for OHADA may resolve the differentiation between double and single warehouse receipts. This should also be considered in further research to assess which (double or single) warehouse receipt system suits the needs and legal background of OHADA member states. Therefore, OHADA has two options: adopt the existing in the UNIDROIT MLWR definition of a ‘warehouse receipt’ without amendments or, based on further research, tailor the definition of a ‘warehouse receipt’ to its needs.

The UNIDROIT MLWR, in Article 2, provides definitions for terms such as ‘depositor’ of goods, ‘electronic records’, ‘holder’ of an electronic negotiable warehouse receipt, ‘holder’ of a non-negotiable electronic warehouse receipt, ‘holder’ of a paper negotiable warehouse receipt to the order of and to bearer, ‘negotiable warehouse receipt’, ‘non-negotiable warehouse receipt’, ‘protected holder’, ‘storage agreement’ and ‘warehouse operator’.[97] The UNIDROIT MLWR aims to provide relevant definitions for countries considering the adoption of negotiable or non-negotiable warehouse receipts. To tailor these definitions to the legal backgrounds of OHADA member states, it is essential to determine which type of warehouse receipt (negotiable or non-negotiable) aligns with the OHADA Uniform Acts and the legal framework of its member states.

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[92] ibid.
[93] Höllinger (n 72) 32.
[94] UNIDROIT (n 83) s 16, Uniform Commercial Code 1952 (US) § 7-202.
[95] Organisation of American States, 'Electronic Warehouse Receipts for Agricultural Products' (88th regular session (CJI/doc.475/15), Rio de Janeiro April 2016) 3.
[96] ibid 3.
[97] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 2.

Negotiability is an essential element of warehouse receipt systems as it directly affects the transferability of warehouse receipts and the associated ownership rights. Nowadays, many countries issue non-negotiable warehouse receipts to offer better protection for financial institutions from fraud.[98] However, considering the growing popularity of electronic warehouse receipt systems, which mitigate the risks associated with negotiable warehouse receipts,[99] and make it easier to transfer, trade and refinance negotiable warehouse receipts,[100] it is more practical to adopt a negotiable warehouse receipt system. Negotiable warehouse receipts can also contribute to the facilitation of warehouse receipt financing as it is easier to transfer them.

When considering the possibility of a legal transplant,[101] it should be noted that the French Commercial Code recognises the transfer of the warehouse receipt through the endorsement of one or both parts of it.[102] According to the French Commercial Code, negotiable warehouse receipts must include the name, profession, and domicile of the depositor.[103] Therefore, warehouse receipts under French law are issued 'to the order of' a named person. In contrast, the US Uniform Commercial Code recognises both non-negotiable and negotiable warehouse receipts issued to a 'bearer' or 'to the order of'.[104] Taking into consideration the OHADA legal background,[105] it would be recommended to introduce a negotiable warehouse receipt system issued 'to the order of'. This would address the historical and socio-economic background of OHADA member states. This system can be extended later to a more sophisticated system following the US warehouse receipt system.

The definition of the warehouse varies in different countries and may be referred to as warehouse, warehouse operator or warehouse keeper.[106] For example, in the US, a warehouse can issue a warehouse receipt.[107] While in Germany, a warehouse keeper can issue a warehouse receipt.[108] In France, a warehouse operator can issue negotiable pledge slips and storage receipts.[109] After analysing the definitions from the different jurisdictions, the UNIDROIT MLWR working group concluded that all the definitions require a business person to accept storage goods as a part of their business activity.[110] This requirement was addressed

[98] Höllinger (n 72) 26.
[99] Dubovec (n 74) 722.
[100] Höllinger (n 72) 26.
[101] see s 2.3.3.
[102] Commercial Code 1807 (France) art L522-26.
Endorsement is a way of transferring a negotiable warehouse receipt. In practice, the endorsement is the signature of the warehouse receipt holder, which confirms the transfer of the warehouse receipt.
[103] Commercial Code 1807 (France) art L522-24.
[104] Uniform Commercial Code 1952 (US) § 7-501.
[105] see s 4.3.
[106] UNIDROIT, 'Issues Paper' (Study LXXXIII – W.G.2 – Doc. 2, Rome March 2021) s 36.
[107] Uniform Commercial Code (US) § 7-102(13).
[108] Commercial Code 1900 (Germany) § 475c (1).
[109] Commercial Code 1807 (France) art L522-1.
[110] UNIDROIT (n 106) s 37.

in the definition of the warehouse receipt operator in the UNIDROIT MLWR. OHADA can adopt this definition as it reflects the nature of the warehouse operator and will enable OHADA to introduce a harmonised warehouse receipt law that is easily understood by businesses from different jurisdictions.

Article 3 of the UNIDROIT MLWR discusses the form of a warehouse receipt, which can be either paper-based or electronic.[111] As electronic warehouse receipts offer better protection and are increasingly common in many countries, OHADA can consider adopting electronic warehouse receipts at a later stage of warehouse receipt law reform once the paper-based system is established and implemented. Implementation of a sophisticated system of electronic warehouse receipts at this stage of warehouse receipt law reform may deter stakeholders from participating in warehouse receipt financing.[112] The introduction of the electronic warehouse system requires financial investments to implement the technical system and for all the stakeholders to have access to the electronic system.[113] Therefore, it is recommended that OHADA pursue a piecemeal warehouse receipt reform to allow stakeholders to prepare for the use of electronic warehouse receipts.[114] At a later stage, the introduction of the electronic warehouse receipt system can be implemented by revising a Uniform Act on Warehouse Receipts.[115]

Article 4 of the UNIDROIT MLWR offers two options for adopting countries. They can either allow contractual parties in the warehouse receipt relationship to disregard or modify specific provisions of the warehouse receipt legislation or prohibit it entirely.[116] Party autonomy is a legal doctrine that allows contractual parties to choose the applicable law to govern their agreement.[117] It also provides freedom for contracting parties to design their contract agreement and tailor it to their needs.[118] This principle of party autonomy is present in the legislations of many modern civil and common countries, including the US and France. In the US, the general rule is that parties can modify provisions of applicable law by their agreement.[119] Similar rules exist in France, allowing contractual parties to design their contracts and choose the form and content within the limits of the law.[120] The draft of the

[111] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 3.
[112] Höllinger (n 72) 32.
[113] Philine Wehling, Bill Garthwaite, 'Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends' (FAO Investment Centre, Rome 2015) 40.
[114] World Bank Group, 'A Guide to Warehouse Receipt Financing Reform. Legislative Reform ' (World Bank Report, Washington DC 2016) 18.
[115] see s 3.5.2.1.
[116] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 4.
[117] Fleur Johns, 'Performing Party Autonomy' (2008) 71 Law and Contemporary Problems 243.
[118] ibid.
[119] Uniform Commercial Code 1952 (US) § 1-302(a).
[120] Civil Code 1804 (France) art 1102.

OHADA Uniform Act on Contract Law also includes a principle of freedom of contract.[121]

The nature of security rights and negotiable instruments limits the scope of party autonomy.[122] This limitation is in place to maintain negotiability and easy transferability of negotiable documents such as warehouse receipts.[123] Therefore, the number of provisions the parties can exclude should be limited.[124] In this stage of a proposed warehouse receipt law reform to promote the uniform application of a new Uniform Act on Warehouse Receipts, it is recommended that OHADA adopt an approach where contracting parties cannot opt out from any provisions of a new Uniform Act on Warehouse Receipts. In a later stage, this approach could be changed, and specific provisions of a new Uniform Act on Warehouse Receipts could be varied or excluded by the contractual parties. However, it is essential to introduce this concept in the OHADA Uniform Acts, which could be done by adopting and implementing the draft OHADA Uniform Act on Contract Law, which provides a general definition of party autonomy.[125] In absence of explanation of the concept of party autonomy, the introduction of such provision in a new Uniform Act on Warehouse Receipts may create legal uncertainty and confusion.

Article 5, 'Interpretation,' explains that the provisions of the UNIDROIT MLWR should be interpreted considering their international nature and the importance of uniform application.[126] To ensure uniformity of the application of the UNIDROIT MLWR, OHADA should base its interpretation and adoption of the UNIDROIT MLWR on the experience of other countries with greater experience in adopting international soft law instruments.[127] Considering OHADA's legal and historical background, it is recommended that OHADA base its interpretation of the UNIDROIT MLWR on the experience of civil law countries. Additionally, OHADA should seek support from international organisations with experience in the field, such as UNIDROIT.

5.3.2. Issuance, Alteration, Replacement and Content of Warehouse Receipts

Since the general definitions and provisions from the UNIDROIT MLWR were established in the previous sections, this subsection discusses provisions of the UNIDROIT MLWR regarding the issuance, alteration, replacement, and content of a warehouse receipt. This subsection

[121] Preliminary Draft OHADA Uniform Act on Contract Law (not adopted yet) art 1/1.
[122] UNIDROIT, 'Summary Report of the Sixth Session (1-3 March 2023)' (Study LXXXIII – W.G.6 – Doc. 3, Rome March 2023) s 7.
[123] ibid.
[124] ibid.
[125] Justin Monsenepwo, 'Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the Codification of Party Autonomy under OHADA Law' (2019) 15 Journal of Private International Law 162.
[126] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 5.
[127] Michael Joachim Bonell, 'International Uniform Law in Practice - Or Where the Real Trouble Begins' (1990) 38 American Journal of Comparative Law 865, 870-871.

also assesses how such provisions of the UNIDROIT MLWR could be adopted in a Uniform Act on Warehouse Receipts. Additionally, the provisions of the French and the US warehouse receipt legislation and the experience of these countries in the field of warehouse receipts are assessed to tailor the new UNIDROIT MLWR to the legal background of OHADA. The hermeneutic approach complements the analysis from this section as it helps to understand how provisions of the UNIDROIT MLWR can be tailored to fit into the OHADA member states' historical and socio-economic backgrounds.

5.3.2.1. Issuance of Warehouse Receipts

The first part of Article 6 of the UNIDROIT MLWR provides that it is the responsibility of the warehouse operator to issue a warehouse receipt for the goods stored in the warehouse upon the claim of the depositor.[128] This provision imposes a mandatory obligation on the warehouse operator to issue a warehouse receipt, which was a specific intention of the drafters of the UNIDROIT MLWR.[129] This provision differentiates a warehouse receipt from a 'goods received note', which cannot be transferred further and serves only as a record of the goods deposited to the warehouse.[130] This provision aims to facilitate the development of warehouse receipt financing. A similar practice exists under the French Commercial Code, where it is mandatory for the warehouse operator to issue a warehouse receipt.[131]

The UNIDROIT MLWR states that a warehouse receipt should be issued by the warehouse operator upon a request by the depositor to address situations where depositors do not need a warehouse receipt as they do not intend to transfer or pledge it.[132] This provision regarding the issuance of warehouse receipts upon the goods stored in the warehouse aims to ensure that the goods were stored in the warehouse[133] and that the warehouse receipt is backed by collateral. The second part of Article 6 of the UNIDROIT MLWR states that even if the warehouse operator did not issue the warehouse receipt, the storage agreement will still remain valid.[134] This provision addresses a certain practice in some countries where warehouse operators do not issue warehouse receipts.[135] For example, in the US, a warehouse operator can issue a warehouse receipt, but it is not a mandatory obligation, and a warehouse receipt may not be issued.[136] Adoption of this article in a new Uniform Act on

[128] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 6 s 1.
[129] UNIDROIT (n 122) s 12, 13.
[130] ibid.
[131] Commercial Code 1807 (France) art L522-24.
[132] UNIDROIT (n 106) s 35.
[133] UNIDROIT, 'Summary Report of the Fifth Session (5 - 7 December 2022)' (Study LXXXIII – W.G.5 – Doc. 6, Rome 7 December 2022) s 29.
[134] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 6 s 2.
[135] UNIDROIT (n 122) s 15.
[136] Uniform Commercial Code 1952 (US) § 7-201(a).

Warehouse Receipts can instil trust among the stakeholders as it guarantees that the issued warehouse receipt is backed up by stored goods. Therefore, OHADA can adopt this article in a Uniform Act on Warehouse Receipt.

Article 7 of the UNIDROIT MLWR establishes a duty of the depositor to confirm to the warehouse operator that they have rights to deposit the goods and that the goods are free of any claims and rights of third parties unless agreed otherwise by the warehouse operator and the depositor.[137] This provision ascertains the legal effectiveness and practical value of the warehouse receipt finance when the stored goods can be used as collateral to secure a loan.[138] This provision also protects the priority interests of a lender in the warehouse receipt financing from the third-party claims in case of a borrower's inability to pay back or default of the warehouse operator.[139] Article 7 of the UNIDROIT MLWR relieves the warehouse operator from the duty to check the due diligence of the depositor and imposes on the depositor the duty to provide information about third-party claims regarding stored goods.[140] This article relieves the warehouse operator from a cumbersome procedure to check the legal history of the stored goods, which makes the process of issuance of a warehouse receipt quicker. The adoption of this article in a Uniform Act on Warehouse Receipts for OHADA can facilitate warehouse receipt financing.

Article 8 of the UNIDROIT MLWR provides that a warehouse receipt incorporates all the terms of the storage agreement.[141] However, if the storage agreement varies from the terms of a warehouse receipt, the warehouse receipt terms will take precedence.[142] Article 8 of the UNIDROIT MLWR provides the rule to be applied in case of a conflict of terms in a warehouse receipt and a storage agreement.[143] This article also differentiates a storage agreement, which is contractual in nature, from a warehouse receipt.[144] It also differentiates the relationship between the depositor and the warehouse operator (contractual nature) and the holder of a warehouse receipt and the warehouse operator, which are additionally protected by the warehouse receipt law.[145] This article provides an extra protection for warehouse receipt contracting parties and aims to foster greater trust in warehouse receipt relationships compared to mere storage agreements. Therefore, this article can be adopted in a Uniform Act on Warehouse Receipts for OHADA to provide extra protection for the parties involved in

[137] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 7.
[138] World Bank Group (n 114) 27.
[139] ibid 27.
[140] UNIDROIT (n 64) ss 105-106.
[141] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 8 s 1.
[142] ibid art 8 s 2.
[143] ibid art 8.
[144] ibid.
[145] ibid.

warehouse receipt contracts.

This subsection established the provisions regarding the issuance of warehouse receipts and how such provisions can be complemented with the legal transplant from France and the US to be included in a new Uniform Act on Warehouse Receipts. The hermeneutic approach allowed to assess a compatibility of legal transplant with socio-economic and historical background of OHADA member states. The following subsection will discuss the main content of a warehouse receipt and what information should be included in a warehouse receipt. The following subsection will also establish how such provisions of the UNIDROIT MLWR can be adopted in a Uniform Act on Warehouse Receipts.

5.3.2.2. Content of Warehouse Receipts

Article 9 of the UNIDROIT MLWR outlines the essential information that should be included in a warehouse receipt. This includes the title 'warehouse receipt'; if the warehouse receipt is negotiable, then the name of the person to order of whom the warehouse receipt is issued, or the words 'to the bearer' if it is issued to the bearer; if the warehouse receipt is non-negotiable, the name of the person in favour of whom it issued; name and address of the depositor and the warehouse receipt operator; description of the goods and their quantity; the third party claims to the stored good disclosed by the depositor; the period of storage and place where they are stored; the identification number of the warehouse receipt; date and place the warehouse receipt was issued; date the storage agreement was signed and the statement that it will be provided on request to the potential transferees.[146] The main content of the warehouse receipt is determined after a comparative analysis of national laws, which establishes the similarities between the main and optional content of a warehouse receipt in many jurisdictions.[147]

A parallel also can be drawn with similar international instruments, such as the United Nations Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, which establishes the main content for a bill of exchange,[148] and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which provides main content for paper-based and electronic transport documents.[149] Similarly, in France, there are minimum requirements regarding the content of a warehouse receipt, including the name, country and profession of the depositor, information regarding the nature

[146] ibid art 9 s 1.
[147] UNIDROIT (n 106) s 41.
[148] Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (adopted 7 June 1930, entered into force 1 January 1934) annex I, ch 1, art 1.
[149] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 36, 38,39.

and value of the stored goods, and the possibility of substituting the fungible goods.[150] In the US, the main content of a warehouse receipt includes the location of the warehouse, the date of issuance of the warehouse receipt, the unique identifier of the warehouse receipt, the statement regarding whether the warehouse receipt is negotiable (issued to the order of or to the bearer) or non-negotiable, storage price, the description of the nature of goods or their packages, the signature of the warehouse operator representative, information regarding advances paid or liabilities, that a warehouse operator holds a lien or security interests, the fact of any ownership rights of the warehouse to the stored goods.[151]

According to Article 9 of the UNIDROIT MLWR, a warehouse receipt that does not include some of the main provisions is still considered valid, and the warehouse operator is liable for the incomplete information on the warehouse receipt.[152] Article 9 of the UNIDROIT MLWR imposes a duty on the warehouse operator to issue a warehouse receipt with all the essential information.[153] A similar provision exists in the US Uniform Commercial Code, which states that if any of the primary information is omitted, the warehouse operator is liable for losses caused by the missing information.[154] Comparable rules exist in the international instruments regarding transport documents and electronic transport records.[155] However, the consequences of inaccurate or missing information also depend on the national contract legislation.[156] In some countries, a contract needs to be signed by the contracting parties, and a missing signature may result in a contract being considered void.[157] OHADA has not yet enacted the draft Uniform Act on Contract Law, but a parallel could be drawn with the Uniform Act Organising Securities,[158] where a signature is a central component of an autonomous guarantee contract, and omission of it results in the contract being considered void.[159] Therefore, while implementing the list of main provisions in a new Uniform Act on Warehouse Receipts, all the main terms should be harmonised with the existing Uniform Acts.

Furthermore, if information regarding the negotiability of the warehouse receipt is missing (the name of the person to whose order it is issued, the statement that the warehouse receipt is issued to the bearer, the name of the person to whose favour it is issued), the

[150] Commercial Code 1807 (France) art L522-24.
[151] Uniform Commercial Code 1952 (US) § 7-202 (b).
[152] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 9 s 2.
[153] UNIDROIT (n 64) s 111.
[154] Uniform Commercial Code 1952 (US) § 7-202 (b).
[155] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 37.
[156] UNIDROIT (n 106) s 50.
[157] see Commercial Code 1900 (Germany) § 475c, Civil Code 1900 (Germany) s 125.
[158] Uniform Act on Security Interests (adopted 15 December 2010).
[159] Uniform Act on Security Interests (adopted 15 December 2010) art 41.

warehouse receipt is considered a negotiable warehouse receipt issued to the bearer.[160] This provision of the UNIDROIT MLWR establishes a general rule for situations when important information regarding the negotiability of the warehouse receipt is omitted. This rule aims to eliminate possible conflicts and legal implications associated with missing information regarding the negotiability of the warehouse receipt. The adoption of this provision in a new Uniform Act on Warehouse Receipts can assist in resolving legal issues associated with the missing information regarding the negotiability of a warehouse receipt.

Article 10 of the UNIDROIT MLWR provides additional information that a warehouse operator can include in a warehouse receipt.[161] The warehouse operator may include information regarding the insurer, insurance policy and insured value of the stored goods; the amount of storage fees or how such fees are calculated; the quality of goods and whether they could be mixed.[162] The inclusion of the additional terms in the warehouse receipt is optional, and the main aim of this article is the promotion of a good practice approach.[163] The warehouse operator is responsible for issuing warehouse receipts and deciding which optional terms to include.[164]

Similarly, under the US Uniform Commercial Code, a warehouse operator can include any optional terms in a warehouse receipt as long as they do not contradict the list of the main terms required for a warehouse receipt.[165] In the German Commercial Code, the warehouse operator may include optional terms that the warehouse operator considers appropriate.[166] However, if any of the optional terms incorporated into the warehouse receipt are incorrect, it does not affect the validity of the warehouse receipt but imposes a liability on the warehouse operator for losses caused by the incorrect information.[167] Comparable provisions exist in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which states that the absence of incorrect information does not affect the validity of the transport document or electronic transport record.[168] Allowing warehouse operators to add additional terms in a warehouse receipt enables a new Uniform Act on Warehouse Receipts to accommodate the diverse commercial and business practices in OHADA member states. This helps to address differences in the socio-economic background of OHADA

[160] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 9 s 3.
[161] ibid art 10.
[162] ibid art 10 s 1.
[163] UNIDROIT (n 106) s 45.
[164] ibid s 46.
[165] Uniform Commercial Code 1952 (US) § 7-202 (c).
[166] Commercial Code 1900 (Germany) § 475c s 2.
[167] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 10 s 2.
[168] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 37.

member states and historical differences in the business practices of OHADA member states.

Article 10 of the UNIDROIT MLWR establishes a default rule for warehouse receipts that do not specify the quality of fungible goods.[169] In such cases, the goods are considered to be of average quality.[170] Article 11 of the UNIDROIT MLWR provides a general rule for situations where the warehouse operator is unable to verify the information provided by the depositor regarding sealed or packaged goods.[171] In these situations, the warehouse operator may describe stored goods according to the information provided by the depositor or the information on the packing of such goods.[172] However, the warehouse operator is released from the liability resulting from inaccurate or incomplete information regarding the goods unless the warehouse operator knew or was supposed to know that the information was incorrect.[173] A similar provision exists in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which states that the carrier would not be liable for any losses during the time the goods remain undelivered unless the carrier did not take reasonable steps to preserve the goods and the carrier knew or was supposed to know that the goods would be damaged.[174] Articles 10 and 11 of the UNIDROIT MLWR reflect the best practice approaches in situations where there is no information regarding the quality of stored fungible goods or packed and sealed goods. These provisions help a Uniform Act on Warehouse Receipts to accommodate best practice approaches and avoid uncertainty and potential conflicts.

This subsection discussed the main and optional terms of the warehouse receipt under the UNIDROIT MLWR. This subsection also established how these provisions can be tailored and adopted in a Uniform Act on Warehouse Receipts for OHADA, addressing different business practices of OHADA member states. The following subsection will discuss how the UNIDROIT MLWR addresses situations regarding the alteration of the warehouse receipt and how such provisions can be adopted in a new Uniform Act on Warehouse Receipts.

5.3.2.3. Alteration of Warehouse Receipts

Article 12 of the UNIDROIT MLWR establishes a general rule regarding altered warehouse receipts.[175] When a warehouse receipt is altered without the authorisation of the warehouse

[169] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 10 s 3.
[170] ibid.
[171] ibid art 11.
[172] ibid art 11 s 1.
[173] ibid art 11 s 2.
[174] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 48 s 5.
[175] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 12 s 1.

operator, the warehouse operator will not be bound by such changes.[176] However, if the warehouse operator fails to fill in the information in a negotiable warehouse receipt and it is later amended without its authority, the warehouse operator will be bound by those changes if the holder was unaware that the changes were not authorised.[177] The primary purpose of this article is to prevent a risky existing practice when a warehouse operator does not fill in the required information in a warehouse receipt.[178] This article aims to protect the subsequent holder of a warehouse receipt from the negligence of the warehouse operator, who may intentionally omit some information from the warehouse receipt.[179] In such situations, the UNIDROIT MLWR protects the 'innocent' subsequent holder and places the burden of risk on the warehouse operator. This provision is based on a good practice approach and encourages the warehouse operator to comply under the threat of extra liability. Similarly, under the US Uniform Commercial Code, if information is omitted from the warehouse receipt and the warehouse receipt was filled in without authority, an innocent subsequent holder can treat such alteration as authorised.[180] These provisions can be adopted in a Uniform Act on Warehouse Receipts for OHADA as they encourage warehouse operators to follow best practice approaches to provide the complete information in a warehouse receipt and avoid conflict situations.

Article 13 of the UNIDROIT MLWR enables the holder of the warehouse receipt to request the warehouse operator to issue a replacement of the warehouse receipt in case of its loss or damage.[181] The holder of an electronic warehouse receipt may ask for retention of control if they lose control over such a receipt.[182] To qualify for the replacement of the warehouse receipt, the holder must present proof of loss or destruction, proof of their rights for the lost or destroyed warehouse receipt and indemnity or security of the indemnity for the issuance of the new warehouse receipt.[183] This article of the UNIDROIT MLWR reflects the commercial practice when the warehouse operator delivers the goods to a holder of a lost or destroyed warehouse receipt, who can prove the legitimate rights to the stored goods.[184] As the warehouse operator remains liable according to the terms of the originally issued warehouse receipt, the UNIDROIT MLWR provides the warehouse operator with the right to cover potential risks and asks the holder of the lost or destroyed warehouse receipt to provide

[176] ibid.
[177] ibid art 12 s 2.
[178] UNIDROIT (n 64) s 120.
[179] UNIDROIT (n 122) s 37.
[180] Uniform Commercial Code 1952 (US) § 7-208.
[181] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 13 s 1.
[182] ibid art 13 s 2.
[183] ibid art 13 s 1.
[184] UNIDROIT (n 64) s 124.

indemnity.[185] A similar practice exists in the US, where the warehouse operator can deliver goods to the holder of the lost or destroyed warehouse receipt, and the holder can provide an indemnity for such goods that is twice higher than the initial value of the goods.[186]

If the warehouse operator refuses to issue a replacement warehouse receipt, the holder of the lost or destroyed warehouse receipt can seek a court to compel the warehouse operator to issue a replacement.[187] This practice is common in countries with well-developed warehouse receipt legislation. For example, in the US, a holder of a lost, destroyed or stolen warehouse receipt may apply to a court to either receive the goods listed on the lost, stolen or destroyed warehouse receipt or obtain a replacement warehouse receipt.[188] In France, the holder of the lost or destroyed warehouse receipt may request a court order to issue a replacement warehouse receipt if the holder can prove their rights over such warehouse receipt and provide indemnity.[189]

To address the issue of the double presentation of the replacement warehouse receipt and the original lost or destroyed one, it should be clarified that the replacement warehouse receipt is issued in place of the lost or destroyed one in accordance with Article 4 of the UNIDROIT MLWR.[190] Section 5 of Article 13 of the UNIDROIT MLWR protects a good faith holder of the warehouse receipt that is believed to be lost or destroyed, allowing them to claim compensation from the previous holder of the warehouse receipt under other laws.[191] Provisions regarding the alteration of a warehouse receipt are based on legislation from developed countries such as the US and France, reflecting best practice approaches in the industry. Therefore, such provisions can be adopted in a new Uniform Act on Warehouse Receipts.

Article 14 of the UNIDROIT MLWR enables the holder of the warehouse receipt to request the warehouse operator to convert the warehouse receipt form from paper-based to electronic and vice versa.[192] This change does not affect the rights and obligations under such a warehouse receipt.[193] The warehouse operator is responsible for ensuring that the previous form of the warehouse receipt can no longer be used and only one form exists.[194] This article addresses the transition of a warehouse receipt form from paper-based to electronic, which

[185] ibid.
[186] Uniform Commercial Code 1952 (US) §7-601(b).
[187] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 13 s 3.
[188] Uniform Commercial Code 1952 (US) § 7-601(a).
[189] Commercial Code 1807 (France) art L522-36.
[190] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 13 s 4.
[191] ibid art 13 s 5.
[192] ibid art 14 ss 1, 3.
[193] ibid.
[194] ibid art 14 s 2.

can offer greater security and efficiency to the warehouse receipt system.[195] The conversion from electronic to paper-based warehouse receipts may be required when an issued warehouse receipt is used in developing countries, where a holder of such a warehouse receipt does not have access to technology which gives control over electronic warehouse receipts.[196] This article establishes an essential rule that electronic and paper-based warehouse receipts are functionally equal. Provisions regarding the conversion of the form of a warehouse receipt are necessary for the facilitation of cross-country commerce and the free circulation of warehouse receipts, regardless of their form. Therefore, such provisions can be included in a new Uniform Act on Warehouse Receipts for OHADA.

5.3.2.4. Transfer of Negotiable Warehouse Receipts

This subsection focuses on provisions of the UNIDROIT MLWR concerning the transfer of warehouse receipts. This subsection discusses how warehouse receipts can be transferred and the effect of the transfer of a warehouse receipt according to the UNIDROIT MLWR. It establishes how the provisions of the UNIDROIT MLWR can be complemented with legal transplants to address OHADA member states' background (socio-economic, historical, and cultural). It establishes how such provisions can be adopted in a new Uniform Act on Warehouse Receipts.

5.3.2.4.1. How Negotiable Warehouse Receipts Can Be Transferred

The UNIDROIT MLWR dedicates a whole section to the transfer of negotiable warehouse receipts. The rationale behind that is that, in practice, non-negotiable warehouse receipts are agreed to be non-transferable by contracting parties.[197] Generally, a non-negotiable warehouse receipt is issued to the name of the financier and kept by the financer in case it is collateral for a loan.[198] When the loan is repaid, the warehouse receipt is either returned to the borrower or considered cancelled.[199] As a result, there is no actual transfer of a non-negotiable warehouse receipt, as the financier is not a transferee but a mere holder of the warehouse receipt. Therefore, the UNIDROIT MLWR focuses on the transfer of negotiable warehouse receipts, which is discussed in this subsection and assessed for the possibility of adoption in a Uniform Act on Warehouse Receipts.

Article 15 of the UNIDROIT MLWR outlines different methods of transferring paper-based and electronic negotiable warehouse receipts.[200] This article aligns with the UNCITRAL

[195] Organisation of American States, 'Inter-American Juridical Report. Electronic Warehouse Receipts for Agricultural Products' (89th Regular Session (CJI/doc. 505/16 rev2), Rio de Janeiro September 27) 3.
[196] UNIDROIT (n 64) s 129.
[197] UNIDROIT (n 122) s 53.
[198] ibid.
[199] ibid.
[200] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 15.

Model Law on Secured Transactions, which explains the mechanics of the transfer of negotiable documents.[201] The UNCITRAL Legislative Guide on Secured Transactions is also taken into consideration as it defines negotiable documents, including warehouse receipts.[202] The UNIDROIT MLWR was drafted in accordance with these norms to avoid confusion in terminology.[203] The concept of 'transfer' of negotiable documents is widely used in common law countries, while civil law countries are more familiar with the notion of 'negotiation'.[204] However, several international instruments introduce the notion of 'transfer' as a jurisdiction-neutral term that is easily translatable into different languages.[205] The provisions of the UNIDROIT MLWR regarding transfer and endorsement are similar to the provisions of the United Nations Convention on International Bills of Exchange and International Promissory Notes, which regulates the transfer of international bills of exchange.[206] Similarly, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea outlines how a negotiable transport document or negotiable electronic transport record can be transferred.[207] The French Commercial Code recognises the notion of transfer and states that warehouse receipts and warrants can be transferred together or separately by endorsement.[208] The OHADA Uniform Act Organising Securities also contains the concept of transfer and transferable security rights.[209] Therefore, provisions regarding the transfer of negotiable documents fit the current legal framework and the wider background of OHADA member states and can be adopted in a new Uniform Act on Warehouse Receipts.

An electronic warehouse receipt can be transferred by endorsement or delivery if it is issued to the bearer, the endorsement is blank, or it is endorsed to the bearer.[210] Additionally, an electronic warehouse receipt can be transferred by endorsement or transfer of control if it is issued to the bearer, the endorsement is blanked, or it is endorsed to the bearer.[211] In the case of transfer of control for the electronic warehouse receipt, three conditions must be satisfied: exclusive control over the electronic warehouse receipt, identification of the person in control, and transfer of control.[212] The endorsement is a signature on the warehouse receipt,

[201] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 14, 16, 26, 46.
[202] UNCITRAL 'Legislative Guide on Secured Transactions' (adopted 11 December 2008) A/63/438 (Vienna 2009) s 20.
[203] UNIDROIT (n 106) 55.
[204] ibid ss 57-58.
[205] ibid.
[206] United Nations Convention on International Bills of Exchange and International Promissory Notes (09 December 1988, not entered into force) ch 3.
[207] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force) art 57.
[208] Commercial Code 1807 (France) art L522-26.
[209] Uniform Act on Security Interests (adopted 15 December 2010) title 2.
[210] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 15 s 1.
[211] ibid art 15 s 2.
[212] ibid art 15 s 3.

which starts the transfer process of a negotiable warehouse receipt.[213]

The provisions regarding the transfer of electronic warehouse receipts are similar to those that govern its paper-based equivalent, except for the delivery requirements.[214] Instead of physical delivery, control over the electronic warehouse receipt is transferred.[215] Similarly, in the US, the paper-based warehouse receipt can be transferred by endorsement and delivery or only by delivery, depending on the type of negotiable warehouse receipt (to the order of the named person or to the bearer).[216] Concerning the transfer of the electronic warehouse receipt, the US Uniform Commercial Code operates with the notion of delivery of the documents,[217] which does not fully comprehend the notion of transfer of the electronic warehouse receipt. Therefore, the provisions of the UNIDROIT MLWR reflect the transfer of control over the electronic warehouse receipt and can be adopted in a new Uniform Act on Warehouse Receipts.

5.3.2.4.2. Effect of Transfer of Negotiable Warehouse Receipts

The UNIDROIT MLWR distinguishes between the rights of the transferee who is not a protected holder of the negotiable warehouse receipt and the rights of the protected holder of the negotiable warehouse receipt.[218] The difference is based on cases where a warehouse receipt is non-negotiable or when some formalities for transferring a negotiable warehouse receipt were not satisfied (for example, missing endorsement).[219] In such cases, the transferor transfers ownership rights over the goods and claims only associated with the goods can be raised to the warehouse operator.[220]

Article 16 of the UNIDROIT MLWR provides that when a negotiable warehouse receipt is transferred, the transferee obtains the same rights as the transferor can convey, including all the benefits associated with the warehouse operator's obligation concerning the stored goods.[221] Therefore, the transferee obtains all the rights under the warehouse receipt and storage agreement, including rights to claim delivery of the goods.[222] This article establishes the fundamental principle of personal property law known as *nemo dat quod non habet*, which means that the transferor generally can convey only the rights they possess.[223] This situation

[213] UNIDROIT (n 64) s 131.
[214] ibid s 133.
[215] ibid.
[216] Uniform Commercial Code 1952 (US) § 7-501(a).
[217] ibid § 7-501(b).
[218] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) s B.
[219] UNIDROIT (n 106) s 59.
[220] ibid.
[221] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 16.
[222] UNIDROIT (n 64) s 137.
[223] Ken Kanjian, 'The Nemo Dat Rule and Estoppel by Representation and Estoppel by Negligence - Moorgate Mercantile Co. Ltd. v. Twitchings' (1977) 8 Sydney Law Review 698, 698.

may arise when the transferor does not have ownership rights over the goods or when the transferor passes the security rights over the goods to a third party.[224] In such situations, the transferee either does not obtain any property rights over the stored goods or the rights are burdened by the third person's prior security rights.

A similar provision exists in the US Uniform Commercial Code, where a transferee of the warehouse receipt that has not been duly negotiated only obtains the rights that the transferor had or could transfer.[225] The rules of Article 16 of the UNIDROIT MLWR apply to the single warehouse receipt system.[226] In contrast, in the double warehouse receipt system, these apply only to the first part of the warehouse receipt - the certificate of deposit.[227] The second part of the double warehouse receipt (warrant or pledge bond) does not give rights associated with the warehouse receipt.[228] Therefore, to adopt these provisions of the UNIDROIT MLWR in the double warehouse receipt system, they should be amended to the needs of such a system. OHADA member states are from the same civil law historical background, which traditionally operates with the double warehouse receipt system. As it was established earlier, further research is required to assess whether OHADA should introduce the single or double warehouse receipt system.[229] These rules can be adopted in a new Uniform Act on Warehouse Receipts depending on which system of warehouse receipts OHADA introduces.

Article 17 of the UNIDROIT MLWR defines the protected holder of a negotiable warehouse receipt.[230] To be considered a protected holder of a negotiable warehouse receipt, three conditions must be satisfied: the transfer of the warehouse receipt must satisfy the conditions for its transfer, the person acted honestly without knowledge of any prior third parties' claims, and the transfer was acted in the ordinary course of business of the transferer and transferee.[231] The registration of the warehouse receipt in the secured transaction register does not necessarily mean that the person was aware of the previous claims to the warehouse receipt.[232] This article aims to facilitate trade and the use of the warehouse receipt by eliminating the need to verify the chain of previous transactions once the stored goods are entered into the system.[233]

Similar provisions regarding the protected holder of negotiable instruments exist in the

[224] UNIDROIT (n 64) s 138.
[225] Uniform Commercial Code 1952 (US) § 7-504(a).
[226] UNIDROIT (n 122) s 70.
[227] ibid.
[228] ibid.
[229] see s 5.3.1.
[230] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 17 s 1.
[231] ibid art 17 s 1.
[232] ibid art 17 s 2, UNIDROIT s 142.
[233] UNIDROIT, 'Preliminary Drafting Suggestions for the Model Law on Warehouse Receipt' (Study LXXXIII – W.G.2 – Doc. 3, Rome February 2021) 13.

UNCITRAL Model Law on Secured Transactions, which is adopted in the UNIDROIT MLWR.[234] Similarly, in the US Uniform Commercial Code, the equivalent of the protected holder is 'holder in due course'.[235] The French Civil Code also recognises the notion of good faith and the notion of the acquirer or assigner in good faith.[236] However, the notion of the protected holder may be a new concept for civil law countries, as civil law doctrine automatically protects all subsequent holders of warehouse receipts in the endorsement chain.[237] Therefore, for adoption in OHADA member states to address the historical and legal backgrounds, this concept should be clarified and defined clearly, or a different notion should be introduced in a Uniform Act on Warehouse Receipts.[238]

Article 18 of the UNIDROIT MLWR emphasises that the ownership rights of the protected holder of a warehouse receipt take precedence over the prior existing interests in the stored goods.[239] The UNIDROIT MLWR provides two draft options regarding the rights of the protected holder of a negotiable warehouse receipt.[240] Option one states that the protected holder of the warehouse receipt obtains ownership rights over the warehouse receipt and stored goods, as well as all the benefits associated with the obligation of the warehouse operator to store and deliver goods.[241] Similar provisions exist in the US Uniform Commercial Code, which states that a holder of a due negotiated warehouse receipt obtains title to the warehouse receipt and the goods, along with the rights associated with the warehouse operator's obligation to store and deliver goods.[242] This article differentiates the protected holder from a transferee, as the protected holder can obtain better rights than a transferor can give.[243] Therefore, this option of article 18 of the UNIDROIT MLWR provides an exception from the *nemo dat quod non habet* rule.

Option 2 of Article 18 of the UNIDROIT MLWR states that the protected holder of the warehouse receipt obtains ownership over the warehouse receipt and rights to the stored goods associated with the physical possession of the goods, including the rights associated with the warehouse operator's obligation to store and deliver goods.[244] The second drafting option addresses commercial practices in some jurisdictions, where transferring the ownership rights over the stored goods together with the warehouse receipt may result in the loss of the

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[234] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 46.
[235] Uniform Commercial Code 1952 (US) § 7-501.
[236] Civil Code 1804 (France) ss 550, 1112.
[237] UNIDROIT (n 106) s 63, see 5.4.
[238] see s 5.4.
[239] UNIDROIT (n 233) 17.
[240] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 18.
[241] ibid art 18 option 1 s 1.
[242] Uniform Commercial Code 1952 (US) § 7-502 (a).
[243] UNIDROIT (n 64) s 145.
[244] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 18 option 2 s 1.

goods if the depositor does not have a title over them.[245] To adopt these articles in a new Uniform Act on Warehouse Receipts, a further comprehensive investigation is required to identify commercial practices related to the transfer of ownership rights over the stored goods and the warehouse receipt in OHADA member states. This helps to take into consideration the existing business, socio-economic and historical backgrounds related to the transfer of ownership rights in OHADA member states. In turn, this assists in determining which drafting option is more suitable for a new Uniform Act on Warehouse Receipts.

Article 18 of the UNIDROIT MLWR further clarifies the exclusive degree of protection given to the protected holder of a negotiable warehouse receipt.[246] Article 18 of the UNIDROIT MLWR also sets out that the rights of the protected holder prevail over any other rights even in the following situations: when the transfer of the goods associated with the breach of duty by the transferor, when the warehouse receipt was lost by the previous holder; associated with the fraud, theft, mistake, etc; and when the stored goods or the warehouse receipt were already sold or alienated to the third party.[247] These provisions of the UNIDROIT MLWR minimise the risks for the good faith purchaser and eliminate potential hurdles for the purchaser associated with the investigation of the chain of commercial transactions.[248] This exclusive degree of protection facilitates the use of the warehouse receipt by increasing its attractiveness for the contracting parties in the warehouse receipt relationship.[249] Similar protection is provided to the protected holder by the United Nations Convention on International Bills of Exchange and International Promissory Notes.[250] The US Uniform Commercial Code offers a similar degree of protection and states that the ownership rights of the protected holder prevail over the prior existing interests in the stored goods.[251] As mentioned earlier, the provisions regarding good faith are recognised in civil and common law countries;[252] this article can be included in a Uniform Act on Warehouse Receipts for OHADA.

This subsection discussed the provisions of the UNIDROIT MLWR regarding the transfer of a warehouse receipt, the rules regarding how a negotiable warehouse receipt can be transferred and the effect of such transfer. It was established how such provisions of the UNIDROIT MLWR can be adopted in a new Uniform Act on Warehouse Receipts. It was also established how legal transplant can complement provisions of the UNIDROIT MLWR to

[245] UNIDROIT (n 64) s 146.
[246] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 18 s 2.
[247] ibid.
[248] UNIDROIT (n 233) 16.
[249] UNIDROIT (n 122) s 70.
[250] United Nations Convention on International Bills of Exchange and International Promissory Notes (09 December 1988, not in force) art 27, 29.
[251] Uniform Commercial Code 1952 (US) § 7-503.
[252] see s 5.3.2.4.

address the OHADA member states legal, socio-economic and historical backgrounds. The following subsection will discuss the requirements of the UNIDROIT MLWR related to the third-party effectiveness of security rights and how they could be incorporated into a Uniform Act on Warehouse Receipts.

5.3.2.5. Third-Party Effectiveness of Security Rights

Security rights are special types of interests in the property, which are granted by a debtor to a creditor over the debtor's property - collateral. Security rights give a creditor the right to recourse to the property in case of a debtor's non-payment or non-performance of obligations.[253] In warehouse receipt financing, the debtor uses the stored goods as collateral for a loan, and the financial institutions possess security rights over the stored goods. This subsection discusses how to adopt provisions of the UNIDROIT MLWR regarding third-party effectiveness in a new Uniform Act on Warehouse Receipts for OHADA.

Article 19 of section C of the UNIDROIT MLWR explains the methods for achieving third-party effectiveness of a security right in a warehouse receipt.[254] Security rights in a negotiable warehouse receipt can be effective against third parties through registration in the states' security rights register or by the secured creditor taking possession of the paper-based warehouse receipt or control over the electronic warehouse receipt.[255] This article is based on the provisions of the UNCITRAL Model Law on Secured Transactions, which specify that a security right is effective against a third party if it is registered in the security rights register.[256] A security right in a tangible asset must be owned by the creditor to be effective against a third party.[257] Article 19 of the UNIDROIT MLWR complements the existing security rights laws of enacting states and applies specifically to warehouse receipts. For provisions of Article 19 of the UNIDROIT MLWR to be fully effective, enacting countries should incorporate warehouse receipt legislation into the secured transaction framework. If a country does not contain specific legislation in the field of secured transactions, the UNCITRAL Model Law on Secured Transactions can be adopted, which provides general rules regarding the registration of security rights[258] and specific provisions regarding the creation of security rights in a negotiable document,[259] third-party effectiveness,[260] and priority rules.[261]

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[253] Grant Gilmore, *Security Interests in Personal Property* (The Lawbook Exchange 1999).
[254] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 19.
[255] ibid art 19.
[256] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 18.
[257] ibid.
[258] UNIDROIT, 'Note on Inclusion of Rules Governing Security Rights in Warehouse Receipts in the Model Law' (Study LXXXIII – W.G.5 – Doc. 4, Rome) s 4.
[259] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 16.
[260] ibid art 26.
[261] ibid art 49.

In the case of OHADA, Article 19 of the UNIDROIT MLWR should complement provisions of the Uniform Act Organising Securities. For example, the Uniform Act Organising Securities contains similar provisions regarding methods for achieving third-party effectiveness in a pledge, such as registration in the Trade and Personal Property Rights register or giving possession over collateral to the pledgee.[262] The OHADA Uniform Act Organising Securities introduces a comprehensive framework to regulate different types of transferable securities.[263] The OHADA Uniform Act on General Commercial Law provides conditions for the registration process of personal securities.[264] As the OHADA Uniform Acts related to third-party effectiveness in the pledge relationship are developed, the provisions regarding third-party effectiveness in the warehouse receipt fit in the current security rights framework of OHADA. For better representation, the provisions regarding third-party effectiveness of security rights in a warehouse receipt relationship can be included in Title Two, 'Transferable Securities' of the OHADA Uniform Act Organising Securities, which already contains provisions regarding possessory liens,[265] pledge of tangible property,[266] pledge of intangible property,[267] general and special liens.[268] This indicates that Article 19 of the UNIDROIT MLWR fits into the wider background of OHADA member states and addresses the existing business practices.

The UNIDROIT MLWR includes an optional Chapter V 'Pledge Bonds', which contains provisions regarding the possibility of issuing two documents - a certificate of deposit and a pledge instrument – addressing the double warehouse receipt systems practice.[269] However, implementing such a system at this stage of the proposed legal reform for OHADA may be too sophisticated, which can result in the ineffectiveness of the warehouse receipt system.[270] Considering that the UNIDROIT MLWR is a soft law norm, it offers states flexibility in adopting certain provisions.[271] It may be more feasible to adopt a single warehouse receipt system and implement a more sophisticated system of double warehouse receipts during the revision of a new Uniform Act on Warehouse Receipts. This approach can assist in implementing the proposed warehouse receipt legal reform step by step and allow the market and stakeholders to adapt and prepare for the implementation of the new system. However, further research is required to assess which warehouse receipt system (double or single) is suitable for

[262] Uniform Act on Security Interests (adopted 15 December 2010) art 97.
[263] ibid title 2.
[264] Uniform Act on General Commercial Law (adopted 15 December 2010) part 3.
[265] Uniform Act Organising Securities (adopted 15 December 2010) title 2 ch 2.
[266] ibid title 2 ch 4.
[267] ibid title 2 ch 5.
[268] ibid title 2 ch 6.
[269] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) ch 5.
[270] see s 5.3.1.
[271] see s 2.2.2.2.

OHADA.[272] This is due to the historical adherence of civil law countries to a double warehouse receipt system, which may not, however, reflect the practicality of a single warehouse receipt system.

This subsection discussed the provisions of the UNIDROIT MLWR related to third-party effectiveness in warehouse receipt financing and established how such provisions can fit into the legal framework of OHADA. The following subsection will discuss the requirements of the UNIDROIT MLWR regarding guarantees and representations by a transferor of a warehouse receipt and how such provisions can be adopted in a new Uniform Act on Warehouse Receipts.

5.3.2.6. Representations and Guarantees by a Transferor of Warehouse Receipts

Article 20 of the UNIDROIT MLWR provides the representations that the transferor of a negotiable warehouse receipt needs to make to a transferee. These representations include the authenticity of the warehouse receipt and the facts that can affect its validity, the value of the stored goods, and the effect of the transfer of title over the warehouse receipt or the stored goods.[273] Article 20 of the UNIDROIT MLWR is designed to protect the transferee. If any of the representations are not real, the transferee can bring an action under domestic legislation for the breach of the representation by the transferor.[274] The transferor is liable for representing the inauthentic warehouse receipt, even if they were unaware of its inauthenticity.[275] However, the transferor is not liable for the representation of the warehouse receipt if they were unaware of the facts that affect its validity, the value of goods, or the effect of the title transfer over the warehouse receipt.[276]

Article 21 of the UNIDROIT MLWR provides that a person who holds a warehouse receipt on behalf of the transferor or is entrusted by the transferor to exercise certain rights regarding warehouse receipts has full rights associated with the warehouse receipt, including the right to request a delivery of the stored goods.[277] Article 21 of the UNIDROIT MLWR provides two options for the states to adopt regarding the transfer of the warehouse receipt by the intermediary. The first option is when the entrusted person acts as an agent and can only transfer the warehouse receipt if they have authority.[278] The second option is when the intermediary only represents the authority to transfer the warehouse receipt.[279] The US Uniform Commercial Code provides that an intermediary entrusted to or acting on behalf of

[272] see s 5.3.1.
[273] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 20.
[274] UNIDROIT (n 122) s 79.
[275] UNIDROIT (n 64) s 155.
[276] ibid s 155.
[277] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 21.
[278] UNIDROIT (n 64) s 156.
[279] ibid.

another person can exercise only the rights for which they have authority.[280] Similar provisions exist in the United Nations Convention on International Bills of Exchange and International Promissory Notes, which provides that the endorsee is authorised by the endorsement to collect the instrument and exercise the full rights they authorised to by the endorsement.[281]

The OHADA Uniform Act on General Commercial Law regulates agency agreements and agency mandates.[282] According to the Uniform Act on General Commercial Law, the intermediary exercises all the rights to act on behalf of the principal.[283] The OHADA Uniform Act Organising Securities specifies the agency's rights and obligations regarding specific security rights.[284] For example, the security agents act within the power they are authorised to exercise by the creditor.[285] The provisions of the OHADA Uniform Act on General Commercial Law and the Uniform Act Organising Securities regarding the agency and agency agreement are quite advanced. Moreover, as the stakeholders in OHADA member states are familiar with the agency concept and already exercise agency agreement, it is recommended for OHADA to adopt the first option of Article 21 of the UNIDROIT MLWR in a new Uniform Act on Warehouse Receipts. This allows a Uniform Act on Warehouse Receipts to address the existing business practices and broader background of OHADA member states (legal, historical, and socio-economic).

Article 22 of the UNIDROIT MLWR states that the transferor of the negotiable warehouse receipt does not act as a grantor for the warehouse operator's delivery of the stored goods.[286] The transferor is not liable if the warehouse operator fails to deliver the goods or if the warehouse operator does not exercise the duty of care,[287] and as a result, the stored goods are damaged or lost value.[288] This article aims to release the transferor from any obligations or responsibility for the actions of the warehouse operator.[289] A similar provision exists in the US Uniform Commercial Code, which waives the liability of the transferor related to any actions of the bailee or the previous transferor.[290] The UNIDROIT MLWR excludes the possibility of simultaneous liability of the transferor and the warehouse operator for the warehouse operator's duties. This article can be adopted in a new Uniform Act on Warehouse Receipts as it establishes one of the essential duties of the warehouse operator. This provision

[280] Uniform Commercial Code 1952 (US) § 7-508.
[281] United Nations Convention on International Bills of Exchange and International Promissory Notes (09 December 1988, not in force) art 21.
[282] Uniform Act on General Commercial Law (adopted 15 December 2010) book 4.
[283] ibid art 148.
[284] Uniform Act Organising Securities (adopted 15 December 2010) ch 2.
[285] ibid art 8.
[286] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 22.
[287] ibid art 23.
[288] UNIDROIT (n 64) s 157.
[289] UNIDROIT (n 233) 19.
[290] Uniform Commercial Code 1952 (US) § 7-505.

complements the warehouse operator's rights and obligations and emphasises the warehouse operator's liability regarding the stored goods, which will be discussed in the following section.[291]

This subsection discussed the provisions of the UNIDROIT MLWR regarding third-party effectiveness and how these provisions can be incorporated into a Uniform Act on Warehouse Receipts for OHADA. It was also established how a new Uniform Act on Warehouse Receipts can address the border background of OHADA member states. The following subsection will discuss the provisions of the UNIDROIT MLWR regarding the main rights and obligations of warehouse operators and how such provisions of the UNIDROIT MLWR can be incorporated into a new Uniform Act on Warehouse Receipts for OHADA.

5.3.2.7. Rights and Obligations of the Warehouse Operator

The warehouse operator is one of the main parties in the warehouse receipt relationship. The warehouse operator issues the warehouse receipt and executes other essential functions, such as storing goods and delivering the stored goods. The function of the warehouse operator is associated with specific important duties and obligations, which are discussed in this subsection. This subsection assesses how the provisions of the UNIDROIT MLWR regarding the rights and obligations of the warehouse operator can be adopted in a new Uniform Act on Warehouse Receipts for OHADA. This subsection also assesses how the provisions of the UNIDROIT MLWR can be complemented with legal transplants to address the historical, socio-economic and legal background of OHADA member states.

5.3.2.7.1. Obligations of the Warehouse Operator

The purpose of establishing obligations of the warehouse operator in the warehouse receipt law is to increase trust in the warehouse receipt relationship, facilitate the use of warehouse receipts and increase the value of warehouse receipts.[292] The UNIDROIT MLWR outlines the principal rights and obligations of the warehouse operator that may affect the value of warehouse receipts.[293] The warehouse operator remains obliged under the duties provided in Chapter IV of the UNIDROIT MLWR, even when the warehouse receipt does not contain all the necessary information and requirements.[294] This guarantees the safety of the stored goods and the persistence of their value. The possibility of adopting such provisions of the UNIDROIT MLWR in a Uniform Act on Warehouse Receipts are assessed in this subsection.

Article 23 of the UNIDROIT MLWR sets out the duty of the warehouse operator to store

[291] see s 5.3.2.7.
[292] UNIDROIT (n 64) 158.
[293] ibid.
[294] ibid 159.

the goods with the reasonable care of a professional and competent warehouse operator in a relevant sector of commerce.[295] This article reflects the concept of the 'level of diligence expected of a professional operator in the relevant sector.'[296] Influenced by Roman law, civil law countries impose such a duty of care on every service provider.[297] For example, under the French Commercial Code, the warehouse operator is bonded by the duty of care and conservation for the stored goods.[298] In common law, it is a commercial practice for service providers to be bound by the duty of care.[299] In the US Uniform Commercial Code, the warehouse operator must execute the degree of care that a reasonable, careful person would execute regarding the stored goods.[300] The UNIDROIT MLWR, however, respects freedom of contract and enables the warehouse operator and contracting parties to limit or extend their liabilities by storage agreements and the terms of the warehouse receipt.[301] However, the warehouse operator's liability cannot be limited in cases of fraud, negligence, misconduct and misappropriation of the goods.[302] This article should be adopted in a new Uniform Act on Warehouse Receipts for OHADA as it reflects standard commercial practices of countries with robust legislation on warehouse receipts.

Article 24 of the UNIDROIT MLWR requires the warehouse operator to store goods separately, allowing for easy identification based on the information on the warehouse receipt.[303] This rule reflects the standard practice in many jurisdictions where the warehouse operator should store non-fungible goods[304] separately from other goods.[305] Under the US Uniform Commercial Code, the warehouse operator must keep non-fungible goods separately for each warehouse receipt.[306] Conversely, under the French Commercial Code, only fungible goods can be replaced by goods of the same nature and quantity.[307] Article 24 of the UNIDROIT MLWR also grants the warehouse operator the right to mingle stored goods of the same quality and type if permitted by the terms of the warehouse receipt and storage agreement.[308] The US Uniform Commercial Code takes a similar approach, stating that

[295] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 23.
[296] UNIDROIT, 'Preliminary Drafting Suggestions for Chapter IV - Rights and Obligations of the Warehouse Operator' (Study LXXXIII – W.G.5 – Doc. 3, Rome November 2022) 2.
[297] UNIDROIT (n 11) s 157.
[298] Commercial Code 1807 (France) art L522-15.
[299] UNIDROIT (n 11) s 157.
[300] Uniform Commercial Code 1952 (US) § 7-204 (a).
[301] UNIDROIT (n 64) s 162.
[302] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 23 s 2.
[303] ibid art 24 s 1.
[304] see s 4.2.1.
[305] UNIDROIT (n 296) 4.
[306] Uniform Commercial Code 1952 (US) § 7-207(a).
[307] Commercial Code 1807 (France) art L522-37-3.
[308] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 24 s 2.

fungible goods can be mingled while stored in the warehouse.[309] A similar possibility to mingle together fungible goods exists in the French Commercial Code.[310] The classification of property into fungible and non-fungible goods is quite familiar for civil law countries, including OHADA member states.[311] Therefore, this article can be adopted in a new Uniform Act on Warehouse Receipts as it addresses the business practices, socio-economic and historical backgrounds of OHADA member states.

Article 26 of the UNIDROIT MLWR imposes a duty to deliver stored goods to the holder of the warehouse receipt, who satisfies three conditions: the holder must claim the delivery of goods, return the warehouse receipt to the warehouse operator and pay all the outstanding fees to the warehouse operator.[312] Once the stored goods are delivered, the warehouse operator must cancel the warehouse receipt.[313] The UNIDROIT MLWR does not specify what constitutes the cancellation, but the standard business practice provides that a warehouse receipt is either physically destroyed (or made inoperable in terms of an electronic warehouse receipt) or the word 'cancelled' can be stated on the warehouse receipt.[314] The duty of the warehouse operator to deliver stored goods upon a request from the holder of the warehouse receipt is one of the core conditions of the storage agreement and the terms of a warehouse receipt and exists in almost all jurisdictions.[315] For example, under the US Uniform Commercial Code, the warehouse operator must deliver the stored goods to the rightful holder of the warehouse receipt.[316]

The UNIDROIT MLWR establishes a duty of the warehouse operator to partially deliver the stored goods upon a request from the holder of the warehouse receipt, provided the holder meets the same three conditions for the delivery in Article 26 of the UNIDROIT MLWR.[317] The warehouse operator is required to label the warehouse receipt for the partial delivery and return it to the holder.[318] A similar commercial practice can be used to identify a partial delivery under the warehouse receipt, where the words 'partially delivered' and the amount of goods delivered can be stated on the warehouse receipt. Article 28 of the UNIDROIT MLWR imposes a duty to split a warehouse receipt into multiple warehouse receipts for the total value of the stored goods.[319] The holder of the warehouse receipt who wishes to split it must request the

[309] Uniform Commercial Code 1952 (US) §7-207.
[310] Commercial Code 1807 (France) art L522-37-3.
[311] see s 4.2.1.
[312] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 26 s 1.
[313] ibid art 26 s 2.
[314] UNIDROIT (n 64) s 175.
[315] UNIDROIT (n 296) 5.
[316] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) § 7-403.
[317] ibid art 27 s 1.
[318] ibid art 27 s 2.
[319] ibid art 28.

split, return the initial warehouse receipt to the warehouse operator and pay the fees associated with the issuance of the new split warehouse receipts.[320] These articles can be adopted in a new Uniform Act on Warehouse Receipts as it establishes the essential duty of the warehouse operator and reflects the existing business practices of many countries.

This subsection discussed the provisions of the UNIDROIT MLWR regarding the main duties of the warehouse operator and how these provisions can be adopted in a Uniform Act on Warehouse Receipts. The following subsection will discuss the provisions of the UNIDROIT MLWR concerning the essential rights of the warehouse operator and how they can be addressed in a new Uniform Act on Warehouse Receipts for OHADA.

5.3.2.7.2. Rights of the Warehouse Operator

The nature of the warehouse receipt agreement prevents the parties of the agreement from performing their obligations simultaneously.[321] As a result, the depositor pays only part of the storage fees when the goods are stored.[322] Another part of the storage fees can be paid in instalments or when the warehouse operator delivers the stored goods. This poses a risk for the warehouse operator of nonpayment of the expenses associated with the storage of goods.[323] Article 25 of the UNIDROIT MLWR provides the warehouse operator with the right of lien on the goods associated with the storage fees, unexpected charges, preservation of the stored goods, sale of the stored goods, or similar charges under the storage agreement if such conditions are included in the warehouse receipt.[324] The lien of the warehouse operator is effective even if the stored goods are no longer in the warehouse operator's possession.[325] The lien of the warehouse operator is effective against third parties, including the protected holder of the warehouse receipt.[326] As the protected holder of the warehouse receipt has special protection under the UNIDROIT MLWR,[327] there are special conditions for the warehouse operator's lien to be effective against the protected holder. Such charges should be stated in the warehouse receipt, or if there are no special provisions on the warehouse receipt regarding such charges, only reasonable charges after the issuance of the warehouse receipt can be imposed by the warehouse operator for the lien.[328] The nature of the warehouse operator lien is left to be regulated by the domestic legal norms in secured transactions in

[320] ibid.
[321] UNIDROIT (n 11) s 104.
[322] ibid.
[323] ibid.
[324] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 25 s 1.
[325] UNIDROIT (n 64) s 167.
[326] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 25 ss 2, 3.
[327] see s 5.3.2.4.2.
[328] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 29 s 3.

enacting states.[329]

Similarly, under the US Uniform Commercial Code, the warehouse operator has a right of lien against the storage goods.[330] Special provisions under the US Commercial Code explain the details of the enforcement procedure.[331] Similar provisions regarding the lien of the warehouse operator exist in the civil law countries following the French civil law route.[332] However, the provisions regarding the scope and the enforcement of such liens vary greatly among civil law countries.[333] The OHADA Uniform Act Organising Securities contains special provisions regarding general and special liens.[334] Article 182 of the OHADA Uniform Act Organising Securities states that creditors who hold a lien have a right of preference over the assets in their possession or if the asset is insured and destroyed to the insurance premium.[335] This provision of the OHADA Uniform Act Organising Securities is similar to Article 16 of the UNCITRAL Model Law on Secured Transactions.[336] Article 57 of the OHADA Uniform Act Organising Securities provides the priority rule, which is based on the time and date of the registration of the security interest.[337] Similar priority rules exist in the UNCITRAL Model Law on Secured Transactions.[338] The OHADA secured transactions laws are identical to the provisions of the UNCITRAL Model Law on Secured Transactions, which was taken into consideration while drafting the UNIDROIT MLWR. Therefore, Article 25 of the UNIDROIT MLWR can be adopted in a new Uniform Act on Warehouse Receipts for OHADA as it reflects existing business practices in OHADA member states and fits into the legal, socio-economic and historical background.

Article 29 of the UNIDROIT MLWR grants the warehouse operator the right to refuse the delivery of goods in certain situations. This includes cases when the stored goods are destroyed or lost, and the warehouse operator is not liable for such loss or destruction; where the warehouse operator sold the stored goods, which were subject to a lien; if the stored goods are claimed to belong to another person; or where the court prohibited the delivery of the stored goods.[339] If the warehouse operator refuses to deliver the goods under Article 29 of the UNIDROIT MLWR, there must be evidence to support the circumstances that relieved the warehouse operator from the duty to deliver.[340] Similarly, the US Uniform Commercial Code

[329] UNIDROIT (n 64) s 171.
[330] Uniform Commercial Code 1952 (US) § 7-209.
[331] ibid § 7-210.
[332] see ss 4.1., 4.3.
[333] UNIDROIT (n 296) 4.
[334] Uniform Act Organising Securities (adopted 15 December 2010) ch 6 ss 1, 2.
[335] ibid art 182.
[336] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 16.
[337] Uniform Act Organising Securities (adopted 15 December 2010) art 57.
[338] UNCITRAL 'Model Law on Secured Transactions' (adopted 1 July 2016) art 29.
[339] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 29.
[340] UNIDROIT (n 64) s 183.

outlines the circumstances where the warehouse operator is excused from the duty to deliver the stored goods.[341] These provisions excuse the warehouse operator from the delivery obligation for reasons beyond the warehouse operator's control. This article can be adopted by OHADA in a new Uniform Act on Warehouse Receipts as it represents one of the essential rights of the warehouse operator.

Article 30 of the UNIDROIT MLWR grants the warehouse operator the right to terminate the storage for non-removal of the stored goods after the end of the storage period, expiry of the storage period, or when the goods became hazardous by their nature.[342] This article addresses existing commercial practices when storage agreements have either a fixed duration of storage or an open-ended period.[343] To terminate the storage, the warehouse operator must notify all the individuals with an interest in the stored goods, or if the warehouse operator does not have such knowledge, public advertisement is required.[344] The UNIDROIT MLWR does not specify the time for removal of the goods, leaving it at the discretion of domestic legislation of enacting states and their warehouse receipt business and commercial practices. The reason is that the business practice enables the warehouse operator to organise the delivery of stored goods on short notice.[345] However, for the depositor of the goods, it may be problematic to organise its business activities to accept the delivery of goods on short notice.[346] Therefore the notice period given by the warehouse operator to a depositor to accept and arrange the delivery of goods after the storage termination should reflect the common existing business practice in the country. Domestic legal norms generally enable the depositor or holder of the warehouse receipt to organise the delivery of the stored goods at any convenient time within the notice period.[347] In the US, for example, there is a detailed rule regarding the notice period, which is 30 days, but it can be shortened.[348] Therefore, there is a need to further identify business specificities in OHADA member states to determine, which notice period would address existing business practices in OHADA countries. This can help to further tailor Article 30 of the UNIDROIT MLWR to the legal, historical and socio-economic background of OHADA member states.

This subsection discussed the provisions of the UNIDROIT MLWR regarding the essential rights and obligations of the warehouse operator and how these provisions can be adopted in a new Uniform Act on Warehouse Receipts. The following subsection will discuss

[341] Uniform Commercial Code 1952 (US) § 7-403.
[342] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 30.
[343] UNIDROIT (n 64) s 185.
[344] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 30.
[345] UNIDROIT (n 30) s 68.
[346] ibid.
[347] ibid s 70.
[348] Uniform Commercial Code 1952 (US) § 7-206.

provisions regarding electronic warehouse receipts and how these provisions can be incorporated into a Uniform Act on Warehouse Receipts for OHADA.

5.3.2.8. Electronic Warehouse Receipts

Article 6 bis of the UNIDROIT MLWR includes provisions and requirements for issuing electronic warehouse receipts.[349] In the case of electronic warehouse receipts, there should be an explanation of the notion of control of an electronic warehouse receipt in the OHADA Uniform Acts. This PhD research focuses on the development of paper-based warehouse receipt systems in OHADA member states.[350] A new Uniform Act on Warehouse Receipts establishes the basis for the future implementation of electronic warehouse receipt systems.[351] The provisions regarding control can be included in a new Uniform Act on Warehouse Receipts, as they develop a basis for the implementation of an electronic warehouse receipt system. The concept of control already exists in the OHADA Uniform Act on General Commercial Law regarding electronic signatures, where a person must be in exclusive control.[352] However, there is no definition of control in the OHADA Uniform Acts. Therefore, it is recommended that provisions regarding the notion of control be included in Book Five of the OHADA Uniform Act on General Commercial Law.[353]

Article 15 bis of the UNIDROIT MLWR establishes reliability standards for electronic warehouse receipts.[354] There are seven general conditions to assess the reliability of the method of managing electronic warehouse receipts.[355] However, countries may modify these conditions, or alternative methods of assessment can be used.[356] Chapter 6 of the UNIDROIT MLWR contains provisions related to electronic warehouse receipts, including the legal effect of an electronic warehouse receipt, an explanation of the notion of control over an electronic warehouse receipt, provisions regarding signing and endorsement of an electronic warehouse receipt, reliability of electronic warehouse receipts and amendments of an electronic warehouse receipts.[357]

The UNIDROIT MLWR is drafted using a neutral approach and leaves certain provisions regarding electronic warehouse receipts for domestic regulation. For example, the method of

[349] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 6 bis.
[350] see s 1.2.2.
[351] ibid.
[352] Uniform Act on General Commercial Law (adopted 15 December 2010) book 5 ch 1 art 83.
[353] ibid book 5.
[354] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 15 bis.
[355] UNIDROIT (n 64) s 135.
[356] ibid.
[357] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) ch 6.

control over the electronic warehouse receipt is not explicitly defined in the UNIDROIT MLWR.[358] The reason for that is if the law provides specific requirements for control, including particular technology, considering the pace of technological development, such provisions can become outdated quickly.[359] The detailed notion of control cannot suit the background of both common and civil law countries.[360] The US Uniform Commercial Code provides specific rules regarding control over the electronic documents of title, including electronic warehouse receipts.[361] The notion of control over the electronic document of title under the US Uniform Commercial Code is derived from the concept of control over investment securities.[362] It is established that a person has control over an electronic warehouse receipt if the system of transfer of interests in the electronic warehouse receipt identifies the person to whom such electronic warehouse receipt was issued or transferred.[363] The system is considered reliable, and the person is deemed to have control if only one single copy of the document exists and such a copy is unique, identifiable and unalterable.[364] In comparison, civil law countries have different notions of control. For example, in France, a member of the European Union, a completely different notion of control is enacted. A person is considered to have control if the debtor loses the right to dispose of the collateral.[365] The European Court of Justice ruling also supported the negative notion of control in the European Union countries, which are civil law countries.[366]

To harmonise the law on digital assets, the UNIDROIT working group drafted and adopted the UNIDROIT Principles on Digital Assets and Private Law, which provides a uniform definition of control.[367] According to the UNIDROIT Principles on Digital Assets and Private Law, a person has control over a digital asset if the person can prevent others from benefiting from it, can derive benefits associated with the digital asset, and has an exclusive ability to transfer these rights to another person.[368] The UNIDROIT Principles on Digital Assets and Private Law are drafted in a technology-neutral way and, as a result, are future-proof for the new emerging technologies.[369] The provisions of the UNIDROIT Principles on Digital Assets and Private Law are also aligned with the UNIDROIT MLWR. OHADA can adopt provisions

[358] UNIDROIT, 'Issues Paper' (Study LXXXII – W.G.3 – Doc. 2 Rome August 2021) s 57.
[359] UNIDROIT, 'Summary Report of the Second Session' (Study LXXXIII – W.G.2 – Doc. 4, Rome April 2021) s 88.
[360] ibid s 84.
[361] Uniform Commercial Code 1952 (US) § 7-106.
[362] ibid § 8-106.
[363] ibid § 7-106 (a).
[364] ibid § 7-106 (b).
[365] UNIDROIT (n 11) s 63, Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002 L 168, p. 43) (the European Union).
[366] *Private Equity Insurance Group SIA v Swedbank AS* [2016] EUECJ C-156/15 (10 November 2016) (the European Union).
[367] UNIDROIT, 'Principles on Digital Assets and Private Law' (Rome April 2023) principle 6.
[368] ibid.
[369] UNIDROIT, 'Issues Paper' (Study LXXXII – W.G.1 – Doc. 2 Rome November 2020) s 12.

regarding control from the UNIDROIT Principles on Digital Assets and Private Law and incorporate them into a new Uniform Act on Warehouse Receipts, adopt the UNIDROIT Principles on Digital Assets and Private Law and develop a new Uniform Act based on it, or adopted the notion of control similar to the European Union approach as it can suit its civil law background. To identify which option can suit the needs, broader background of OHADA member states (legal, cultural, socio-economic), further research is required.

The previous section discussed the provisions of the UNIDROIT MLWR and how these provisions can be incorporated into the existing OHADA Uniform Acts and a new Uniform Act on Warehouse Receipts. It was established how the provisions of the UNIDROIT MLWR can be tailored to accommodate the existing business practices and legal, historical and socio-economic backgrounds of OHADA member states. The following section will discuss the potential challenges of the UNIDROIT MLWR for OHADA.

5.4. Challenges of the UNIDROIT Model Law on Warehouse Receipts for OHADA

One of the main challenges of the UNIDROIT MLWR for OHADA is that it is designed to be adopted by any country regardless of their legal background, which made drafters of the model law adopt legally neutral terminology and concepts. Therefore, specific provisions of the UNIDROIT MLWR do not reflect the needs of civil law countries, including OHADA member states. Furthermore, the UNIDROIT MLWR does not address the broader background of OHADA member states (historical, socio-economic, cultural). Some concepts in the UNIDROIT MLWR are expressed in jurisdiction-neutral terms.[370] For example, in civil law jurisdictions, the notion of 'good faith' is not a mandatory requirement in commercial contracts.[371] Instead, legislation provides the notion of the absence of bad faith, which grants absolute protection for holders of the documents of title.[372] Therefore, certain provisions of the UNIDROIT MLWR should be explained in more detail in a new Uniform Act on Warehouse Receipts so that they do not create legal confusion, uncertainty and misinterpretation among legal practitioners and stakeholders in OHADA member states. This ensures that the provisions of the UNIDROIT MLWR fit into the current socio-economic context of OHADA member states.

The UNIDROIT MLWR is drafted in a harmonised manner, taking into consideration terminology in existing international instruments, such as the United Nations Conventions on International Bill of Exchange and International Promissory Notes,[373] the United Nations

[370] UNIDROIT (n 358) s 63.
[371] ibid.
[372] ibid.
[373] United Nations Convention on International Bills of Exchange and International Promissory Notes (09 December 1988, not in force).

Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,[374] the United Nations Convention on the Liability of Operators of Transport Terminal in International Trade.[375] However, these conventions are not yet in force, and OHADA countries may never be signatories to these conventions. OHADA enacted the Uniform Act on Contract of Carriage of Goods by Road,[376] which establishes definitions of a contract for the carriage of goods, carrier, written document, and notice, provisions regarding the formation of the contract of a contract of carriage of goods, performance of a contract of carriage of goods, and liability of the carrier. The OHADA Uniform Act on General Commercial Law also contains certain provisions regarding commercial sales contracts.[377] Provisions of the conventions mentioned earlier may contradict the existing OHADA Uniform Acts. Therefore, further analysis is required to understand how these particular provisions can fit into the current legal framework of OHADA and the existing business practices in OHADA member states.

Another potential challenge for OHADA is that the concept of a warehouse receipt as a document of title connects with the concept of negotiability. Documents of title, such as warehouse receipts, represent and transfer rights over the stored goods.[378] The transfer of such documents requires a simple transfer.[379] However, it raises an issue of protection as it is impossible to track the chain of transactions of a particular document of title - a warehouse receipt.[380] To address this issue, the US Uniform Commercial Code protects good faith purchasers and creditors who obtain warehouse receipts in the ordinary course of their business.[381] However, civil law countries, including OHADA member states, may not be quite familiar with this concept.[382]

Generally, warehouse receipts can be transferred by assignment, negotiation, and due negotiation.[383] Different methods of transfer grant different rights to transferees of warehouse receipts.[384] Due negotiation introduces a high degree of protection to a transferee of a warehouse receipt from pre-existing claims of third parties.[385] The US Uniform Commercial Code outlines the requirements for the due negotiation of warehouse receipts[386] and specifies

[374] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not in force).
[375] United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (19 April 1991, not in force).
[376] Uniform Act on Contracts for the Carriage of Goods by Road (adopted 22 March 2003).
[377] Uniform Act on General Commercial Law (adopted 15 December 2010) book 8.
[378] UNIDROIT (n 369) s 68.
[379] ibid.
[380] ibid.
[381] Uniform Commercial Code 1952 (US) § 7-501.
[382] UNIDROIT, 'Summary Report of the First Session' (Study LXXXIII – W.G.1 – Doc. 5, Rome February 2021) s 31, UNIDROIT (n 366) s 70.
[383] UNIDROIT (n 369) s 71.
[384] ibid.
[385] ibid.
[386] Uniform Commercial Code 1952 (US) § 7-501.

which pre-existing interests of third parties can be overreached by due negotiation.[387] This concept offers greater protection to a transferee of a warehouse receipt and acts as an 'insurance' for a transferee, which increases trust in the warehouse receipt relationship.

Civil law countries are more familiar with the concept of transferability of the document of title, which was established in the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes.[388] According to this concept, the possessor of the document of title is legally recognised as the holder of the document of title if it has been transferred through an uninterrupted chain of transactions.[389] Similar provisions exist in the French civil law. Under the French Commercial Code, the endorsement of the warehouse receipt transfers to the holder of the warehouse receipt the right to dispose of the goods.[390]

Civil law countries offer similar protection to a transferee of the warehouse receipt. However, instead of operating with the concept of negotiability, civil law jurisdictions introduce specific principles that apply to negotiable documents, such as principles of literality and abstraction.[391] Therefore, the main difference is that in common law countries, the degree of protection depends on the type of holder: mere holder, holder for value, and holder in due course.[392] Whereas, civil law countries do not differentiate among different classes of holders and recognise any holder who obtains a negotiable document via the chain of uninterrupted endorsements.[393]

The UNIDROIT MLWR introduces the concept of a protected holder of the warehouse receipt.[394] The notion of a protected holder of a warehouse receipt in the UNIDROIT MLWR is closely linked to the concepts of due negotiation and was inspired by the US Uniform Commercial Code concept of negotiation of documents of title.[395] The concept of negotiability relating to documents of title and due negotiation was initially developed in the US. Countries familiar with the concept of due negotiability tend to follow the US approach in developing warehouse receipt legislation. Introducing the US concept of due negotiability in connection with the document of title may create legal confusion or misinterpretation in civil law countries, including OHADA member states.

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[387] ibid §§ 7-502, 7-503.
[388] Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (adopted 7 June 1930, entered into force 1 January 1934).
[389] ibid art 16.
[390] Commercial Code 1807 (France) art L522-28.
[391] UNIDROIT (n 369) s 76.
[392] Daniel Annoff, 'Negotiable Instruments (Cheques & Bills of Exchange)' (*Max Planck Encyclopedia of European Private Law,* 2012) <https://max-eup2012.mpipriv.de/index.php/Negotiable_Instruments_(Cheques_%26_Bills_of_Exchange)> accessed 01 April 2024.
[393] ibid.
[394] UNGA 'Draft Model on Warehouse Receipts' UNCITRAL session Session UN Doc A/CN.9/WG.I/WP.134 (20 November 2023) art 2, 17.
[395] Uniform Commercial Code 1952 (US) § 7-501.

Therefore, it is recommended that a different concept of transferability for OHADA be introduced or the concept of due negotiability of the document of title should be explained in detail in a Uniform Act on Warehouse Receipts. For example, it may be worth complementing the provisions regarding the protected holder by explaining that a protected holder is a transferee who obtained a warehouse receipt through the chain of uninterrupted endorsements. This reflects the existing civil law countries' concept of transferability and ensure that a Uniform Act on Warehouse Receipts addresses the existing business practices in OHADA member states. If OHADA decides to follow the route of stricter adherence to the UNIDROIT MLWR - a unified approach, it is essential to explain the concept of due negotiation in connection to documents of title in a new Uniform Act on Warehouse Receipts.

The main aim of the UNIDROIT MLWR is to establish regulations regarding a warehouse receipt as an instrument of finance. Therefore, the contractual rights and obligations of parties in the warehouse receipt relationship are covered only if necessary, and they are not a primary focus of the UNIDROIT MLWR.[396] However, since the UNIDROIT MLWR particularly targets countries with undeveloped warehouse receipt legislation or no legislation at all, and most OHADA countries belong to these groups,[397] it would be advisable for OHADA to incorporate detailed rights and obligations of each party in the warehouse receipt relationship into a Uniform Act on Warehouse Receipts.[398]

The UNIDROIT MLWR adopted an approach where it remains silent regarding the warehouse liability for the breach of its obligations and leaves it to the general rules for liability of adopting states.[399] Different approaches exist in common and civil law countries. Under the US Uniform Commercial Code, there is no strict liability for warehouse operators, and warehouse operators are only liable for the losses or damages of the stored goods if they occur because of the negligence of the warehouse operator.[400] Influenced by the Roman law of liability for the possession of another person's goods,[401] there is a strict liability regime in civil law countries for warehouse operators in case of damage or loss of the stored goods.[402]

The limitation of the liability of the warehouse operator is generally governed by domestic contract legislation and rooted in the principle of the freedom of the contract.[403] The ability of the warehouse operator to limit its liability to a certain extent is an essential part of the warehouse receipt legal framework. It balances the risks associated with the storage of goods

[396] UNIDROIT (n 382) s 25.
[397] see ss 1.1., 1.2.1.
[398] ibid s 22.
[399] UNIDROIT (n 106) s 173.
[400] Uniform Commercial Code 1952 (US) § 7-204.
[401] see s 4.1.2.
[402] Commercial Code 1807 (France) art L522-19, L 522-15.
[403] UNIDROIT (n 106) s 181.

for the warehouse operator and the risks associated with the warehouse operator's liability to store the goods for the depositors.[404] Under the US Uniform Commercial Code, the warehouse operator can limit or exclude their liability for the loss or damage of the goods by incorporating such provisions in the storage agreements.[405] In civil law countries, for example, in France, the liability of the warehouse operator for the damage or loss of the stored goods is limited by law.[406] In France, warehouse operators should adhere to the specific regulations,[407] which are provided by the administrative courts with the regulatory power - the Conseil d'Etat.[408] As OHADA member states are from the same legal French background,[409] it can be possible for OHADA to adopt the approach that is taken by the French Commercial Code, where the liability of the warehouse operator is limited by law. This ensures that a new Uniform Act on Warehouse Receipts fits into the historical, socio-economic and legal background of OHADA member states.

The UNIDROIT MLWR also remains silent regarding the obligations of the warehouse operator to maintain its facilities according to certain standards and insurance coverage, leaving it to domestic regulation.[410] In comparison, the French Commercial Code includes norms regarding the obligation of the warehouse operator to insure goods against fire[411] and maintain facilities according to certain standards.[412] There are no direct rules that oblige a warehouse operator to maintain certain standards of their facilities or to insure stored goods in the US Uniform Commercial Code. However, each state in the US imposes obligations regarding the duty of the warehouse operator to maintain their facilities according to certain standards.[413] For OHADA, it may be viable to establish certain provisions regarding the standard of warehouse receipt facilities in a new Uniform Act on Warehouse Receipts, as this allows the creation of one unified approach among its member states, further harmonise law in the field of warehouse receipts, and facilitate cross-country trade.

The provisions of the UNIDROIT MLWR were analysed in this chapter, as well as how such provisions can be tailored to the OHADA legal, socio-economic and historical backgrounds of OHADA member states and adopted in a new Uniform Act on Warehouse Receipts. The final section of this chapter will summarise the analysis of this chapter and provide final recommendations.

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[404] ibid s 183.
[405] Uniform Commercial Code 1952 (US) §7-204.
[406] UNIDROIT (n 106) s 184.
[407] Commercial Code 1807 (France) art L522-17.
[408] UNCITRAL, 'Developing an UNCITRAL instrument on Warehouse Receipts' (Vienna 2020).
[409] see s 4.1.
[410] UNIDROIT (n 358) s 105.
[411] Commercial Code 1807 (France) art L522-16.
[412] ibid art L522-17.
[413] UNIDROIT (n 358) 109.

5.5. Conclusion

The UNIDROIT MLWR is designed neutrally so that any country, regardless of its legal background, can adopt its provisions. The UNIDROIT MLWR offers two options for enacting states to adopt: a single warehouse receipt system or a double warehouse receipt system. Even though civil law countries traditionally have a double warehouse receipt, it may be advisable for OHADA to opt for a single warehouse receipt. The main rationale behind that is that at this stage of the proposed warehouse receipt, the implementation of a too-sophisticated warehouse receipt system may result in the failure to achieve the desired results of legal reform. However, further research is required to assess this assumption and evaluate which option fits into the existing business practices, legal, socio-economic and historical backgrounds of OHADA member states.

The UNIDROIT MLWR is drafted neutrally to establish jurisdiction-neutral terms and concepts. However, certain provisions of the UNIDROIT MLWR need to be explained in more detail so that there are no misunderstandings, misinterpretations or legal confusion among legal practitioners and all the stakeholders in OHADA member states. The possibility of replacing certain terms of the UNIDROIT MLWR with more familiar terminology for the OHADA legal background should be carefully assessed. This assists in tailoring a Uniform Act on Warehouse Receipts to the socio-economic and historical backgrounds of OHADA member states. It should be taken into consideration that alienations from the initial terminology of the UNIDROIT MLWR in a Uniform Act on Warehouse Receipts may result in not achieving the initial goal of the UNIDROIT MLWR, which is the harmonisation of warehouse receipt legislation.

Certain provisions of the UNIDROIT MLWR should be assessed for their compatibility with the existing OHADA Uniform Acts. In particular, the OHADA Uniform Act on General Commercial Law[414] and the OHADA Uniform Act Organising Securities[415] should be assessed. Certain provisions of the UNIDROIT MLWR are designed and drafted in a harmonised manner with the UNCITRAL Legislative Guide on Secured Transactions and require enacting countries to have legal rules regarding secured transactions in place. However, OHADA developed its Uniform Act Organising Securities based on the UNCITRAL Legislative Guide on Secured Transactions.[416] Therefore, OHADA already has preconditions for the implementation of a new Uniform Act on Warehouse Receipts. This guarantees that a Uniform Act on Warehouse Receipts fits into the OHADA legal framework and existing business practices in OHADA member states.

[414] Uniform Act on General Commercial Law (adopted 15 December 2010).
[415] Uniform Act Organising Securities (adopted 15 December 2010).
[416] UNCITRAL 'Legislative Guide on Secured Transactions' (adopted 11 December 2008) A/63/438 (Vienna 2009).

Finally, certain provisions of the UNIDROIT MLWR can be further tailored to the OHADA legal background. As OHADA member states share the same legal background and legal family (French civil law background), it is recommended that certain provisions from the French Civil Code and the French Commercial Code be adopted. A legal transplant from the French legislation can enable OHADA to further tailor the UNIDROIT MLWR to its legal needs and framework and existing business practices and socio-economic of OHADA member states, which is based on robust and well-developed French warehouse receipt legislation.

The legal transplant from France does not contradict the existing OHADA Uniform Acts. Furthermore, a legal transplant from the US Uniform Commercial Code can also assist in tailoring the UNIDROIT MLWR and developing a new Uniform Act on Warehouse Receipts. The US Uniform Commercial Code is based on well-established business and commercial practices in the field of warehouse receipts. The adoption of such provisions allows OHADA to introduce well-established and tested real-world provisions regarding warehouse receipt financing in a new Uniform Act on Warehouse Receipts. Overall, this helps to propose a well-designed Uniform Act on Warehouse Receipts, which will be positively accepted by the stakeholders and will be understandable for legal practitioners in OHADA member states.

Chapter 6

6. Conclusion and Final Recommendations

This chapter summarises all the previous research chapters and provides final recommendations for OHADA regarding the adoption of a Uniform Act on Warehouse Receipts. For better representation, this chapter includes the following sections: summary of the research, limitations of the research, recommendations for future research in the area of warehouse receipts, contribution to the knowledge in the field of warehouse receipts, and the benefits of implementing a Uniform Act on Warehouse Receipts for OHADA.

6.1. Summary of the Research

This section provides an overall summary of the research conducted and answers to the research questions of this PhD project: how OHADA can adopt the UNIDROIT MLWR, how the UNIDROIT MLWR can fit in the current legal framework of OHADA, how provisions of the UNIDROIT MLWR can be adopted by OHADA, and how OHADA can conduct warehouse receipt legal reform.

6.1.1. How the UNIDROIT Model Law Can Be Adopted by OHADA

OHADA develops Uniform Acts, which are hard law norms in nature. Each OHADA member state is required to adopt them.[1] The Uniform Acts prevail over the domestic legislation of OHADA member states even if they contradict them.[2] OHADA has successfully utilised the benefits of hard law instruments, creating a comprehensive legal framework for businesses in its member states.[3] This had a positive impact on businesses and investments in its member states.[4] Through the unification of business law, OHADA created a single legal framework, which increased legal certainty in its member states and facilitated their economic development.[5] This unified framework attracted foreign investments and contributed to the development of modern, simple business rules – the OHADA Uniform Acts.[6]

The UNIDROIT MLWR is a soft law instrument that countries can adopt and tailor to their needs. It is drafted neutrally to address the differences between different legal traditions.[7] However, specific provisions of the UNIDROIT MLWR may be unfamiliar to countries with certain legal traditions. For example, the UNIDROIT MLWR was based on the concept of due

[1] see s 3.3.2.
[2] ibid.
[3] see ss 1.1.3., 3.1.2.
[4] ibid.
[5] see ss 1.1., 3.1.
[6] ibid.
[7] see s 5.4.

negotiability of the document of title regarding warehouse receipts.[8] However, countries from different legal backgrounds, including OHADA member states, may not be familiar with the concept of due negotiability, which was initially designed and adopted in the US legislation.[9] This lack of familiarity may lead to different interpretations of the terms of the UNIDROIT MLWR and affect the harmonisation of warehouse receipt law.[10] Therefore, the UNIDROIT MLWR needs to be adapted to suit the needs of OHADA member states.[11]

OHADA has successful experience in incorporating international soft laws into regional hard law instruments. For example, the OHADA Uniform Act Organising Securities, a hard law norm, was based on the UNCITRAL Legislative Guide on Secured Transactions, a soft law norm.[12] This demonstrates the ability of OHADA to carry out legal reforms and adapt international soft law instruments to regional hard law instruments. Considering the above-mentioned positive example, when soft laws can be a foundation for developing hard laws, the UNIDROIT MLWR can serve as a basis for the development of a new Uniform Act on Warehouse Receipts for OHADA. Furthermore, the working methods and legal framework of OHADA are less likely to be affected by corruption and political sway issues.[13] This indicates that it is more beneficial for OHADA member states if OHADA conducts warehouse receipt legal reform rather than individual states conducting it solely.

It was established in this PhD project and summarised in this subsection that the adoption of the UNIDROIT MLWR can be a basis for the development of a Uniform Act on Warehouse Receipts. However, the UNIDROIT MLWR was drafted to be adaptable to any country's legal background. Therefore, some of the provisions of the UNIDROIT MLWR can potentially be further tailored to the legal background of OHADA and its member states. The following subsection will summarise how the UNIDROIT MLWR could be tailored to the legal background of OHADA.

6.1.2. How Can the UNIDROIT Model Law Fit in the OHADA Legal Framework

OHADA member states share the same civil law background, which can be traced back to Roman law.[14] Roman law heavily influenced the development of civil law legislation in many countries, including France.[15] During the colonial period, French civil law tradition was transplanted into African countries, including OHADA member states.[16] Modern French legislation, including the Civil Code and the Commercial Code, to some extent, has a similar

[8] see s 5.3.2.4.
[9] see s 5.4.
[10] ibid.
[11] see ch 5.
[12] see s 2.2.2.3.
[13] see ch 3.
[14] see s 4.1.
[15] ibid.
[16] see ss 4.1., 2.3.3.2.

classification of personal property to Roman law.[17] As OHADA follows French civil law, a similar classification can be found in the OHADA Uniform Acts.[18] The notions of acquiring ownership and possessions in French civil law preserve a certain degree of similarity with Roman law.[19] Since OHADA follows the French civil law tradition, a similar classification can be found in the OHADA Uniform Acts and Civil Codes of its member states.[20] The concepts of real securities and contracts and obligations, which closely relate to warehouse receipt financing in French civil law tradition, also maintain a certain degree of similarity with Roman law. The analysis of OHADA member states legislation regarding real securities, contracts, and obligations indicates the tendency to follow French civil law tradition. The connection of the OHADA Uniform Acts with French civil law tradition indicates the possibility of adopting legal transplants from the French Commercial Code to complete the provisions of the UNIDROIT MLWR. However, this raises questions regarding the legal evolution and path dependency of the OHADA Uniform Acts.

The legal evolutionary theory suggests that the potential benefits of warehouse receipt financing can lead to warehouse receipt law reform in OHADA member states. However, the legal evolutionary theory cannot identify a particular form of law reform. The path dependency analysis indicates that once legal institutions and systems are established, they are unlikely to change.[21] Instead, the legal system and legislation are likely to follow the chosen path. OHADA, at the initial stage of its development, decided to follow the French legal tradition, which was installed via colonial legal transplant in OHADA member states.[22] Following the path dependency route enabled OHADA to quickly develop an efficient legal framework, which is considered successful by multiple intergovernmental organisations and legal practitioners.[23] It is highly unlikely that OHADA will deviate from the chosen path. Therefore, a proposed warehouse receipt law reform is likely to result in the development of a new Uniform Act on Warehouse Receipts.

The previous subsection summarised that the UNIDROIT MLWR could be a basis for the development of warehouse receipt law reform in OHADA.[24] The research indicates that the provisions of the UNIDROIT MLWR can be complemented by legal transplant. In particular, the French Commercial Code may be the basis for the legal transplant. Therefore, it is recommended that OHADA adopt the UNIDROIT MLWR, tailor it with the help of legal transplants and develop a Uniform Act on Warehouse Receipts. The following subsection will

[17] see s 4.2.1.
[18] ibid.
[19] see ss 4.2.2., 4.2.3.
[20] ibid.
[21] ibid.
[22] see ss 3.1., 3.5.
[23] see s 4.3.2.
[24] see s 6.1.

summarise what and how the provisions of the UNIDROIT MLWR can be adopted in a Uniform Act on Warehouse Receipts.

6.1.3. What Provisions of the UNIDROIT Model Law Can Be Adopted by OHADA

The UNIDROIT MLWR is designed to be adopted by any country regardless of its legal background or the stage of development of its warehouse receipt domestic legislation.[25] The UNIDROIT MLWR offers two options for countries to adopt: single or double warehouse receipt systems.[26] Therefore, it is essential to tailor the provisions of the UNIDROIT MLWR for OHADA. This research proposes a warehouse law reform regarding paper-based warehouse receipts. The development and implementation of the electronic warehouse receipt are only discussed generally when such provisions relate to the regulation of paper-based warehouse receipts. An in-depth discussion of the regulation of electronic warehouse receipts is beyond the scope of this research.[27] The implementation of a single warehouse receipt system can be beneficial for OHADA member states as it can quickly facilitate the development of warehouse receipt financing.[28] However, the double warehouse receipt system is historically more common in civil law countries, including the French civil law tradition. In practice, in many civil law countries with double warehouse receipt systems, both parts of the warehouse receipt are circulated together, which undermines all the benefits of the double warehouse receipt system.[29] Although the implementation of the single warehouse receipt system contains several benefits, further research is required to identify which type of warehouse receipt system (single or double) can benefit OHADA member states and can be positively accepted by them.

The provisions of the UNIDROIT MLWR regarding issuance, content and alteration of a warehouse receipt aim to facilitate the use of warehouse receipts. These provisions also establish the difference between a warehouse receipt as a document of title and a mere storage agreement or goods received notes.[30] The provisions of the UNIDROIT MLWR regarding issuance, content, and alteration can be included in a new Uniform Act on Warehouse Receipts, with some alterations and amendments drawn from legal practices in the US and France.[31] Incorporating legal transplants from the US Uniform Commercial Code allows a Uniform Act on Warehouse Receipts for OHADA to address the best practice approaches. Legal transplants from the French Commercial Code allow a new Uniform Act on Warehouse Receipts to be tailored to the legal background and tradition of OHADA member

[25] see s 5.1.
[26] see s 5.2.
[27] see s 1.2.
[28] see s 5.3.1.
[29] ibid.
[30] see s 5.3.2.
[31] see ss 5.3.2.1., 5.3.2.2., 5.3.2.3.

states.

The provisions regarding the transfer of negotiable warehouse receipts in the UNIDROIT MLWR are based on the common law concept of due negotiation related to documents of title.[32] This concept and the concept of a protected warehouse receipt holder may not be familiar to civil law countries, including OHADA member states.[33] To address this challenge, two options are recommended to OHADA: adopt a more familiar method of transferring warehouse receipts through a chain of uninterrupted transactions or include a detailed explanation of the notion of due negotiation and protected holder in a new Uniform Act on Warehouse Receipts.[34] The second option enables OHADA to adhere more strictly to the provisions of the UNIDROIT MLWR - uniform application.

The UNIDROIT MLWR includes provisions that address the effectiveness of security rights on warehouse receipts against third parties. These provisions are designed to align with the domestic legislation of enacting states regarding security transactions.[35] The OHADA Uniform Act Organising Securities is based on the UNCITRAL Model Law on Secured Transactions and contains provisions regarding third-party effectiveness.[36] Therefore, a Uniform Act on Warehouse Receipts fits the current legal framework of OHADA and works in conjunction with the OHADA Uniform Act Organising Securities.[37] This indicates that OHADA has preconditions for successfully adopting and implementing a new Uniform Act on Warehouse Receipts.

The UNIDROIT MLWR establishes the key rights and obligations of warehouse operators.[38] However, the UNIDROIT MLWR does not address the warehouse operator's liability in case of a breach of its duties or its obligations to maintain storage facilities according to certain standards.[39] Civil and common law systems take different approaches to regulating a warehouse's liability for breaching its duties and obligations to maintain its storage facilities according to specific standards.[40] As OHADA member states share a civil law background,[41] it is recommended that OHADA adopt the French civil law approach regarding the regulation of warehouse operator liability in case of a breach of its obligations and its obligation to maintain a certain standard of storage facilities.[42] Such an approach aligns with the legal background of OHADA and ensures the efficient implementation of a Uniform Act on

[32] see s 5.4.
[33] ibid.
[34] ibid.
[35] see s 5.3.2.5.
[36] ibid.
[37] ibid.
[38] see s 5.3.2.7.
[39] see s 5.3.2.7.1.
[40] ibid.
[41] see s 6.2.
[42] see s 5.3.2.7.1.

Warehouse Receipts.

The UNIDROIT MLWR grants the warehouse operator specific rights, including the right of lien on the stored goods, the right to refuse delivery of goods if they are lost or destroyed (provided the warehouse operator is not liable), and the right to terminate the storage agreement under certain circumstances.[43] These provisions can be adopted in a new Uniform Act on Warehouse Receipts with some amendments and a legal transplant from the US Uniform Commercial Code and French Commercial Code. However, the provisions of the OHADA Uniform Act Organising Securities should be considered as they relate to such specific rights. This enables OHADA to further harmonise and advance its legal framework.

Finally, the UNIDROIT MLWR contains certain provisions regarding electronic warehouse receipts.[44] This PhD project focuses on paper-based warehouse receipt law reform for OHADA. It only touches upon provisions of electronic warehouse receipts as long as they connect with the regulation of paper-based warehouse receipts.[45] However, as the UNIDROIT MLWR contains some basic provisions regarding electronic warehouse receipts, such as the notion of control of electronic warehouse receipts, it is recommended for OHADA either to adopt certain provisions of the UNIDROIT Principles on Digital Assets and Private Law and incorporate them into a Uniform Act on Warehouse Receipts or develop a new Uniform Act based on the UNIDROIT Principles on Digital Assets and Private Law. This creates preconditions for OHADA to implement electronic warehouse receipts.[46]

This subsection summarised the answers to the questions of how the UNIDROIT MLWR can be adopted in OHADA, the form of warehouse receipt law reform for OHADA, and how the provisions of the UNIDROIT MLWR can be tailored to the legal background of OHADA in a Uniform Act on Warehouse Receipts. The following subsection will focus on summarising answers to the research question related to the implementation of a new Uniform Act on Warehouse Receipts in OHADA member states.

6.1.4. Implementation of an OHADA Uniform Act on Warehouse Receipts

The OHADA institutional framework can support the development and implementation of a Uniform Act on Warehouse Receipts. The OHADA Permanent Secretariat is well-positioned to initiate warehouse receipt law reform in its member states.[47] To ensure that the perspectives and ideas of business and public communities are considered when drafting a new Uniform Act on Warehouse Receipts, the Permanent Secretariat can initiate consultations with 'national

[43] see s 5.3.2.7.2.
[44] see s 5.3.2.8.
[45] ibid.
[46] ibid.
[47] see s 3.4.3.

commissions', which consist of legal professionals.[48] This practice can assist in further tailoring a Uniform Act on Warehouse Receipts and addressing the business practices of OHADA member states.

The Council of Ministers is the main decision-making body of OHADA, which can finalise and adopt a new Uniform Act on Warehouse Receipts.[49] The structure of the Council of Ministers ensures that the views of certain OHADA member states or political groups do not prevail during the adoption of a new Uniform Act on Warehouse Receipts.[50] However, the major challenge of the Council of Ministers is that the adoption of new Uniform Acts involves only government representatives and lacks the involvement of the business community and other stakeholders.[51] Therefore, it is recommended that OHADA invite businesses, academics, and local communities to the processes of drafting and adopting new Uniform Acts so that the adopted Uniform Acts, including a Uniform Act on Warehouse Receipts, address the views of different communities and are not swayed by certain political groups.

Once Uniform Acts are adopted and entered into force, the Common Court of Justice and Arbitration guarantees their uniform applicability and interpretation.[52] The Common Court of Justice and Arbitration can support the implementation and interpretation of a Uniform Act on Warehouse Receipts.[53] The independent judicial body of OHADA– the Common Court of Justice and Arbitration is less likely than domestic courts to be swayed by national political elites. Furthermore, the Common Court of Justice and Arbitration can ensure the uniform application of a new Uniform Act on Warehouse Receipts, increasing trust among stakeholders in warehouse receipt financing. However, there is a reluctance from legal professionals from OHADA member states to appeal to the Common Court of Justice and Arbitration as the appeal procedure is associated with substantial costs and involves travelling to a different location.[54] Therefore, to address this issue, it is recommended that OHADA implement circuit courts or permanent OHADA courts in each member state.[55]

The OHADA Advanced Regional School of Magistracy (ERSUMA) can further increase awareness among legal practitioners and stakeholders regarding the warehouse receipt law reform and application of a Uniform Act on Warehouse Receipts.[56] The Advanced Regional School of Magistracy (ERSUMA) can also provide training regarding the application and

[48] ibid.
[49] see s 3.4.2.
[50] ibid.
[51] ibid.
[52] see s 3.4.1.
[53] ibid.
[54] ibid.
[55] see s 3.5.2.3.
[56] see s 3.4.4.

interpretation of a new Uniform Act on Warehouse Receipts.[57] The Advanced Regional School of Magistracy (ERSUMA) can guarantee better acceptance of an OHADA Uniform Act on Warehouse Receipts by stakeholders, increasing the chances of its smoother implementation.[58]

However, the adoption and implementation of an OHADA Uniform Act on Warehouse Receipts can face some challenges. The integration challenges of OHADA may affect the recognition of domestic judicial decisions of one member state based on a new Uniform Act on Warehouse Receipts in other member states.[59] Implementing a transnational integrated judicial system in business law in all OHADA member states can further improve legal certainty in OHADA member states and trust in its judicial system among all the stakeholders.[60] Resolving the issue of enforceability and application of judicial decisions can enable OHADA to resolve the issue of enforceability of transnational court decisions. In turn, it can further increase the trust in the judicial system in OHADA member states and the OHADA Uniform Acts, including a Uniform Act on Warehouse Receipts.

The lack of financing can also affect the adoption and implementation of a new Uniform Act on Warehouse Receipts.[61] The lack of financial resources affects the work of the Permanent Secretariat of OHADA, which may slow down warehouse receipt law reform.[62] Furthermore, the issue of underfinancing affects the Common Court of Justice and Arbitration, which remains understaffed.[63] Due to a lack of financing, the Advanced Regional School of Magistracy (ERSUMA) cannot provide training for non-French-speaking practitioners. This may also affect awareness among different stakeholders regarding the application of a Uniform Act on Warehouse Receipts. However, OHADA constantly receives grants and support from international organisations, which may help to increase its productivity and efficiency.[64] The financial challenge of OHADA may hinder the progress of warehouse receipt law reform and the adoption of a Uniform Act on Warehouse Receipts.

Considering OHADA's experience in developing hard law norms based on international soft law instruments and the positive impact of its law reform among its member states, OHADA is capable of conducting warehouse receipt legal reform. The institutional structure of OHADA is less susceptible to corruption than the governments of its member states.[65] Taking into consideration that the potential benefits of warehouse receipt law reform can facilitate the

[57] ibid.
[58] ibid.
[59] see s 3.5.2.1.
[60] ibid.
[61] see s 3.5.2.2.
[62] see s 3.4.3.
[63] see s 3.5.2.3.
[64] ibid.
[65] see s 3.6.

development of warehouse receipt legislation in OHADA member states and the fact that the OHADA Uniform Acts have a strong connection with French civil law, it is recommended for OHADA to start a process of law reform, which is based on the adoption of the UNIDROIT MLWR to the legal background of OHADA, the adoption of a legal transplant from the French civil law in the field of warehouse receipts and adoption of a new Uniform Act on Warehouse Receipts.

6.2. Benefits of Implementation of a Uniform Act on Warehouse Receipts

Many African countries, including Sub-Saharan African countries, have been actively implementing law reforms related to agriculture since 2016, which was driven by the need to achieve food security.[66] However, OHADA member states are not among the top improvements, according to the World Bank Group Enabling Business of Agriculture Report 2019. A Uniform Act on Warehouse Receipts can improve business conditions for agricultural businesses and benefit all parties involved in the warehouse receipt relationship and the agricultural sector.[67] The implementation of a new Uniform Act on Warehouse Receipts can enable different parties of international trade (such as farmers, agricultural producers, financial institutions, and governments) to use a warehouse receipt as an instrument in situations involving deposits, commercial sales and pledges of different types of commodities.[68]

The proposed warehouse receipt law reform can be potentially beneficial for agricultural counties that produce storable commodities,[69] such as OHADA member states. Furthermore, it is estimated that countries with better regulations related to agricultural finance have lower poverty rates and higher food security rates than countries with no specific regulations.[70] Therefore, a Uniform Act on Warehouse Receipts can potentially help OHADA member states to achieve the UN Sustainable Development Goal 1 'No Poverty' and Goal 2 'Zero Hunger'.[71]

The proposed warehouse receipt law reform can benefit smallholder farmers. The attempts to boost agriculture in Africa, including OHADA member states, led by the government during colonial and post-colonial periods were mainly focused on supporting large-scale farmers.[72] Smallholder farmers face a lack of support, although smallholder

[66] World Bank Group, 'Enabling the Business of Agriculture 2019' (World Bank Group, Washington DC 2019) 15.
[67] For the connection between agriculture, OHADA and the warehouse receipt system, see s 1.1.2.
[68] World Bank Group, 'A Guide to Warehouse Receipt Financing Reform: Legislative Reform' (WBG, Washington DC 2016) 12.
[69] Frank Hollinger, Lamon Rutten, Krassimir Kiriakov, 'The Use of Warehouse Receipt Finance in Agriculture in Transition Countries' (Food and Agriculture Organisation of the UN, Rome 2009) 11.
[70] World Bank Group (n 66) 10.
[71] For practical implications of warehouse receipt law reform and achievement of the United Nations SDGs see s 1.5.
[72] World Bank Group, 'Agriculture for Development 2008' (World Development Report Washington DC 2007) 91.

farmers can use their resources more efficiently than large-scale agricultural producers.[73] A Uniform Act on Warehouse Receipt based on the UNIDROIT MLWR can benefit smallholder farmers directly and indirectly.[74] The indirect benefits of warehouse receipt law reform for smallholder farmers include the establishment of best market approaches and predictability of commodity prices.[75]

There are also several direct benefits. Thus, it can allow them to sell their crops jointly to obtain better prices, which is particularly relevant to MSME farmers from rural areas.[76] The option to combine their goods and sell them together can also provide smallholder farmers with access to commodity markets.[77] The possibility of farmers' cooperative financing and ability to participate in commodity market transactions is particularly relevant to African smallholder farmers, including OHADA member states, as they are heavily dependent on seasonal price fluctuations during harvest time.[78] As a result, the proposed warehouse receipt law reform enables MSME farmers to take advantage of the benefits of the warehouse receipt system. This enables them to sell their crops at better prices and conditions, thereby facilitating the development of their businesses. This particularly applies to OHADA, as many businesses in its member states are smallholder farmers from rural areas who cultivate small plots of land.[79]

The proposed warehouse receipt law reform can be particularly beneficial for smallholder farmers who lack immovable collateral to secure a loan.[80] Backed up by a new Uniform Act on Warehouse Receipts, warehouse receipts can be attractive collateral to secure a loan for smallholder farmers in OHADA member states. In 2019, one of the OHADA member states, Côte d'Ivoire, scored a high ranking in the warehouse receipt index.[81] This was due to the implementation of certain regulatory changes between 2016 and 2018, which eliminated boundaries regarding the use of warehouse receipts as collateral to secure a loan.[82] This indicates the positive practical implications of warehouse receipt law reform on access to finance for smallholder farmers.

A Uniform Act on Warehouse Receipts can improve business opportunities for

[73] ibid.
[74] Jonathan Coulter, Gideon E Onumah, 'The Role of Warehouse Receipt Systems in Enhanced Commodity Marketing and Rural Livelihoods in Africa' (2002) 27 Food Policy 319, 335.
[75] ibid.
[76] ibid 326.
[77] Marek Dubovec, Adalberto Elias, 'A Proposal for UNCITRAL to Develop a Model Law on Warehouse Receipts' (2017) 22 Uniform Law Review 716, 718.
[78] Patrick Honohan, Thorsten Beck, 'Making Finance Work for Africa' (World Bank Group Washington DC 2007) 146.
[79] see s 1.1.2.
[80] World Bank Group (n 66) 37-38.
[81] ibid 38-40, 57.
[82] ibid.

smallholder farmers in OHADA member states. African countries, including OHADA member states, from 2016 to 2019 actively promoted reforms to enhance business opportunities for small-scale agricultural businesses.[83] The proposed warehouse receipt law can further improve business conditions for smallholder farmers by opening access to finance. The proposed warehouse receipt law reform enables smallholder farmers take advantage of seasonal market price fluctuations by postponing the sale of their stored crops.[84] Additionally, a Uniform Act on Warehouse Receipts can introduce international standards of warehouse receipts, enabling farmers to borrow money in different currencies from international banks and obtain lower interest rates.[85] Overall, this reform and a new Uniform Act on Warehouse Receipts can improve farmers' and commodity producers' access to finance, significantly benefiting MSMEs lacking other financing to secure a loan.

The proposed warehouse receipt law reform can also improve the productivity and profitability of smallholder farmers.[86] The improvement in productivity for agricultural businesses in Africa can directly influence the growth of the whole agricultural sector in most African countries, including OHADA member states.[87] The growth of the agricultural sector can increase employment opportunities and change the scale of production. Considering that most of the farms in OHADA member states in rural areas are family-owned, the growth of the agricultural sector can facilitate less labour-intensive agricultural practices, increase smallholder farmers' productivity, and improve working conditions for rural farmers.[88] The implementation of a Uniform Act on Warehouse Receipts can contribute to increasing employment opportunities for rural farmers and also rural non-farm employment related to agriculture.[89]

A Uniform Act on Warehouse Receipts and establishment of a well-functioning warehouse receipt system can provide financial flexibility to borrowers in OHADA member states. They can choose between different types of loans, satisfying the need for short-term loans and freeing up land for long-term loans.[90] The availability of affordable loans can encourage businesses to leave the informal sector of the economy, which is particularly relevant for OHADA countries.[91] For example, in Mali, Senegal, and Guinea, which are OHADA member states, smallholder farmers mainly operate in an informal economy,

[83] ibid 15-17.
[84] US Agency for International Development, 'Warehouse Receipts: Financing Agricultural Producers' (Technical Notes No5, Bamako 200) 1.
[85] Panos Varangis, Richard Lacroix, 'Using Warehouse Receipts in Developing and Transition Economies' (1996) 33 Finance & Development 36, 37.
[86] World Bank Group (n 72) 10-11.
[87] Honohan (n 78) 5.
[88] ibid 13.
[89] World Bank Group (n 72) 36-37.
[90] World Bank Group (n 66) 12.
[91] ibid 12.

particularly in rural areas.[92] This affects their access to finance, the quality of goods they produce, and their ability to participate in commodity markets.[93] Agriculture is considered one of the main sources of rural poverty reduction.[94]

The willingness of farmers from rural areas to participate in the formal economy contributes to the economic growth of OHADA member states. This is particularly relevant to OHADA member states as the level of businesses participating in the informal economy is higher in Sub-Saharan African countries than in other parts of the world.[95] Participation in the formal economy can catalyse the economic development of the rural population of OHADA member states. On average, smallholders through farm-related activities account for 40-60 per cent of total rural income in developing countries.[96] Therefore, a Uniform Act on Warehouse Receipts can play a vital role in the growth of the rural economy in OHADA member states. Furthermore, the growth of the rural economy in OHADA member states can increase demand for non-agricultural goods, which facilitates the development of other sectors of the economy in OHADA member states.

The proposed warehouse receipt law reform offers significant benefits for the agricultural sector.[97] Warehouse receipts backed up by a new Uniform Act on Warehouse Receipts can enable farmers to use their crops as collateral to secure a loan and postpone selling their crops to obtain a better market price.[98] The agricultural businesses from rural areas in OHADA member states are more affected by the restricted access to finance than small-scale producers from other sectors of the economy.[99] This can be particularly relevant to smallholder farmers from rural areas, where access to finance is one of the major challenges.[100] This can enable farmers to use various types of collateral, not just land, to secure a loan,[101] which is particularly advantageous for smallholder farmers from rural areas who do not have ownership rights over land. However, in Sub-Saharan Africa, more than 60 per cent of the share of GDP accounts for the agricultural sector.[102] Opening access to finance for smallholder farmers in Africa, including OHADA member states, can be a starting point for agricultural development

[92] Mark D La Grange, 'Feasibility Study for a Regional Warehouse Receipt Program for Mali, Senegal and Guinea' (USAID, Washington DC 2002).
[93] ibid.
[94] ibid 45-47.
[95] Honohan (n 78) 70.
[96] Food and Agriculture Organisation of the UN, 'Policies and Institutions to Smallholder Agriculture' (Committee on Agriculture, Rome 2010) 2-3.
[97] The main focus of this PhD Project is the benefits of warehouse receipts for agriculture in OHADA member states. For the connection between the warehouse receipt system and agriculture, see s 1.1.2.
[98] see s 1.1.2.
[99] African Development Bank, 'African Economic Outlook 2024. Driving Africa's Transformation. The Reform of the Global Finance Architecture' (African Development Bank Group, 2024) 66.
[100] World Bank Group (n 72) 145-147.
[101] World Bank Group (n 66) 12.
[102] African Development Bank (n 99) 7.

and combating food insecurity.[103]

The market price for agricultural products fluctuates seasonally, decreasing during harvest time and increasing as stocks decline.[104] The warehouse receipt system enables farmers to address this market fluctuation by postponing the selling of their stored crops to selling them later at better prices.[105] Additionally, farmers can use their stored goods as collateral to secure a loan to facilitate their business operations.[106] This shift can result in seasonal price fluctuations based on storage and financing costs rather than oversupply and allow better control of agricultural commodity price fluctuations and associated risks.[107] The proposed warehouse receipt law reform and facilitations of warehouse receipt financing could allow governments in OHADA member states to develop a long-term strategy to minimise the impact of food price fluctuation shocks.[108] This can help OHADA member states to address issues associated with exports of agricultural commodities and high price volatility, which in turn assists in reducing trade volatility.[109]

The adoption of a Uniform Act on Warehouse Receipts can lead to the establishment of best-market approaches, which sets quality standards and improves storage conditions.[110] Implementing quality standards and quality assessment standards enables systematic checks on the quality and quantity of stored goods and incentivises higher-quality products through price premiums.[111] This, in turn, can motivate farmers and producers in OHADA member states to improve the quality of their goods and reduce post-harvest losses. This can then increase the affordability of the loans for smallholder farmers, as the verified quality of their crops which are stored in an independent warehouse, increases security.[112] This enables OHADA member states to address the unaffordability of healthy diets and hunger.

A Uniform Act on Warehouse Receipts can help to establish warehouse storage and handling standards.[113] These standards can reduce post-harvest losses for smallholder farmers, which is particularly relevant to Sub-Saharan African countries, including OHADA member states.[114] Introducing postharvest and storage services can be especially beneficial for smallholder farmers, enabling them to preserve their crops better and sell them later.[115]

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[103] ibid.
[104] Philine Wehling, Bill Garthwaite, 'Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends' (FAO, EBRD, Rome 2015) 2.
[105] ibid 2
[106] ibid.
[107] Coulter (n 74) 326.
[108] World Bank Group (n 72) 122.
[109] ibid 44.
[110] Wehling (n 104) 2.
[111] World Bank Group (n 66) 13.
[112] World Bank Group (n 72) 146.
[113] Coulter (n 74) 326.
[114] Honohan (n 78) 44.
[115] Wehling (104) 2.

Furthermore, the warehouse storage standards ensure the accurate value and quality of the storage goods for depositors.[116] Additionally, the proposed reform can facilitate the development of a warehouse system that reduces post-harvest losses.[117] This offers farmers a better storage alternative than in-farm storage, which exposes goods to more significant risks of floods and infestations.[118] Professional warehouses provide better protection against storage deterioration and degradation of goods, helping to preserve stored goods, increase their quality, and reduce post-harvest losses. Reducing post-harvest losses can bring economic benefits to OHADA countries and contribute to achieving food sustainability and local food security.[119]

Implementing a warehouse receipt system in conjunction with professional warehouses can help to improve local food security.[120] Professional management of stored goods can provide governments of OHADA member states with real-time information about inventory levels and enhance their ability to predict food shortages.[121] As a result, governments will be better equipped to regulate their good stocks and address food insecurity more effectively.[122] The proposed warehouse receipt law reform is particularly relevant to African countries, including OHADA member states, as many of its member states heavily rely on food imports and experience high levels of food insecurity.[123] Ultimately, this can positively impact food security in OHADA member states, where food insecurity and hunger are prevalent.[124]

The warehouse receipt law reform can also benefit financial institutions. The most significant advantage for financial institutions is that a new Uniform Act on Warehouse Receipts will enable banks to reduce lending risks, as the stored collateral will secure the loan.[125] If non-payment or default, the bank can obtain the stored goods or sell the warehouse receipt to obtain the financial equivalent.[126] The right for a bank to seize the colleterial in the case of the debtor's inability to pay back the loan, together with the priority right claims, guarantees effective risk management for financial institutions and the recovery of potential losses in case of non-payment.[127] This, in turn, reduces transaction and lending costs, such as information-gathering costs and credibility checks.[128]

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[116] Coulter (n 74) 336.
[117] World Bank Group (n 66) 12.
[118] ibid.
[119] ibid.
[120] ibid.
[121] Coulter (n 74) 329.
[122] ibid.
[123] World Food Programme, 'Global Report on Food Crises 2017' (Food Security Information Network, Rome March 2017).
[124] ibid.
[125] Wehling (n 104) 2.
[126] Varangis (n 85) 37.
[127] Wehling (n 104) 2.
[128] World Bank Group (n 66) 12.

The possibility for smallholder farmers to cooperate and use their groups to secure a loan is also associated with reducing risks associated with lending to financial institutions.[129] This can also be beneficial for smallholder farmers as it increases their overall credibility and enables them to obtain better terms under the finance agreements.[130] Additionally, a new Uniform Act on Warehouse Receipts can facilitate the development of the financial, insurance, and exchange-based trading sectors.[131] For example, warehouse receipt financing can allow financial institutions to manage the risks associated with loans and back such risks with the stored goods.[132] A Uniform Act on Warehouse Receipts enables banks to reduce the risks and interest rates, as the stored collateral can secure the loan.[133] As a result, the cost of loans in OHADA member states drops, making loans more affordable for smallholder farmers and farmers from rural areas.

A new Uniform Act on Warehouse Receipts can significantly benefit the agricultural sector. Storing agricultural commodities can assist in reduction of the volatility of commodity prices, leading to more stable prices and market conditions.[134] This stability in the local and regional commodity market can provide predictability for farmers, agricultural producers and all the stakeholders, enabling them to manage risks and support their development. Ultimately, this can contribute to the growth of the entire agricultural sector and the economic development of OHADA member states and the African region. The proposed warehouse receipt law reform can also contribute to establishing exchange markers in OHADA member states, which has been a long challenge in Africa due to weak warehouse receipt systems and poor warehouse standards.[135]

Finally, a new Uniform Act on Warehouse Receipts can further contribute to the harmonisation of business laws in OHADA member states. A new Uniform Act on Warehouse Receipts closely connects to the OHADA Uniform Act Organising Securities[136] and the Uniform Act on General Commercial Law.[137] As a result, a Uniform Act on Warehouse Receipts allows the establishment of a harmonised legal framework for business in OHADA member states, including MSMEs and banks. This can further increase the credibility of the OHADA legal framework and its Uniform Acts.

6.3. Limitations of the Research

Several factors limit the scope of this PhD research. The main focus of this PhD research is

[129] Honohan (n 78) 145.
[130] ibid 150.
[131] ibid 12.
[132] World Bank Group (n 66) x.
[133] Varangis (n 84) 37.
[134] Wehling (n 104) 2.
[135] World Bank Group (n 72) 121.
[136] Uniform Act Organising Securities (adopted 15 December 2010).
[137] Uniform Act on General Commercial Law (adopted 15 December 2010).

warehouse receipt legal reform in the agricultural sector within OHADA member states.[138] This is based on the fact that agriculture is a significant source of income in many developing countries, including OHADA member states.[139] In 2019, almost fifty per cent of the working-age population in OHADA member states were involved in agriculture.[140] Warehouse receipt law reform has the potential to benefit smallholder farmers, financial institutions, and the agricultural sector as a whole.[141] The proposed warehouse receipt law reform aims to improve access to finance for farmers from OHADA member states,[142] particularly for MSMEs from rural areas.[143] Focusing exclusively on the agricultural sector can help this research to address the specific needs of OHADA member states. Facilitating the agricultural industry in OHADA countries will, in turn, create favourable conditions for economic development and improve access to finance for agricultural businesses.[144]

A new Uniform Act on Warehouse Receipts can accommodate the needs of different sectors of the economy, not only the agricultural industry. It can accommodate various types of collateral for warehouse receipt financing. However, this PhD research focuses on the agricultural sector's needs in a Uniform Act on Warehouse Receipts. This means that certain amendments may be necessary to address the needs of other industries and their existing business practices in using different types of collateral for warehouse receipt financing. A Uniform Act on Warehouse Receipts establishes general mechanics of warehouse receipt financing, focusing on the agricultural sector. Further research is required to identify best practices and issues related to using different types of collateral in warehouse receipt financing so that a new Uniform Act on Warehouse Receipts addresses the specific needs of various industries in OHADA member states.

This PhD research primarily focuses on legal rules related to paper-based warehouse receipts. It covers general provisions related to electronic warehouse receipts, such as issues related to the notion of control of an electronic warehouse receipt. This research aims to establish general rules for paper-based warehouse receipts, which could later be adjusted to accommodate electronic warehouse receipts. The notion is that OHADA countries currently lack one unified approach to regulate warehouse receipt relationships. Once the preconditions for implementing the electronic warehouse receipt system are established, provisions regarding the regulation of electronic warehouse receipts can be introduced via revision of a Uniform Act on Warehouse Receipts. Implementing a too-sophisticated system of paper-

[138] see s 1.2.2.
[139] ibid.
[140] ibid.
[141] see s 6.2.
[142] Frank Höllinger, Lamon Rutten, Krassimir Kiriakov, 'The Use of Warehouse Receipt Finance in Agriculture in Transition Countries' (FAO Investment Centre Working Paper, Rome 2009) 6.
[143] US Agency for International Development (n 73) 1.
[144] see s 6.2.

based and electronic warehouse receipts may create legal uncertainty and confusion among different stakeholders, which can hinder the implementation of warehouse receipt legal reform. Therefore, further research is required to assess the feasibility of the implementation of electronic warehouse receipt systems in OHADA member states to answer the question of how the revision of a new Uniform Act on Warehouse Receipts can be conducted.

The timeline and the word limit of this PhD project constitute the limitations of the research. Due to the three-year time constraint, it was impossible to thoroughly investigate certain aspects related to the proposed warehouse receipt reform in OHADA member states. For example, even though electronic warehouse receipts are gaining popularity and can be later incorporated into the proposed warehouse receipt legal reform for OHADA, this research's time and word limits constrained the depth of analysis in these areas. Therefore, this PhD research can only provide a general overview of provisions related to electronic warehouse receipts without delving into detailed analysis due to the time and word count limitations for this PhD project.

The UNIDROIT MLWR is a new international soft law instrument. It has not yet been adopted and tested in practice in any country. One limitation of this research is to base a new Uniform Act on Warehouse Receipts for OHADA on the provisions of the untested in real-world UNIDROIT MLWR. It is recommended that OHADA, as a relatively new intergovernmental organisation, seek expertise from other intergovernmental organisations with experience in successfully implementing similar laws.[145] For example, OHADA can seek expertise and consultations from UNIDROIT and UNCITRAL. The UNIDROIT working group has developed the Guide to Enactment to the UNIDROIT MLWR,[146] which can assist OHADA in implementing a new Uniform Act on Warehouse Receipts. UNIDROIT and UNCITRAL's expertise can support OHADA in conducting warehouse receipt law reform more smoothly and quickly.

Finally, OHADA prioritises the French language over other official languages. The OHADA Treaty states that if there are any contradictions between translations, the French language version has priority over other versions.[147] However, there is still no official English translation of the OHADA Uniform Acts. This PhD research was conducted entirely in English and is based on an English translation. Therefore, the research is limited in terms of access to official English translations of the OHADA Uniform Acts.

This section established the main limitations of this PhD research. The following section will focus on the recommendations for future research in the area and how the limitations of

[145] see s 5.3.1.
[146] UNIDROIT, 'Draft Guide to Enactment of the UNCITRAL/UNIDROIT Model Law on Warehouse Receipts' (Study LXXXIIIA – W.G.1 – Doc. 2, Rome November 2023).
[147] see s 3.2.

this PhD research can be addressed in future research related to the warehouse receipt system.

6.4. Recommendation for Future Research in the Area

This PhD research focuses on warehouse receipt law reform in the agricultural sector in OHADA member states.[148] However, the warehouse receipt system is not limited to the use of agricultural commodities. The African region, including OHADA member states, has the potential to produce raw materials, high-quality mineral resources and metals.[149] To address the use of different types of commodities in warehouse receipt financing, further assessment is needed to identify the best practice approaches for using various types of collateral in warehouse receipt financing. Identifying the special needs and best practice approaches of using different types of commodities in warehouse receipt relationships in OHADA member states assists in complementing a new Uniform Act on Warehouse Receipts. This can further contribute to the facilitation of economic development of OHADA member states and attract investments in different sectors of the economy.

This PhD research excludes the adoption and implementation of electronic warehouse receipts from the scope of this research. Implementing electronic warehouse receipts requires further research to assess how a revised Uniform Act on Warehouse Receipts can accommodate them. This offers better protection against fraud associated with using paper-based warehouse receipts.[150] Further research is needed to assess the possibility of implementing an electronic warehouse receipts system in OHADA member states and identify special provisions that should be included in the revision of a new Uniform Act on Warehouse Receipts.

One of the major issues OHADA faces is the lack of financial resources, which affects its working methods.[151] The lack of financial resources affects the efficiency of the OHADA Common Court of Justice and Arbitration,[152] the Permanent Secretariat,[153] and the Advanced Regional School of Magistracy (ERSUMA).[154] Insufficient funding prevents OHADA from fully optimising its working methods and achieving its objectives. For example, even though OHADA has several official working languages and some OHADA member states have different official languages,[155] the Advanced Regional School of Magistracy (ERSUMA) only

[148] see s 6.2.
[149] United Nations Conference on Trade and Development, 'The Potential of Africa to Capture Technology-Intensive Global Supply Chains' (Economic Development in Africa Report 2023, New York 2023) 6.
[150] Dubovec (n 76) 724.
[151] see s 3.4.
[152] see s 3.4.1.
[153] see s 3.4.3.
[154] ibid.
[155] see s 3.2.

offers training in the French language.[156] Membership fees paid by OHADA member states are the primary source of funding for OHADA.[157] Additionally, OHADA receives grants from intergovernmental organisations, such as the World Bank Group.[158] Further research is required to explore how OHADA can attract funding and identify other potential sources of financial support.

Another challenge related to the working methods of OHADA is the adoption of a pro-Western approach and rigid hierarchy of OHADA.[159] OHADA chose a pro-Western approach to attract foreign investors.[160] This resulted in the successful adoption of several Uniform Acts and the establishment of the legal framework, which created positive outcomes for OHADA member states.[161] Complementing the working methods of OHADA with traditional and customary business practices can better address the needs of local businesses and attract new member states from the African region. Further research is needed to assess how the working methods of OHADA can be complemented and changed to facilitate its progress.

OHADA faces institutional challenges related to the functioning of the Common Court of Justice and Arbitration. The location of the Common Court of Justice and Arbitration creates obstacles for legal practitioners from OHADA member states to appeal, as it requires an extra financial burden and time to travel for appeal hearings.[162] National Supreme Courts are reluctant to coordinate their work and delegate commercial cases to the Common Court of Justice and Arbitration.[163] The main reason is that national Supreme Courts see the Common Court of Justice and Arbitration as their competitor.[164] Further research is required to assess the possibility of resolving such issues. One possible solution is to adopt the system of circuit courts or implement permanent OHADA courts in every member state, coordinated by the Common Court of Justice and Arbitration. The possibility of implementing the circuit or permanent OHADA courts in its member states should be further assessed.

OHADA is an intergovernmental organisation that has established a transnational legal framework.[165] OHADA transnational legal norms – Uniform Acts - are enforceable by domestic courts in each member state. However, there is a possibility of shortcomings related to the enforceability of judicial decisions between OHADA member states.[166] The variation in

[156] see s 3.5.2.3.
[157] ibid.
[158] ibid.
[159] see s 3.4.2.
[160] ibid.
[161] see s 3.1.
[162] see s 3.5.2.3.
[163] see s 3.4.1.
[164] ibid.
[165] see s 3.2.
[166] see s 3.5.2.1.

domestic judicial procedures and the domestic enforcement of judicial decisions in OHADA member states create legal uncertainty and can deter business and foreign investors.[167] To address this issue, OHADA can adopt the approach of the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters.[168] Further research can be conducted to establish how to address the enforceability of the OHADA transnational Uniform Acts on the domestic level of its member states.

The UNIDROIT MLWR offer two options for enacting states to adopt: a single or double warehouse receipt system.[169] It may be beneficial for OHADA to implement a single warehouse receipt system. However, historically, many civil law countries prefer double warehouse receipt systems. Further research is required to identify which warehouse receipt system fits in the legal framework of OHADA member states. Similarly, specific provisions of the UNIDROIT MLWR require the further identification of the OHADA local business traditions to be tailored to their needs. Therefore, further research is required to identify regional specificities of OHADA member states so that a new Uniform Act on Warehouse Receipts is beneficial for smallholder farmers.

The UNIDROIT working group developed the Guide to Enactment for the UNIDROIT MLWR.[170] The recommendations of this PhD project are based on the draft version of the Guide to Enactment for the UNIDROIT MLWR.[171] However, the Guide to Enactment for the UNIDROIT MLWR was presented after the research for this PhD project was finished.[172] The Guide to Enactment for the UNIDROIT MLWR can assist OHADA in customising the UNIDROIT MLWR to meet the needs of its member states. The provisions of the Guide to Enactment for the UNIDROIT MLWR can support OHADA in conducting the proposed warehouse receipt law reform and address specific challenges related to its implementation. Therefore, further research can be conducted to tailor a new Uniform Act on Warehouse Receipts according to the recommendations from the final version of the Guide to Enactment for the UNIDROIT MLWR.

When finalising a Uniform Act on Warehouse Receipts for OHADA, consulting with French-speaking legal practitioners from OHADA member states and experienced translators in comparative law translation is essential. This is necessary because while some legal terms

[167] ibid.
[168] Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (adopted 2 July 2019, entered into force 1 September 2023).
[169] see s 5.3.1.
[170] see s 6.3.
[171] UNIDROIT (n 116).
[172] UNIDROIT, 'UNCITRAL/UNIDROIT Model Law on Warehouse Receipts adopted by the United Nations Commission on International Trade Law' (*UNIDROIT, 2024*) <https://www.unidroit.org/uncitral-unidroit-model-law-on-warehouse-receipts-adopted-by-the-united- nations-commission-on-international-trade-law/> accessed 19 August 2024.

have similar interpretations in different jurisdictions and legal traditions, others cannot be used interchangeably due to their historical and legal backgrounds.[173] Further interdisciplinary research is essential to properly phrase and translate the final version of a Uniform Act on Warehouse Receipts into the French language.

6.5. Contribution to Knowledge

This PhD research contributed to the development of knowledge related to warehouse receipts and different legal theories in several ways. Firstly, this PhD research assessed the feasibility of incorporating the UNIDROIT MLWR, a soft law norm, into a hard law norm – a new Uniform Act on Warehouse Receipts. This PhD research identified the specific form of legal reform that is beneficial for OHADA. It was established in the PhD research that due to the chosen legal path and rigid OHADA structure,[174] the new warehouse receipt legal reform is likely to lead to the development of a Uniform Act on Warehouse Receipts.

Chapter two of this research contributed to the ongoing theoretical discussion of soft and hard laws.[175] This chapter provided a theoretical discussion of emerging hybrid law norms and their place in modern international commercial law. Chapter two of this research contributed to the establishment of a definition of hybrid law norms. Chapter two also established the benefits and shortcomings of hard and soft law instruments in international commercial law. This chapter contributed to the theoretical discussion of which law norms (hard or soft) can accommodate the needs of different actors of international commerce, MSMEs, banks and governments. Chapter two identified how intergovernmental organisations such as OHADA can conduct law reforms and implement regional laws. Chapter two of this research also assessed the benefits and shortcomings of the unification and harmonisation of law, hard laws, and soft laws for OHADA.

Chapter two of this research also contributed to the development of the theory of legal transplant. In particular, chapter two contributed to the theoretical discussion of the advantages and disadvantages of legal transplants in international commercial law. This chapter identified the place of legal transplants in the development of contemporary business legal norms. This chapter also identified and contributed to the theoretical discussion of two unique types of legal transplants: colonial legal transplants and malicious legal transplants.

Chapter three of this research assessed the capability of OHADA to conduct regional warehouse receipt legal reform and adopt the provisions of the international legal instrument

[173] Sofie MF Geeroms, 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated ...' (2002) 50 The American Journal of Comparative Law 201.
[174] see s 4.3.
[175] see ch 2.

– the UNIDROIT MLWR into a regional legal norm – a new Uniform Act on Warehouse Receipts.[176] This chapter also contributed to the theoretical discussion of the OHADA working methods and legal reform. The expertise and working methods of OHADA were evaluated in connection to the ability to conduct warehouse receipt law reform.[177] The research identified the advantages and challenges of the legal framework and working methods of OHADA.[178] Additionally, several recommendations were provided on how specific challenges of OHADA can be addressed so that they do not affect the proposed warehouse receipt law reform.

Chapters four and two of this research contributed to theoretical discussions and raised broader questions about the working methods and legal framework of OHADA.[179] Thus, the research raised questions about the path of dependency and the legal evolution of OHADA and its Uniform Acts. Even though OHADA made significant progress in the short term and is considered a highly successful intergovernmental organisation, adhering to a hard law unification may create obstacles to its future progress. This research identified patterns of path dependency in the working methods of OHADA and its Uniform Acts. Thus, this research established that OHADA closely follows the French legal route in developing its laws.

Chapter five of this PhD research developed a comprehensive analysis of the UNIDROIT MLWR.[180] Specifically, the research examined how the provisions of the UNIDROIT MLWR relate to the civil law background of OHADA countries. This PhD research provided a comprehensive analysis of each article of the UNIDROIT MLWR in connection to the civil law background of OHADA member states. This research also conducted a comparative legal analysis of the OHADA Uniform Act Organising Securities,[181] and the Uniform Act on General Commercial Law,[182] and the UNIDROIT MLWR to identify how each provision of the UNIDROIT MLWR can be tailored to the legal background of OHADA member states. It was determined which provisions of the UNIDROIT MLWR can serve as the basis for the new legal reform for OHADA.

Chapter five of this PhD research also identified the possibility of complementing the provisions of the UNIDROIT MLWR with legal transplants from the US and France.[183] This PhD research revealed a close connection between the OHADA Uniform Acts and the French civil law background.[184] It was determined that the UNIDROIT MLWR could benefit from the legal transplant from French legislation. This PhD research conducted a detailed analysis of

[176] see ch 3.
[177] see ss 3.2., 3.3., 3.4.
[178] see s 3.5.
[179] see ch 2, 4.
[180] see ch 5.
[181] Uniform Act Organising Securities (adopted 15 December 2010).
[182] Uniform Act on General Commercial Law (adopted 15 December 2010).
[183] see ch 5.
[184] see ch 4.

the legal provisions of the US Uniform Commercial Code[185] and the French Commercial Code,[186] showing that these provisions can complement the UNIDROIT MLWR to enhance the legal background and traditions of OHADA member states. This PhD research provided a comprehensive analysis of each section of the UNIDROIT MLWR in relation to similar provisions in French and US legislation.

Finally, chapter five of this research conducted a comprehensive analysis of the UNIDROIT MLWR and the OHADA Uniform Acts. Chapter five developed recommendations for the proposed warehouse receipt law reform for OHADA.[187] Chapter six highlighted the advantages of warehouse receipt law reform for OHADA. This PhD research emphasised that a new warehouse receipt legal reform can enhance access to finance for agricultural businesses in OHADA member states. It emphasised that warehouse receipt legal reform can be particularly beneficial for MSMEs in OHADA member states, facilitating their growth. Ultimately, this can contribute to the economic development of OHADA member states and attract foreign investments, further strengthening OHADA's attractiveness.

[185] Uniform Commercial Code 1952 (US).
[186] Commercial Code 1807 (France).
[187] see ch 3, 5.

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