The business trust and a Southern African *lex mercatoria*[*]

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Abstract

This article is an investigation into the potential of the trust concept and a the development of a model trust law as commercial vehicles to contribute to the development of a Southern African *lex mercatoria*. It is proposed that Southern Africa may improve its competitiveness by way of a distinctive *lex mercatoria*, both within the larger African context and as international gateway to investment in Africa. It is submitted that sound and certain regulatory mechanisms for legal entities are of the utmost importance in a region wanting to achieve objectives of the nature of those of the Southern African Development Community. The development of a distinctive Southern African *lex mercatoria* may well contribute to a more attractive and accessible environment in which to transact business.

Introduction

Trusts have been used internationally for many years as business entities although they have been neither acknowledged nor regulated as a corporation.[1] A proper understanding of the unique way in which trusts developed into so-called 'uncorporations', and their practical application in the business sphere, may prove of some value in the future structured development of this legal phenomenon, both in Southern Africa and elsewhere.

This article enquires whether the trust concept as a commercial vehicle has the potential to contribute to the development of a *lex mercatoria* for Southern Africa. In a practical sense, the South African trust context will be measured against that of Mauritius – both jurisdictions being members of the Southern African Development Community (SADC).[2] While South Africa has a long, well developed, common-law trust history, Mauritius offers modern trust legislation, within a small offshore jurisdiction. The contrast

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[1] Sitkoff 'Trust as uncorporation: a research agenda' 2005 *University of Illinois LR* 31.

[2] Hereafter referred to as the 'SADC'.

between the business trust as legal entity in an industrialised economic environment and in a services-related financial hub focusing on wealth preservation across national borders, is clear.

The competitiveness of a country has been defined as '… the degree to which [that country] can, under free and fair market conditions, produce goods and services that meet the test of international markets while simultaneously expanding the real incomes of its citizens'.[3] In light of the differences between the legal and economic realities within SADC, this article will ask whether Southern Africa should improve its competitiveness through a distinctive *lex mercatoria*, both within the larger African context, and as an international gateway to investment in Africa.[4]

The trust concept

The trust concept in South Africa was introduced in the 19th century by the British, who used the concept in their wills and contracts, including ante-nuptial agreements. However, South African trust jurisprudence has had to develop its own character over the last 200 years, as the dual ownership concept in English law was not reconcilable with Roman-Dutch law from which the South African legal system largely originated.[5] The common-law development resulted in the first enactment of a law dealing with trust in 1989.[6] The South African Law Commission had, in its 1989 report, opposed total codification for fear of inhibiting the natural development of trust law.[7]

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3 From the Report of the United States President's Commission on Competitiveness (1984), as referred to in Su Yin & Walsh 'Analyzing the factors contributing to the establishment of Thailand as a hub for regional operating headquarters' (2011) 6 *Journal of Economics and Behavioural Studies* 279.

4 See National Treasury Budget Review (2010) 78. Available at: http://www.treasury.gov.za/documents (last accessed 15 January 2012). See Legwaila'Tax reasons for establishing a headquarter company' 2011 32/1 Obiter 126. Compare A review framework for cross-border direct investment into South Africa. Available at http://www.treasury.gov.za.documents last (last accessed 15 January 2012).

5 See Olivier, Strydom & Van den Berg *Trustreg en praktyk* (2009) 1–17, fn 76. Compare Cameron, De Waal, Kahn, Solomon & Wunsch Honoré's *South African law of trusts* (2002) 21 for a detailed discussion on the development of the trust concept in South Africa.

6 The Trust Property Control Act 57 of 1988 (TPCA) came into effect on 31 March 1989 as a result of the 'Law of Trusts' Working Paper prepared by the Law Commission. The Act repealed the Trust Moneys Protection Act 34 of 1934.

7 The 1987 report stated in par 1.10 that any attempt to codify the law of trusts 'would result in an undesirable rigidity and (would) hamper further development'. See Strydom *Die aansprake van 'n trustbegunstigde in die Suid-Afrikaanse trustreg* (LLD thesis Potchefstroom University 2000) 26; and Smith *The authorisation of trustees in the South African law of trusts* (LLM dissertation University of the Free State, 2006) 43. De Waal 'Authorisation of trustees in terms of the Trust Property Control Act' 1997 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 472, described the TPCA as 'an evolutionary,

This resulted in legislation that addressed only certain problematic trust property issues, without affecting all forms of trust in South Africa.

To appreciate the application of the trust in a commercial context, it is necessary to understand the core characteristics of the concept. A trust creates a relationship between parties in the form of an obligation with regard to specific assets, and in favour of beneficiaries. The beneficiaries have both personal and proprietary rights (although sometimes very limited) that they may enforce against the trustees.

Certain minimum requirements must be met for a trust to be valid. If these are not satisfied, the 'trust' may be a classified as sham and the results sought will not be achieved. In the case of commercial transactions, a sham trust may have major detrimental consequences, as the main object of a separate commercial vehicle – be it a company or a trust – is the protection it offers. In its most basic form a trust is the result of an arrangement through which control and ownership in assets is made over to a third party for the benefit of one or more beneficiaries.

The uniqueness of the trust concept lies in the separation between ownership of the assets and the enjoyment of those assets. It is easier for common-law jurists to understand this concept, as opposed to civil-law jurists who would battle with the idea of an owner with no right to enjoy his property, yet whose creditors have no right to take possession of that property.[8] Cameron JA articulated the concept as follows in *Land and Agricultural Development Bank of South Africa v Parker and Others* '(t)he essential notion of trust law, from which the further development of the trust must proceed, is that enjoyment and control should be functionally separate'.[9]

Hansmann and Mattei[10] submit that internationally the trust provides a level of flexibility in business structures that is unavailable even in jurisdictions with liberal corporative alternatives. This has contributed to the convergence of trust and corporate law. It has also contributed to the convergence of the

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rather than a revolutionary, step in the development of the South African trust'.

8 See Honoré *On fitting trusts into civil law jurisdictions* (2008) 27 Legal Research Paper, University of Oxford 10–11. Available at http://ssrn.com/abstract=1270179 (last accessed 18 January 2012) 10–11.

9 2005 (2) SA 77 (SCA) 86E. At 86D–E separation is referred to as the 'core idea' of the trust concept. See Sher 'The proper administration of the trust' 2006 2 *Juta's Business Law* 65.

10 Hansman & Mattei 'The functions of trust law: a comparative legal and economic analysis' (1998) 2 *New York University LR* 434. See further Hauser 'Trends in international estate planning and offshore trusts' (2005) *University of Minnesota Law School* 33–35.

trust figure into some jurisdictions, of which the *fiducia* in French law is an example. In many offshore jurisdictions, the need for a trust concept in the business sphere has led to the introduction of the trust in their respective countries.[11]

The trust as commercial entity

In its most limiting form, the business trust is an enterprise vehicle which operates somewhere between a partnership, a company, and a close corporation. In reality, however, it is also used as an investment vehicle through which to realise an estate, protect the interests of debenture holders, manage pension funds, create employee share purchases, and manage incentive schemes, including its use as a collective investment vehicle, as protection against government interference, and for the management of national parks and public places. One such example is the trust created in terms of the Kakamas Trust Act 107 of 1976. Indeed, the fact that a trust is not a corporation, although it often looks and even functions like one, is one of the anomalies that make the business trust such an enigmatic legal concept.[12]

The suitability of the trust as a business vehicle is based on the flexibility of the trust, the transferability of its assets, the separation of formal ownership, and the lack of statutory directives. Even the statutory business trust's major advantage remains its continued flexibility as, other than corporations which are governed by legislation, the trust agreement establishes the rights and obligations of the trustees and beneficial owners. The business trust, therefore, represents the ideal compromise between the company and the common-law trust.[13]

Hayton[14] submits that the following elements of the trust concept make its use attractive to the commercial world: beneficiaries' proprietary interests

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11 Mauritius had to develop trust law by way of legislation in its quest to become a recognised financial hub. China has also recently legislated trusts to establish itself as role-player in the competitive economic market.

12 Hayton (ed) *Modern international developments in trust law* (1999) 151. Compare also Hayton Law relating to trusts and trustees (1995) 28–37 for a discussion of the attractive commercial qualities of the trust and its different roles, for instance as a commercial security device and as a commercial device to segregate assets. Compare Theron *Die besigheidstrust* (LLM dissertation Randse Afrikaanse Universiteit, 1990) in general on the different manifestations of the business trust. See Theron 'Die besigheidstrust' 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 268; and Theron 'Regulering van die besigheidstrust' (1991) *South African Law Journal* 227.

13 See Sitkoff 'Trust as uncorporation: a research agenda' (2005) *University of Illinois LR* 31. See Theron 'Art. 30 van die Maatskappywet 61 van 1973' (1990) *South African Law Journal* 673 for a discussion on the flexibility of the trust as commercial entity.

14 Hayton (1999) n 12 above at 153–161.

vest in a segregated trust fund for the protection it provides; the protection that the strict fiduciary duties and standards afforded by the office of the trustee, provides to the beneficiaries; the flexibility of the terms of the trust instrument; the lack of legal personality which enables the trust to be created and managed in a less formal and less costly way; and the availability of judicial assistance in protecting trustees and beneficiaries.

The off-shore business trust

It is common to walk down a main street in any of the capital cities of the world and enter a building that is registered in the name of an offshore company, the shares of which are held by a discretionary trust established in some other offshore jurisdiction, for the benefit of beneficiaries in a third country. The founder may reside in a fourth location, having given the trustees guidance by way of a non-binding letter of wishes as to how they should exercise its duties.

Foreign trusts have been a popular tax planning tool the world over for a number of years. A variety of assets, immovable property, cash, ships, aircraft, shares, yields, family heirlooms, etcetera can be transferred to an offshore trust. It is submitted by some that as much as two-thirds of all liquid capital in the world can be found in offshore jurisdictions, and that one-third of world capital is deposited into or administered through trusts.[15] International financial centres are not only havens for financial service providers, individual investors, and entrepreneurs from all corners of the globe, but are also used by multinational companies looking for safe havens for their assets, profits, and savings. The asset-protection trust is the most common form of offshore trust.[16]

Even in unlikely civil-law jurisdictions such as China, the phenomenal speed of wealth-creation has driven private individuals to trust products. Aspects such as the continuity of family businesses, the preservation of business assets, and the need for professional and institutional partners have contributed greatly to the demand for trusts – all of this against the 'backdrop of greater regulatory and reporting requirements, demanding more transparency and disclosure of sources of funding, and increasing the cost of compliance'.[17]

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15 See http://www.slogold.net/trusts.html (last accessed 17 September 2011).

16 See http://www.slogold.net/trusts.html (last accessed 17 September 2011).

17 Tan 'Demand for trusts set to take off in China' 2012 International Financial Centre Review. Available at: http://www.ifcreview.com/restricted.aspx?articleId=4795&areaId=24 (last accessed 2 July 2012).

Trusts are used in international finance for a variety of purposes, such as securities clearing systems; custodianship of investments; depository receipts (including currency conversions); market agencies (such as securities brokers); collective investment schemes; deposit protection funds; security interests held by trustees for syndicated lenders; for bondholder trustees; as vehicle for sellers of unperfected sales for buyers; for nominee holders of shares; as investment trusts; for securitisation transactions; and for pension funds.[18] Various financial products, some of them utilising trusts, have developed in many offshore jurisdictions. As a result of the regulatory environment in many jurisdictions an alternative global trading system in low or zero-tax offshore centres has emerged. International banking, offshore investment, and mutual trusts, are continually increasing in importance.

As offshore trusts are largely used as commercial vehicles, the trust concept fulfils a crucial role internationally. Offshore companies would grant little protection if the shares in question were to be held by the individuals in their personal estates in their countries of origin. In certain jurisdictions – including South Africa – an offshore trust may not hold shares in a local entity, as the so-called 'loop structure' is prohibited by the Exchange Control Regulations.[19]

Sharman[20] identifies four products indicative of offshore jurisdictions: asset protection (control over assets, without full legal liability); major disparities between the number of registered legal entities in a country relative to the number of residents; off balance-sheet borrowing opportunities; and the capital round-tripping (domestic funds acquiring offshore status).

For many, the offshore trust has become an extension of their local legal entities, and a number of offshore jurisdictions have capitalised on

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18 Duffet 'Using trusts in international finance and commercial transactions' (1992) 1 *Journal of International Trust and Corporate Planning* 100.

19 Regulation 10(1)(C) of the Exchange Control Regulations. See *Pratt v Firstrand Bank Ltd* 2009 (2) SA 119 (SCA) and *Couve v Reddot International (Pty) Ltd* 2004 6 SA 425 (W) for the application of s 10(1)(C). Compare A review framework for cross-border direct investment in South Africa – discussion document of National Treasury, February 2011. Available at: http://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20crossborder%20direct%20investment%20in%20South%20Africa.pdf (last accessed 17 September 2011).

20 Sharman 'Offshore and the new international political economy' (2010) 1 *Review of International Political Economy* 1. Available at: http://www.informaworld.com (last accessed 1 December 2011).

individuals and companies in search of alternatives.[21] These vehicles assist by creating much needed sources of income and employment in some smaller jurisdictions, and attract additional capital to be invested in the capital or money markets of these jurisdictions. The basic elements for offshore trust jurisdiction include a sound and adequate legal and judicial system, political and economic stability, good communication systems, and the absence of an over-regulated tax and exchange control environment.[22]

Offshore trusts often provide large corporations with expansion opportunities, without necessarily burdening them with substantial increases in operational expenses. Other factors, such as currency restrictions, government and legislative constraints, uncompetitive tax consequences, customs and excise limitations, exchange controls, restrictive labour regimes, and compromised confidentiality may move businesses to consider offshore solutions. Any business venture on the brink of breaking into foreign markets, may be wise to spread its risks through an offshore structure. Although the onshore business structure will usually cross-subsidise the new markets for a time, the long-term result should be a de facto separation between profit and risk.

In our borderless modern society, the offshore trust is far more than a tool for tax evasion. Rather, it is part and parcel of intelligent business and personal financial planning.[23] It is submitted that the current global environment of high-level state control, over-legalisation, currency and market manipulation, over-taxation, economic instability, and general internationalisation of law and politics, compel individuals and businesses to think globally and to spread their risks and tax liability over a number of jurisdictions, wherever possible.

The *de facto* jurisdiction in which the management and control of a business takes place is central to any form of offshore commercial activity. The most likely application of the offshore business trust is as the holder of the shares in one or more offshore company – in the same or different jurisdictions. It is submitted that offshore trusts play a more pivotal role as part of an effective global business structure than as a tool for tax evasion.

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21 Offshore finance centres can be divided into those without any form of taxes, such as the Cayman Islands, those with taxes levied only on internal taxable events, such as Hong Kong, and those which grant special tax privileges to certain types of entities, such as the Channel Islands.

22 Duckworth 'The role of offshore jurisdictions in the development of the international trust' 1999 *Vanderbilt Journal of Transnational Law* 884.

23 See Ginsberg International tax havens (1997) 6.

When trusts are evaluated in an international context, the underlying differences between civil and common-law jurisdictions must always be borne in mind. The intertwining of the financial and commercial environments of European countries during the last two decades, led to the drafting of the 'Principles of Trust Law' in the late 1990s. This was a further effort to lay down the core trust concepts, but with 'leeway for such concepts to develop differently in countries with different legal, cultural and socio-economic heritages'.[24] The Hague Convention on the Law Applicable to Trusts and on their Recognition fulfilled a central role in the drafting of these principles.[25]

The trust figure is ideally positioned to order relationships between different sets of business people, and in the process partition off certain assets for separate treatment by creditors. This characteristic is also advantageous when it comes to financial instruments. The added feature of flexibility in organisational structure can contribute to the commercial life in both common-law jurisdictions that are familiar with the trust concept, and in civil-law jurisdictions.[26]

Hayton[27] proposes a 'common core content' in international trust law — or at least for a specific geographical area. In the context of the European Union, recent attempts have been made to consolidate the law of trusts. The 'Draft Common Frame of Reference' (DCFR) drafted in 2009 (the so-called 'Book X on Trusts'), was an attempt to create a unified trust model for Europe. However, critics believe that the DCFR trust is not the ideal solution for Europe as it draws too heavily on the English legal system and contains 'ambiguities and inconsistencies'.[28] It remains to be seen whether this initiative will bring the European Union jurisdictions any closer to unification as far as trust law is concerned.

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24 Hayton (1999) n 12 above at 19.

25 *Id* at 19–36.

26 A country such as China has introduced the trust figure by way of legislation as the need for a flexible instrument in the commercial sphere was identified.

27 Hayton (1999) n 12 above at 17. See further Principles, definitions and model rules of European private law, draft common frame of reference 2009. Available at: http://ec.Europa.eu/justice/contract/files/european-private-law_en.pdf (last accessed 8 July 2012).

28 Braun 'Trusts in the draft common frame of reference: the "best solution" for Europe?' (2011) 2 *Cambridge LJ* 329. See also Von Bar 'The launch of the draft common frame of reference' (2008) 1 *Juridica International* 4. Available at: http://www.juridicainternational.eu/the-launch-of-the-draft-common-frame-of-reference (last accessed 31 March 2012).

The new *lex mercatoria*

The so-called new *lex mercatoria* is a system of general international contract law, often linked to cross-border arbitration options as protection and enforcement mechanisms.[29] In many cases, the new *lex mercatoria* replaces the traditional, public sources of law such as national statutes and public international law, and is widely regarded as an autonomous legal system, and a 'constantly changing' body of law created and enforced by international business.[30]

Various initiatives have been launched in an attempt to codify this system of law, of which the 'Unidroit Principles of International Commercial Contracts' is the most comprehensive. The role of the United Nations Convention on Contracts for the International Sale of Goods, 1980, (CISG) should also not be under–estimated.[31] While the opponents of these general principles of contract law question whether it at all constitutes 'valid law', its proponents argue that the functionality of these principles will ultimately allow the parties to international contracts to develop their own set of laws.[32] This so-called 'national contract law' can lower the cost of international transactions and avoid jurisdictional disputes. Parties generally prefer the dispute resolution mechanism to follow the law that governs the contract, which explains why more than ninety per cent of transnational commercial contracts provide for alternative dispute resolution clauses.[33]

The *lex mercatoria* is driven by international traders, their lawyers, and the arbitrators involved in the adjudication of disputes. Although potential enforcement issues may remain a strong argument against the *lex mercatoria*, initiatives such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards goes a long way in addressing

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29 See Snyman-Van Deventer 'Die nuwe *lex mercatoria*' (2011) 2 *Stellenbosch LR* 247–271. The writer differentiates the modern *lex mercatoria* from that of medieval times.

30 See Sweet 'The new *lex mercatoria* and transnational governance' (2006) 5 Journal of European Public Policy 629–633 for a discussion on the traditional *lex mercatoria* and the history thereof. He refers to the International Chamber of Commerce (ICC) in Paris as the centre of gravity of the new *lex mercatoria*. Compare in general Wiggers *International law: source materials* (2001). See further Wethmar-Lemmer 'The debate on the existence of the *lex mercatoria*' (2006) 1 *Codicillus* 38.

31 See Gopalan 'Transnational commercial law: the way forward' 2003 *American Universities International Law LR* 803–847. Available at: YPERLINK"http://eprints.nuim.ie/2493/1/SG_Transnational.pdf"http://eprints.nuim.ie/2493/1/SG_Transnational.pdf (last accessed 10 September 2011).

32 See Sweet n 30 above at 634–638 for a more detailed discussion on the different opinions in this debate. The participants in international trade transactions are favouring these initiatives while academic commentators question the pure legality thereof.

33 Sweet n 30 above at 635.

these.[34] The *lex mercatoria* has become a concrete reality within the international business milieu and will be applied by business people irrespective of whether it is acknowledged by national judicial systems or not.

However, the variety of legal solutions, coupled with varying degrees of sophistication they offer, is problematic. Gopalen[35] submits that even the international legal regime does not necessarily always '[reflect] the needs of modern commerce'. Harmonisation is necessary and it will provide a neutral option for both parties of the business deal, while the national laws may be inappropriate for international transactions and may result in disparities. It will ultimately promote international trade and economic development while eliminating barriers in the process.

The opponents of harmonisation raise a number of arguments against a transnational legal system, such as the dangers of multicultural compromises between different legal orders; potential systemic faults in international drafting processes; misplaced idealism; the lack of uniform application by courts in different jurisdictions and lack of accessibility of these judgments; the difficulty in expressing certain legal concepts in foreign languages; *etcetera*. It is submitted that none of these or other criticisms of the harmonisation process, outweighs the necessity for a genuine international legal regime. Such a regime should be based on commercial principles rather than nationalistic legal ideals, as business people 'demand certainty and predictability more than nationally determined notions of justice or fairness'.[36]

Gopalen[37] does not support the notion that transnational commercial law differs from the new *lex mercatoria*. He feels that harmonisation involves minimising the differences between the laws of the different jurisdictions, while the *lex mercatoria* involves the existence (or otherwise) of the system as a viable option. In this sense, international conventions are part of transnational commercial law, but not part of the *lex mercatoria*. This paper however, submits that a process of harmonisation between transnational commercial law and the *lex mercatoria* will increase legal certainty and contribute more effective international trade relations.

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34 *Id* at 638. See in general Booysen *International transactions and the international law merchant* (1995).

35 Gopalan 806–809.

36 *Id* at 804–805.

37 *Id* at 811–812. See further 814–819 on the roles of international conventions and so-called soft law aspects.

In a well-researched article, Snyman-Van Deventer indicates that the modern *lex mercatoria* includes much more than the arbitration of international commercial disputes. International documents like the 'Unidroit Principles of International Commercial Contracts' and the United Nations Convention on Contracts for the International Sale of Goods, are more comprehensive,[38] and are contributing to the proper codification of the underlying principles of the *lex mercatoria*. This implies that, the *lex mercatoria*, as a system of law has developed into a third sphere of law – over and above the national and public international spheres – and has become a *de facto* international commercial legal system.[39]

The sources of the *lex mercatoria* are cited as the legal principles common to trading countries, as well as the general customs of international commerce. The general characteristics include the following: 'non-national; international public law'; uniform rules applied in international commerce; the rules of international organisations; commercial customs; standard contracts; the publication of arbitration awards; and general legal principles. These can be summarised as 'a legal framework created by way of modern international commercial customs, principles, agreements, treaties and arbitration'.[40]

The fact that many trusts are formed by contract means that the *lex mercatoria* can be meaningfully applied in transnational transactions where one or more trusts are involved. It is ever more common to encounter arbitration clauses in trust deeds and other contracts. In Lufuno Mphaphuli Associates, the South African Constitutional Court acknowledged that arbitration has become an area of law 'that is extremely important in the commercial world; recourse to arbitration proceedings to resolve disputes is extensive and is increasing.'[41] It is submitted that, because of the role of the trust in the commercial environment of so many jurisdictions, the future development of the *lex mercatoria* will not leave the use and development of the trust as a legal entity in international law, unaffected.

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38 This code was developed by the International Institute for the Unification of Private Law. The American Law Institute (ALI) developed the Restatement of the Law of Contracts and the Uniform Commercial Code (UCC), which it invited the different states in the US to enact as law. The ICC supports the UCC model and encourages the rest of the international business world to follow suit. See in general Bonell *The Unidroit Principles in Practice* (2006).

39 See Snyman-Van Deventer n 29 above at 267, referring to Carbonneau 'The ballad of transborder arbitration' 2002 *University of Miami LR* 773.

40 Id at 267–270.

41 *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC). See also Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) for a decision on the application of an arbitration clause in a transnational agreement.

Two basic approaches adopted in the determination of the *lex mercatoria* have been its general identification and codification versus the identification of a particular rule on an ad hoc basis. Irrespective of the different schools of thought regarding the justification and applicability of the *lex mercatoria* or not, it does seem to fulfil a particular role in international commercial law. The significant number of recent arbitral awards in which reference was made to the Unidroit Principles may be evidence of the need for some form of a universal set of basic principles in the international business environment.

The Hague Convention in Southern Africa

Trusts were initially principally used in common-law jurisdictions, but are now used internationally and across borders for commercial, financial and personal purposes. This has prompted the international community to step in. The Hague Convention on the Law Applicable to Trusts and on their Recognition was concluded in July 1985.[42] Its preamble states that the trust is considered as a unique legal institution and the convention desires to establish common provisions on the law applicable to trusts and their recognition[43] This Convention has since been ratified by a number of European countries, but no African country has yet done so.

The signatories recognise the existence and validity of trusts established by way of a written trust instrument. The Convention sets out the basic characteristics of a trust and the rules for determining its governing law. As not all Southern African jurisdictions know the trust concept, it may be sensible to follow suit – either by ratifying the Hague Convention or by way of a similar set of uniform rules for Southern Africa.

Trust law in Mauritius

Mauritius has no common-law history of trusts because of its hybrid origin – a combination of French and English law. Its commercial law originated largely from English sources, and so the trust features as a business and financial vehicle naturally.[44] Trusts are, however, statutory creations, in terms of the Trusts Act of 2001 – save for those that arise by operation of

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42 It was adopted at the Fifteenth Session of the Hague Conference on Private International Law in 1984. The primary focus of the Conference is the unification of private international law. More than thirty conventions have been adopted since its establishment.

43 See www.hcch.net/index_en.php for the contents of the different conventions (last accessed 1 July 2014).

44 See Fulton & Whaley 'Gateway to Africa' (2010) 2 *The Lawyer* 42 available at: www.thelawyer.com (last accessed 20 July 2011).

law or by judicial decision, such as unit trusts.[45] To protect its limited land against affluent foreigners, Mauritius has had to create certain limitations on the placing of fixed property in trusts[46] by negotiating tax treaties with a variety of jurisdictions and so improving its position as offshore financial centre with the citizens of the respective treaty-party states.

Mauritius decided to combine the advantages of acting as a traditional financial centre, such as no capital gains tax, no withholding tax, no capital duty on issued capital, free repatriation, and high levels of confidentiality, with the advantages of being a treaty-based jurisdiction[47] by negotiating tax treaties with a variety of jurisdictions and so improving its position as offshore financial centre with the citizens of the respective treaty-party states.

Mauritius initiated offshore banking facilities in 1989, and has offered comprehensive offshore legislation since 1992. Its economy is not limited to offshore activities, but rests on agriculture, manufacturing, and tourism.[48] It differentiated itself in many ways from most of its African neighbours by being innovative and opportunistic. Although Mauritius was the location for the creation of the Organisation for the Harmonisation of Business Law (OHBLA/OHADA) in Africa in 1993, it did not become a party to it.[49]

A Mauritian trust exists where a trustee holds or has vested in him/her property of which he/she is not the owner in his/her own right, but over which he or she has a fiduciary obligation to hold, use, deal, or dispose of for the benefit of the beneficiary, or for a specific purpose. Trusts are created by a disposition of property and must be in writing. A trust must include the

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45 The previous trust legislations namely; the Trusts Act of 1989, the Trust Company Act 28 of 1989 and the Offshore Trusts Act of 1992 were all repealed by Act 14 of 2001. Related legislation includes the Trust Fund for Specialised Medical Care Act of 1992, the Trust Fund for Disabled Persons Act of 1988 and the Trade Union Trust Fund of 1997.

46 See s 7 of Trusts Act 2001. Compare discussion by Ginsberg n 23 above at 501.

47 In 2010 it had tax treaties with thirteen African countries with another seven being negotiated, and has signed investment promotion and protection agreements (IPPAs) with fifteen African countries. IPPAs include a number of commitments, such as free repatriation of investment capital, guarantees against expropriation, proper treatment of investors, compensation for losses in case of war, riots or armed conflict, and arrangements for settlement of disputes between investors and contracting states. See also Moller 'Offshore: Mauritius' 25 June 2007 *The Lawyer* 29. Available at: www.thelawyer.com (last accessed 20 July 2011).

48 See Moller n 47 above.

49 As African countries became more aware of the potential advantages of a harmonised, accessible system of business law, OHADA was formed and a substantial body of uniform law created in the process.

name of the trustee, the intention of the settler, the object, the beneficiary, the property transferred, and the duration of the trust.[50]

Inalienable property and certain leasehold interests may not be transferred or disposed of to a trust, and no immovable property in Mauritius may be transferred to a non-charitable purpose trust[51] Fixed property situated outside Mauritius may be disposed of to any trust. The government is protecting the land for its citizens, as its position as offshore destination may cause non-citizens to purchase all the valuable land and inflate prices to such an extent that the locals will not be able to survive.[52]

Beneficiaries must be identifiable, or at least ascertainable, and their interests are transferable. A trust may also be declared as or known as a protective or a spendthrift trust. In terms of the Act, discretionary, fixed, charitable trusts and non-charitable purpose trusts may be formed.[53]

The voluntary office of protector of a trust is an important function and the trust deed may give that person the powers to remove or appoint trustees; to determine the law of the trust; to change the administration and to withhold consent for certain actions by trustees. The protector is independent of the trustees and is not liable towards the beneficiaries or the trustees.[54]

The Mauritian trust term is 99 years, except for non-charitable purpose trusts, in which case it is 25 years. It is the duty of trustees to preserve and enhance the trust assets, and they are usually endowed with full powers of investment.[55]55 A foreign trust whose proper law is a law other than Mauritian law, is governed by that other proper law. Foreign trusts are, therefore, governed by and interpreted in accordance with the terms of the trust instrument and its proper law.[56]

Mauritius has positioned itself as an important investment jurisdiction not only because of its thriving relationship with major economies such as India and China, but also with its neighbours in Southern Africa.

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50 See ss 3 and 6 of the Trusts Act 2001.

51 See s 7 of Trusts Act 2001.

52 See Ginsberg n 23 above at 501.

53 See ss 14, 17 and 18 of Trusts Act 2001. The fixed trust is similar to the vesting trust in most jurisdictions, while the trust assets vest in the trustees and not the beneficiaries in case of a discretionary trust. The protective or spendthrift trust provides, as its name indicates, special protection to a beneficiary in case of a determent event, such as sequestration.

54 See s 24 of Trusts Act 2001.

55 See s 32 of Trusts Act 2001.

56 Compare s 33 of the Trusts Act 2001.

Many South African companies use Mauritius for group treasury operations, trade finance, international holding companies, and cell captive insurance vehicles.[57] It is submitted that Mauritius has developed a good reputation for the regulation and supervision of its offshore sector. The over-all environment is viewed in international circles as fair and sufficiently regulated.[58]

While Mauritius positioned itself as a jurisdiction of choice to raise international capital for the East and acts as debt and equity investment location, it did not forsake its responsibilities as a member state of both the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (Comesa).

The South African context

A detailed discussion of the trust figure in South Africa does not form part of this essay, but it would be prudent to refer to some principles that correspond to those of Mauritian trust law. It is submitted that the South African trust has developed satisfactorily and can compete as an effective business tool with both a traditionally strong common-law jurisdiction such as the United Kingdom, and a modern offshore jurisdiction such as Mauritius. The South African trust is effectively applied as estate planning tool, business entity and financial instrument. South Africa can compete with the best banking and financial jurisdictions because of its strong regulatory environment, but can at the same time become a competitor in the financial destination and offshore jurisdiction environment.

The introduction of the office of protector in Mauritian trust law, has brought that trust figure in line with that of most financial centre jurisdictions and it is submitted that South Africa may have to consider a similar development if it plans on positioning itself as a offshore financial jurisdiction. The confidentiality of the trust deed is not an unfamiliar principle in the South African context, where the general public also as in Mauritius, does not have access to trust deeds. The Master will only divulge trust information on request from someone with an interest therein. Other

local legislation, such as the Consumer Protection Act,[59] or a legal principle such as public interest, should be adequate in particular circumstances to

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[57] Moller n 47 above at 29. See also Legwaila 'The tax treatment of holding companies in 'Mauritius: lessons for South Africa' 2011 *South African Mercantile LJ* 1–15, and Oguttu 'Curbing tax avoidance – investments in offshore protected cell companies and cell trusts' 2011 *South African Mercantile LJ* 16–44.

[58] Moller n 47 above at 29.

[59] 68 of 2008.

overrule the confidentiality aspect, as it was developed by the common-law and trust practice In South Africa over more than two hundred years. It is therefore submitted that it is not necessary to regulate this by statute, as the legal principles are clear.

Mauritian trusts are limited to ninety-nine or twenty-five years respectively as stated above. The rationale behind these time limitations is unknown, but it may be part of protecting property rights. In many financial centre jurisdictions, and in most African countries, including Mozambique, Kenya, Uganda, Malawi and Rwanda, foreigners may not purchase land outright. They may only register leaseholds for periods usually ranging between twenty-five and ninety-nine years, depending on the country or region. These periods appear to be somewhat arbitrary, without specific scientific or economic basis. It is submitted that it is not necessary for South Africa to limit the perpetual nature of its trust figure, as the nature of trusts and what they are used for will often determine their own justifiable periods of existence. There is no apparent reason why a trust holding assets should be forced to terminate merely because it has been in existence for a particular period of time.

It is submitted that the bulk of the provisions of the Mauritian Trusts Act consist of principles generally present in South African discretionary trusts. An interesting element, however, is the inclusion of the Turquand rule, which may be advantageous in the commercial environment. It is submitted that this principle has already been absorbed into South African trust law.

It is further submitted that a ratification of the Hague Convention by both Mauritius and South Africa should bring the trust law dispensations of the two countries even closer together and may contribute to a more synergistic approach.

The Southern African Development Community (SADC)

SADC is a regional economic community consisting of fifteen Southern African member states, and can be described as 'an organisation that strives for regional integration to promote economic growth, peace and security in the Southern African region'.[60] Apart from the reduction of trade barriers, SADC strives for sound political values among its fifteen member states, building social and cultural ties, alleviating poverty, and enhancing the standard of living among the more than 250 million people in the region.[61]

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60 http://www.southafrica.info/africa/sadc.htm#ixzz1im4udsNF (last accessed 8 February 2012).

61 See www.sadc.int/documents-publications/sadc-treaty (last accessed 1 July 2014) for the founding document of the SADC, called the SADC Treaty, signed on 17 August 1992.

No formally developed SADC legal system exists, although a body of principles, rules, and institutions has been developed with the aim of achieving regional integration.[62] SADC law is instituted and administered by a set of functionaries, with the Secretariat executing SADC policies and the Tribunal providing a forum for the settlement of disputes on the interpretation and application of the SADC Treaty, protocols, and other legal instruments. The main areas of SADC law are trade, investment, agriculture, infrastructure, services, national resources, and security.[63] Member states are directed to coordinate and harmonise national policies and laws with those of the SADC. Although the Treaty and the protocols to the Treaty are regarded as the primary sources of SADC law, non-binding soft-law instruments such as model laws and memoranda of understanding also form an integral part thereof.[64] The launch of the SADC law journal as a general reference for SADC law in 2011, was a major step towards the realisation and establishment of SADC law.[65]

Investment in the SADC is of the utmost importance and cannot be separated from the impact of international business transactions in which different legal structures play a significant role. The integration and harmonisation of finance and investment mechanisms, coupled with sound macro-economic, fiscal, and monetary policies in the region, are necessary for the effective penetration of the international business markets. Member states must coordinate their investment regimes to create an attractive investment climate within the SADC. One of the instruments used is the Investment Annex which includes promotional, protective and regulatory interventions.[66] Another initiative is the Committee on Central Bank Governors, a specialised body within SADC aimed at promoting and achieving closer cooperation among central banks within the Community.[67] The fifteen

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The SADC started as Frontline States, with the objective of political liberation for Southern Africa. It was first called the Southern African Development Co-ordination Conference (SADCC), which was formed in Lusaka, Zambia in 1980 with the adoption of the Lusaka Declaration. The focus moved from political liberation to economic liberation and culminated in the SADC Treaty and Declaration of 1992. The current member states are: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

62 Zongwe 'An introduction to the law of the Southern African Development Community' 2011 Hauser Global Law School Program, New York University School of Law. Available at: http://www.nyu lawglob al.org/Glob alex/Southern African Development Community.htm (last accessed 18 May 2012).

63 *Id* at par 5.1.

64 *Id* at par 2.1.

65 See http://www.sadclawjournal.org/ (last accessed 1 July 2014).

66 Zongwe n 62 above at par 5.2.

67 http://www.sadcbankers.org/Page/default.aspx (last accessed 28 February 2012).

central bank governors deal with the development of financial institutions and markets, cooperation regarding international and regional financial relations, and monetary, investment and foreign exchange policies.[68]

It is submitted that the importance of sound and certain regulatory mechanisms for legal entities is of the utmost importance in a region wishing to achieve objectives of the nature of those of the SADC. The Community may have to evaluate the different corporative and non-corporative legal structures in the region's jurisdictions and embark on an initiative to move towards some common denominators in positioning itself further as an investor-friendly region.

It is submitted that the development of a distinctive Southern African *lex mercatoria* may well contribute to a more attractive and accessible region in which to transact business. The trust concept may, as has been indicated earlier, fulfil an important role in the search for effective business structures to be used across borders and legal and financial regimes.

If the Southern African region wishes to position itself as a reliable player in the fields of international business and finance, the different role players will need to cooperate as a team. In light of the physical location of Southern Africa, it should play to its strengths, such as being the gateway to Africa, its natural beauty, its space, its relative political stability, and its limited exposure to potential natural disasters. 'Team Southern Africa' would be considerably strengthened if it would emphasise the total value the region is able to offer, without individual jurisdictions attempting to have it all.[69]

Conclusion

It is submitted that the South African trust concept has matured dramatically during the past decade – a process that may have been settled by some unequivocal remarks in the Parker case.[70] This development has strengthened the trust figure as a legal and financial instrument in the local commercial environment and should contribute to a higher level of trust in the appropriation of trusts in the marketplace.

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68 Zongwe n 62 above at par 5.2. See http://www.sadcbankers.org/Pages/default.aspx (last accessed 28 October 2012).

69 The more recent initiative of NEPAD (New Partnership for Africa's Development) is focusing on attracting investors by way of public/private partnerships and privatisation programmes in order to improve Africa's infrastructures.

70 Land and Agricultural Development Bank n 9. Compare *Braun v Blann and Botha* 1984 2 SA 850 (A), *Jordaan v Jordaan* 2001 3 SA 288 (C), *Badenhorst v Badenhorst* 20062 SA 255 (SCA), and *Thorpe v Trittenwein* 2007 2 SA 172 (SCA).

In the Southern African context, South Africa and Mauritius are arguably two of the strongest contenders as financial centres in the region which both have strong company and trust-law structures in place. Since a number of other countries in the region also have legal systems of English origin, it should not be too hard to develop and adapt to a set of regional commercial model laws. A model trust law, similar to Book X on European Law, should strengthen the business trust as a legal vehicle in the region, and could contribute to the development of a Southern African *lex mercatoria*.

It will also be wise for jurisdictions in the region with the necessary potential and desire to become part of a regional offshore financial and business stronghold, to adapt and incorporate the Hague Convention, as this will add to confidence in the legal certainty of the region.[71]

A combined and concerted regional effort to strengthen legal cohesion and harmonisation will also prevent arbitrage opportunities, which may damage the region more than they contribute to its development. Trust-law regimes that complement one another, will be only the start and must be followed by political and economic stability, sound legal systems, and complementary tax – and exchange-control policies.[72]

If SADC wishes to achieve its noble vision, Southern Africa will have to be collectively innovative in its endeavours to create and communicate a competitive legal and financial opportunity to the world. Any inclination to manipulate such development from a political perspective should be replaced by a strategic disposition with the focus on the long-term end result of becoming a truly international legal, financial and business pivot.

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71 OHADA is particularly well-represented in the French-speaking African jurisdictions, to who the trust concept is largely foreign. See Martor, Pilkington, Sellers & Thouvenot *Business law in Africa: OHADA and the harmonization process* (2002), in general.

72 See April 'Assessing one-stop-shop best practices for South African investment: a comparative case study of Mauritius and Egypt' (2013) 42/4 *Africa Insight* 124–143 for examples of related initiatives in Southern Africa.