SMEs and International Commercial Dispute Resolution: Without Leading the Horse to Water, it is Unlikely that it will Drink

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I INTRODUCTION: SMES AND INTERNATIONAL TRADE

A Introduction

Small and medium-sized enterprises ("SMEs") are the predominant business form and make up the majority of the businesses of any given country or trading block.[1] About 97 to 99 per cent of enterprises in many, if not all countries, are SMEs.[2] There is agreement among states, business

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1 See a discussion of the different definitional approaches: Gentrit Berisha & Justina Shiroka Pula "Defining Small and Medium Enterprises: a critical review" (2015) 1 Academic Journal of Business, Administration, Law and Social Sciences 17.

2 New Zealand 97.2%: Ministry of Business, Innovation and Employment ("MBIE") *Small Businesses in New Zealand: How do they compare with larger firms?* (Report, March 2013) 1; EU 99%: EU Commission *Entrepreneurship and Small and Medium Sized Enterprises* (3 January 2017) <https://ec.europa.eu/growth/smesen> accessed 2 April 2019; Singapore 99%: Singapore Statistics, Infographic – Profile of Singapore's Businesses <https://www.singstat.gov.sg/modules/infographics/economy> accessed 2 April 2019. The OECD estimates that small and medium enterprises account for 90% of

councils, and international organisations that SMEs are vital for economic growth. As the OECD representatively emphasised: "Small and medium-sized enterprises (SMEs) are important for their contribution to employment, innovation, economic growth and diversity".[3]

While the size of SMEs varies significantly between states,[4] many of their common features and corresponding obstacles to international dispute resolution are largely universal. Real access to effective international dispute resolution mechanisms is essential for encouraging SMEs to grow and prosper in an increasingly globalised world. There is no shortage of effective international dispute resolution mechanisms available to entities operating across borders; however, many SMEs are not in a position to reap the benefits of these mechanisms. Fundamentally, the current nature of international dispute resolution means that SMEs involved in international trade need to have sufficient time, resources, and foresight to plan ahead and build their own path to effective dispute resolution. This article argues that effective default dispute resolution mechanisms are essential to building bridges between the cross-border practices of SMEs and access to cross-border commercial justice.

B Why is Internationalisation Important?

The growth of today's economies is highly dependent on international trade.[5] Expansion into international markets is critical for SMEs' continued

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firms and employ 63% of the workforce in the world (D Munro *A Guide to Financing SMEs* (Palgrave Macmillan, New York, 2013)).

3 OECD, *SMEs and Entrepreneurship*: at <http://www.oecd.org/cfe/smes/> (last accessed 7 January 2017). See also the US Small Business & Entrepreneurship Council *Small Business Facts & Data* <http://sbecouncil.org/about-us/facts-and-data/> last accessed 2 April 2019: "Small businesses continue to be incubators for innovation and employment growth during the current recovery. Small businesses continue to play a vital role in the economy of the United States".

4 In New Zealand an SME is an enterprise with less than a 100 employees (MBIE); in the EU with less than 250, in Japan with less than 300, and in the US with less than 500 (OECD- Centre For Entrepreneurship, SMEs and Local Development, Fostering SMEs' Participation in Global Markets: Final Report (4 July 2013) CFE/SME(2012)6/FINAL para 72.

5 Compare United Nations Conference on Trade and Development, UNCTAD Secretariat, *The role of international trade in the post-2015 development agenda* (Trade and Development Board 6th session, Geneva, 5-9 May 2014) TD/B/C.I/33 (24 February 2014) para 3: "International trade is a powerful enabler of economic development. Empirical literature supports this with strong evidence that increased participation in international

growth and for the economy's (and ultimately the consumers') wellbeing.[6] The UN's Sustainable Development Goals confirm an international commitment to encouraging the growth of SMEs.[7] Despite the obvious case for expansion, only a small percentage of MSMEs are making the most of the benefits that international trade offers. For example, only 38 per cent of New Zealand's SMEs currently export their products, and the majority are not interested in generating overseas income.[8] In the UK, only 9.8 per cent of SMEs export.[9] In Australia, the lack of representative SME participation in exports has been highlighted by the fact that fewer than 300 companies are responsible for more than 80 per cent of all goods exported from Australia.[10] There is overwhelming support through international studies that firm size is an important determinant of whether enterprises trade internationally.[11] This is also evidenced in the majority of OECD countries where businesses of more than 250 employees[12] are responsible for more than 50 per cent of total exports.[13] Moreover, barriers to international trade not only affect existing

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trade can spur economic growth, which itself is a necessary condition for broader development outcomes to be realised." OECD-Centre For Entrepreneurship, SMEs and Local Development, *Fostering SMEs' Participation in Global Markets: Final Report* (4 July 2012) CFE/SME(2012)6/FINAL para 26, at 27. <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CFE/SME(2012)6/FINAL&docLanguage=En> accessed 6 April 2019.

6 UNCTAD, above n 5, para 15.

7 United Nations "Sustainable Development Goals" <https://www.un.org/sustainabledevelopment/economic-growth/> accessed 27 February 2019.

8 MBIE *Small Businesses in New Zealand: How do they compare with larger firms?* (Report, March 2013) 2.

9 Department for International Trade <https://www.gov.uk/government/news/236000-uk-businesses-making-the-most-of-overseas-opportunities> accessed 10 April 2019.

10 *Trade Policy Recommendations: Increasing SME participation in international trade* (2018) Export Council of Australia, Policy report <https://www.export.org.au/LiteratureRetrieve.aspx?ID=161934> accessed 10 April 2019.

11 For example, E Helpman, M Melitz and S Yeaple "Export versus FDI with Heterogeneous Firms" (2004) 94 American Economic Review 300; Thierry Mayer & Gianmarco Ottaviano *The Happy Few: The Internationalisation of European Firms* (Bruegel Blueprint Series, Brussels, 2007); Joachim Wagner "The causal effects of exports on firm size and labor productivity: first evidence from a matching approach" (2002) 77 Economics Letters 287.

12 That equals large companies in the EU context.

13 OECD, Entrepreneurship at a Glance (OECD Publishing, Paris, 2012) 60.

SMEs but may also have a deterrent effect stifling innovation and entrepreneurship. In other words, business ideas may never be carried into reality due to real or perceived barriers to international markets.

One of the reasons for the limited foray into foreign markets by SMEs is the risk associated with doing so. The most commonly cited barrier for New Zealand SMEs is limited experience.[14] The OECD study into barriers of SMEs in regard to conducting international business similarly found limited firm resources, international contacts as well as lack of requisite managerial knowledge about internationalisation to be critical constraints to SME trading across borders.[15] High costs, for example, high insurance costs, can also make it hard for SMEs to compete in an international market.[16] Embedded in the resource, experience and knowledge barrier is the risk associated with potential cross-border dispute resolution. Firms may not be confident that they will be provided with effective justice should a cross-border dispute arise.[17] This is in contrast to larger enterprises that generally have the resources to counter any lack of experience and/or knowledge. Many large enterprises have their own in-house counsel or at least the means to engage specialised counsel.

II SMES AND DEFAULT LEGAL POSITIONS

A Default Dispute Resolution

Parties that engage in cross-border trade are free to agree, in their agreements, to a particular, favourable jurisdiction or to other means of dispute resolution, such as arbitration or mediation. This is beneficial for parties who have the time, resources, and knowledge to negotiate suitable

14 MBIE *The Small Business Sector Report 2014* (Wellington, 2014) 47.

15 OECD *Top Barriers and Drivers to SME Internationalisation, Report by the OECD Working Party on SMEs and Entrepreneurship* (Paris, 2009) 28.

16 L C Leonidou "An Analysis of the barriers hindering small business export development" (2004) 42 Journal of Small Business Management 279-302.

17 For a further discussion see Petra Butler & Campbell Herbert "Access to Justice v Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty" (2014) 26 NZULR 186 at 187; compare also: European Commission, European contract law in business-to-business transactions: Summary (2011); The Bar Council of Ireland, Small Claims Arbitration system (2005) <www.lawlibrary.ie>; Compare also Daniel Girsberger "Eine optimale Form der Streiterledigung fuer KMU?" (2002) <https://www.wengervieli.ch/getattachment/21d11bbe-c7d2-425d-8528-8fa5f6bec722/Eine-optimale-Form-der-Streiterledigung-fur-KMU.aspx> accessed 4 April 2019.

dispute resolution processes and mechanisms to suit the needs of their company and the particular transaction. In this way, contracting parties can also benefit from the many UNCITRAL instruments designed to harmonise and streamline alternative dispute resolution mechanisms. However, if parties do not agree to a particular dispute resolution mechanism, international trade between private parties operates under a default dispute resolution system of international litigation. As will be developed further, litigation is not an ideal default dispute resolution mechanism for international commercial disputes involving SMEs.

B Default Law Applicable to the Contract

Parties to international commercial transactions are also free to choose the laws or even rules that will apply to their contract. This is relevant for everything from interpretation of the contract, right through the dispute resolution. Where the parties have not agreed on the applicable law, this may need to be determined once a dispute has arisen in accordance with the default and often very complex rules of private international law.

Attempts have been made to ameliorate some of the uncertainties and difficulties that result from the application of the rules of private international law. One prominent example is the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG was drafted by UNCITRAL and has been signed by 90 States since 1980. The purpose of the CISG is to provide uniform and neutral rules to apply to the international sale of goods, and it covers issues such as the formation of a contract, the obligations of the parties and the remedies available.[18] Importantly, the CISG applies, by default, to contracts for the international sale of goods where the parties are contracting states to the CISG or by virtue of the application of the rules of private international law. The CISG hereby removes some of the uncertainty and difficulties that can arise when parties have not chosen an applicable law for their international contract for the sale of goods. In this way, it also reduces the importance of the contractual choice of law clauses in that context.[19] The CISG is an example, albeit a limited one, of how default

18 For further discussion of the benefits of the CISG for SMES see Petra Butler "The CISG as the Tool for Successful MSME Participation in Global Trade" forthcoming in Pittsburgh Law's Journal of Law and Commerce.

19 There are some exceptions to this position by virtue of the possibility of Contracting States to make a reservation under art 95 of the Convention.

positions can be introduced to improve default legal positions in international commercial dealings.[20]

C SMEs and the Default Positions

As will be developed in-depth, many SMEs do not necessarily have a practice of signing extensive contractual documents with their international trading partners and frequently do not have a commercial interest in doing so. Additionally, SMEs may not be well-versed in the issues and best practice surrounding the choice of law and dispute resolution clauses. In these cases, access to international commercial justice becomes an expensive and complex minefield, often out of proportion with the value of the original transaction.

III INTERNATIONAL LITIGATION AS THE DEFAULT DISPUTE RESOLUTION MECHANISM

International litigation as the default dispute resolution mechanism for international transactions often does not meet the needs of parties in the case of cross-border commercial disputes.[21] The deficiencies of international litigation include unfamiliar and uncertain foreign judicial procedures, concern that courts will be biased in favour of their own citizens, the risk of parallel proceedings in multiple jurisdictions,[22] language barriers, convoluted procedures for service of documents, difficulties with enforcement of judgments against foreign trading partners, and the time and expense associated with international litigation.[23] Some of the disadvantages of international litigation are as follows.

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20 See a further elaboration and discussion of this in Hanneke van Oeveren "It hurts my head to think about it" – SMEs and the Legal Framework for International Commercial Contracts, LLM thesis (Victoria University Law Faculty, Wellington, 2016) 31.

21 See Queen Mary University of London School of Arbitration surveys on international arbitration, in particular "Corporate Choices in International Arbitration: An Industry Perspective" (2013) <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 4 April 2019.

22 For example *Nelson Honey & Marketing (NZ) Ltd v William Jacks and Company (Singapore) Private Ltd* CIV 2014-442-000079 (3 June 2015) HC Nelson; *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* (2015) SGHCR 21. The Singaporean distributor sued in Singapore for breach of contract (quality of the honey) whereas Nelson Honey sued in New Zealand for purchase price payment.

23 Gary Born "BITS, BATS, and Buts - Reflections on International Dispute Resolution" <https://www.wilmerhale.com/-/media/files/Shared.../News/.../BITs-BATs-and-Buts.pdf>

A Lack of Neutrality

Many international commercial disputes are, by default, resolved by litigation in national courts. However, commercial parties frequently doubt that national courts, particularly the courts of the home jurisdiction of their counterparty, will render an unbiased and competent decision.[24] In many instances, well-documented concerns about corruption and the integrity of national courts further erodes confidence in litigation as a means of dispute resolution.[25]

B Lack of Experience and Expertise

International commercial disputes are often complex. Many such disputes arise in specialised commercial sectors, with complex patterns of business customs and technical issues (for example, oil and gas disputes; insurance and reinsurance disputes; commodities transactions; M&A disputes). Very few, if any, national courts can consistently provide the specialised expertise appropriate for such disputes. Moreover, even disputes with simple factual matrices often entail significant complexity by virtue of the application of foreign law. Some national courts are well-versed in resolving cross-border disputes, but many are not. Particularly in emerging markets, courts may have limited experience in resolving cross-border disputes or may generally lack experienced commercial judges.

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accessed 4 April 2019; William Fiske "Should Small and Medium-Size American Businesses 'Going Global' Use International Commercial Arbitration?" (2004) 18 Transnat'l Law 455, at 457; Gary Born & Petra Butler "Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution" 50 Years UNCITRAL (Vienna, July 2017) <http://www.uncitral.org/pdf/english/congress/PapersforProgramme/104BORNandBUTLERBATsAn_Improved_Means_of_International_Dispute_Resolution.pdf> accessed 4 April 2019.

24 See Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (16th ed, OUP, Oxford, 2015) para 1.99; Julian Lew, Loukas Mistelis and Stefan Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) paras 1-13.

25 See *Global Corruption Report 2007: Corruption in Judicial Systems* (2007) Transparency International, XXI ("Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial").

C Risk of Parallel or Multiple Litigation

In practice, cross-border disputes often lead to litigation in multiple fora[26] – the place of performance, the jurisdiction of the counterparty, the enterprises' own national courts and jurisdictions where the counterparty has assets for enforcement, with each proceeding potentially involving multiple appellate levels. The complexity of handling a multiplicity of proceedings is compounded by the inevitable risk of conflicting decisions.

D Cost and Time to Resolve Disputes

The very real risk of multiple parallel proceedings in cross-border disputes also leads to prohibitive costs and delays. Parties often have to "layer" counsel, first engaging local counsel and then appointing foreign counsel in each of the various relevant jurisdictions.[27] Moreover, enforcement of judgments often requires multiple sets of lawyers in different jurisdictions. In many cases, litigation is slow, with proceedings taking many years to conclude, and then being subject to even lengthier delays for appellate review, followed by yet further delays for enforcement.

E Obstacles to Enforceability of Judgments and Forum Selection Provisions

Different jurisdictions apply different rules (often uncertain national rules) when enforcing foreign judgments and forum selection clauses. Assuming the parties obtain a judgment from a national court, it is often difficult or impossible for the judgment to be enforced abroad, in particular in jurisdictions where the defendant has assets.[28] While there are frameworks for the enforcement of judgments between certain countries, there is as yet no comprehensive mechanism that ensures recognition of a State court's judgment in most other countries.[29] Even where enforcement is possible, the process is invariably slow.

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26 See Butler and Herbert, above n 17, at 199.

27 At 202.

28 See James Fawcett & Janeen M Carruthers, Cheshire, North & Fawcett *Private International Law* (14th ed, OUP, Oxford, 2008) 514.

29 Fawcett and Carruthers, above n 28, at 514. The possible adoption of the Hague Convention might, over time, reduce these risks, but this will be a long-term process with uncertain results. At present, the European Union, Singapore, Denmark, Montenegro,

F Uncertainty and Unpredictability

The factors outlined above introduce a significant degree of uncertainty and unpredictability, which in turn has a chilling effect on international business. The risks associated with potential cross-border business drive up the costs of international commerce and may prevent many potential participants from expanding internationally. This is because the cost is a hugely important factor for firms deciding to internationalise. SMEs will be discouraged from internationalisation where the costs involved exceed the projected benefits.[30]

The presumption is that international litigation is not desirable as a default dispute resolution mechanism to apply in cases involving SMEs. The logical solution is that SMEs ought to choose to contract out of international litigation and instead choose a more appropriate dispute resolution mechanism for the transaction at hand. However, as will be discussed, empirical research suggests that the practices and priorities of many SMEs are not in line with this solution.

IV ACCESS TO INTERNATIONAL COMMERCIAL JUSTICE FOR SMES

As Fiske observed in 2004:[31]

> Without a neutral, efficient, and fair dispute resolution process that is legally enforceable, many businesses would not contract abroad for fear of foreign litigation.

Recent research undertaken by the IMF/World Bank and the European Commission and a pilot study in New Zealand seems to confirm that international litigation is an unsatisfactory vehicle for providing access to justice for many SMEs.[32] The European Commission's study into intra-EU

Mexico, (and the United Kingdom) have ratified the agreement but widespread ratification does not seem likely in the near to mid-term.

30 For a discussion of related economic theories see Richard Caves *Multinational enterprise and economic analysis* (CUP, Cambridge, 1996); Peter Buckley & Mark Casson "The future of the multinational enterprise in retrospect and in prospect" (2003) 34 Journal of International Business Studies 219.

31 William Fiske "Should Small and Medium-Size American Businesses 'Going Global' Use International Commercial Arbitration?" (2004) 18 Transnat'l Law 455 at 459.

32 Compare European Commission *European contract law in business-to-business transactions: Summary* (2011); World Bank and the International Finance Corporation

trade by small and medium-sized businesses found that one-third of respondents felt that the resolution of cross-border conflicts stifled their cross-border trade.[33] The World Bank and the International Finance Corporation in their 2012 co-published study, *Doing Business 2012*, reported that efficiency and transparency in dispute resolution were pivotal in encouraging cross-border trade.[34] Equally, the OECD has recognised that a supportive SME infrastructure "includes an effective regulatory environment, effective contract enforcement and civil justice systems".[35]

Research on the contractual realities for SMEs is scarce, if not non-existent. Many assumptions and conclusions made about international dispute resolution do not specifically consider the unique situation of SMEs. This problem is compounded by the fact that many of the concerns and cases involving SMEs are invisible to usual legal research techniques. This is because disputes involving SMEs are frequently the very cases that do not make it to the court or arbitral tribunal. In many cases, they do not even make it to the lawyer's office. It seems that SMEs, considering their market share, are largely underrepresented in international dispute resolution.

Assumptions in regard to the unsuitability of international litigation as the default dispute resolution mechanism are usually based either on anecdotal evidence, on surveys conducted among large businesses[36] and/or quantitative surveys.[37] What existing surveys have not tested is whether there is a better

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Doing Business 2012 (2012). The Bar Council of Ireland's findings in "Are you an SME with a dispute against a trader in another EU Member State?" draw the same conclusion in regard to Ireland: "Unfortunately going to court is not an option for most businesses as it can be expensive, stressful and time-consuming, and this is even more likely to be true when different languages and differing legal systems are involved."; and Hanneke van Oeveren, above n 20.

33 European Commission, European contract law in business-to-business transactions: Summary (2011).

34 World Bank and the International Finance Corporation *Doing Business 2012* (2012).

35 OECD *Ministerial Conference on SMEs Declaration* (Declaration, 2018) 3 <http://www.oecd.org/cfe/smes/ministerial/SME-Ministerial-Declaration-ENG.pdf> accessed 2 April 2019.

36 See Queen Mary University of London School of Arbitration surveys on <http://www.arbitration. qmul.ac.uk/research/2018/> accessed 8 January 2017.

37 European Commission *European contract law in business-to-business transactions: Summary* (2011); World Bank and the International Finance Corporation *Doing Business 2012* (2012).

alternative to cross-border litigation for SMEs. How do SMEs actually contract? What alternative might exist? A pilot empirical study and survey conducted in New Zealand in 2015 and a broad qualitative study in New Zealand in 2018 confirmed, on the one hand, the anecdotal evidence of the lack of sophistication in cross-border contracting by SMEs; on the other it found that the extent and magnitude of the issue are underestimated and/or ignored.[38]

A The New Zealand Studies

The New Zealand 2015 pilot study interviewed twelve New Zealand businesses from different areas, from manufacturing to IT, located all around the country.[39] The 2018 study interviewed 33 SMEs again, from manufacturing to agricultural products to IT located around the country. The 2018 study also interviewed four large companies from different sectors located in different parts of the country. In addition, in 2018, four Singaporean MSMEs were interviewed – which allows for an insight into MSME contractual behaviour.

The following section summarises the main findings in relation to the practices of SMEs with relevance to international commercial justice.

1 Lack of single contract document

Firstly, the studies found that many SMEs do not have one single contract document.[40] Contracting is done in a piecemeal fashion frequently through a mixture of emails, phone calls, and even WhatsApp or WeChat.[41] Order forms, export documentation, or bills of lading are often the most

38 Hanneke van Oeveren, above n 20. The results of the 2018 qualitative empirical study are for the first time incorporated into this article.

39 Hanneke van Oeveren, above n 20.

40 Out of the 48 New Zealand MSMEs interviewed only 12 MSMEs (ie 25%) stated with an unqualified "yes" that they used a single contract document. Six MSMEs qualified their answer by either making the extent of the contract document dependent, eg on the country they were dealing with, whether it was the service or production side of the business, or the length of the contractual relationship. Two of the Singaporean MSMEs stated that they were using a single contract document.

41 Hanneke van Oeveren, above n 20; NZ Business 8 (retail) – WeChat when importing from China; NZ Business 20 (retail) no contract document.

comprehensive single document of the contract.[42] However, the more complex the product, for example, if the product contains intellectual property rights, or involves distribution agreements, the more likely it is that a single all-encompassing contract document exists.[43] Whether there is a "need" for a formal contract document might also depend on in which country the contractual partner is located.[44]

There was a recurring theme of mistrust of contractual documents. There was some reluctance to require contractual counterparts to sign legalistic-looking documents, perceived as using verbose clauses to contemplate everything that has the potential to go wrong with a particular transaction. The importance of maintaining a relationship between the parties is substituted for any contractual document. As one participant emphasised:[45]

> Good relationships are important to me; I am not really interested in doing deals just for the sake of a deal...I would much rather work on relationships than signing documents and working at a level of distrust.

When asked whether he thought customers read the business' terms and conditions, another participant said "No...and I hope that they don't because it can only be damaging for the relationship."[46]

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42 Study 2018: for example NZ Business 18 (retail); NZ Business 19 (agriculture); Singapore Business A (automotive industry, buying & selling): "The terms and conditions are stated in the purchase order. Whether it is enforceable, we have never trusted it". For 2 of the Singaporean MSMEs the purchase order was the core contract document. For 4 MSMEs out of the 48 NZ MSMEs a bill of lading, an order form, an export certification were the single contract documents.

43 Study 2018: for example NZ Business 3 (agriculture- exporting to 23 countries), NZ Business 7 (consumer electronics). Z Business 24 (marine sector), NZ Business 25 (educational technology). NZ Business 26 stated: "There are two sectors. There's the product and the service. The service has a massive contract that gets associated with that. The product, there is some basic warranty but [that's all]".

44 Study 2018: NZ Business 22 (agriculture) exporting to the US and Canada finding a real need for contract document: "...because everthing you do with them [US, Canada] is very contractual and it's all very organised as well."; NZ Business 12 (retail) exporting to the Pacific Islands "... dreaming about contracts, I deal with brutal reality. There is reality to business. The reality is you do the work and you get paid. So you have to get paid, and you have to get paid however you can. But dreaming about having contracts…".

45 Hanneke van Oeveren, above n 20, at 27 fn 104. This was echoed by NZ Business 1 of the 2018 study: "I won't work with people that I don't feel some sort of comfortable, decent connection with".

46 Hanneke van Oeveren, above n 20, at 27 fn 105.

Also instructive is the following statement by NZ Business 29 of the 2018 study:

> Some we do, and some we don't … It just depends on who we're dealing with – history and those sorts of things. When you've been paid upfront, it's not always as effectual, and it also depends on the specifications and things, which are involved in the transaction. Most of it there is a contract, but there are some people we've been dealing with for a long time where there's no actual contract as such, there's just an email back and forth what they want, and we sort it out from there.

The implication of a lack of formal contractual documents is that many SMEs do not have commercial practices that lend easily to the incorporation of more appropriate dispute resolution mechanisms. Interestingly, even one of the large businesses interviewed stated that contract documents (which contained a choice of law and dispute resolution clause) were just springboards for negotiations and were not really relied upon.[47]

2 *Lack of awareness of the legal issue and lack of engagement of/with legal services*

SMEs lack resources to engage legal advice or to deal with the associated processes on top of the day job of trying to sustain and to expand their business.[48] Smaller businesses are often run by an individual or by a small group of people who are responsible for everything from day-to-day management, human resources, right through to the company's approach to international transactions. This means that decisions are also frequently made by a single decision-maker,[49] who lacks time to extensively research and consider international issues. In addition, SMEs generally lack awareness of the complexity of the potential legal issues – illustrated by the comment of one of the participants:[50]

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47 Study 2018: Business 35 (import, over 500 employees).

48 Hanneke van Oeveren, above n 20. The New Zealand findings are echoed by the UK Federation of Small Businesses in its study "Tied Up – Unravelling the Dispute Resolution Process for Small Firms" (London, November 2016) – A quantitative survey which looked at the domestic use of dispute resolution mechanisms by SMEs.

49 Leonidou, above n 16, at 279.

50 Hanneke van Oeveren, above n 20, at 40 fn 155.

> If someone comes to us to do business, then I guess my gut feeling would be that whatever law we work in always applies. So if somebody rings me from the US and wants to buys something from me, then I assume that they came to us, so our law must apply. The moment we call them instead, then US law might apply.

In particular, MSMEs are often not aware that additional issues may arise in cross-border situations.

Of 33 NZ MSMEs who were interviewed in 2018, all of whom were engaged in cross-border trade, 13 MSMEs had sought legal advice regarding their domestic contracts, but only 11 of them in relation to cross-border contracts.

Some of the MSMEs take a rather pragmatic view.[51] As one participant stated:[52]

> For a layman like myself, even reading a legal document is already something; you have a bit of an idea of what it says, but what it really means you don't really know.

Sometimes a "down-to-earth" approach prevails, which perhaps echoes perceptions gained by watching US legal drama:[53]

> No...because America, you know, don't kid yourself. The Americans are not going to sue me, I could poison and kill an American [with my product], and they wouldn't sue me because the lawyers would not make enough. They could take me to the cleaners, they could take my business, they could take my wife and children and sell them into slavery, and they still would not make enough to pay their fee.

However, even if SMEs seek legal advice the advice they are receiving often does not satisfy their needs. As a participant explained:[54]

> … a ten-minute discussion with my solicitor, we sent a machine to the UK, which I owned. I had known the dealer for a long time, and there

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51 "In business, it's always a risk and it's a matter of you determining if that customer is a good customer when it comes to terms of payment" Study 2018: Business 19 (agriculture).

52 Hanneke van Oeveren, above n 20, at 27.

53 Hanneke van Oeveren, above n 20, at 49 fn 201.

54 Hanneke van Oeveren, above n 20, at 28 fn 108.

> was mutual trust, but once I sent the machine, it was effectively out of my hands, he had it, but I owned it. I had a ten-minute discussion with my solicitor, but he said it was a complicated thing, *so I said we will forget it and go with the handshake*. (Emphasis added)

Traditional academic writing on international commercial contracts often assumes the involvement of lawyers in the contract drafting stage.[55] However, in many cases, the value of the individual transactions will mean that the involvement of a lawyer is not a commercially viable option. One participant clarified:

> For us, the amounts are just too small; if we are doing a deal worth $50,000, the profit margin might only be 10 per cent, if we use a lawyer "poof" half the profit is gone.

Furthermore, in relation to international matters, an SME's usual lawyer might not have a broad knowledge of the best practice for key clauses in an international commercial contract. This may be particularly true for smaller firms located in regional areas of New Zealand with lawyers who engage in a broad range of legal services for both private and commercial clients. Many small businesses will customarily refer all their legal queries and issues to the same lawyer.[56] When asked about the use of drafted documents for international transactions, one participant reported that:[57]

> I wouldn't have a clue where to start and I also probably would fear that if I went to my usual lawyer… He wouldn't have a clue either... .

3 (Perceived) Ingenuity of SMEs

An interesting slightly counter-implication of the multi-tasking SME management is their involvement with and understanding of the day-to-day performance of contracts, as well as the negotiation thereof. In general, smaller businesses will also have fewer customers and fewer individual transactions than larger firms. Where a firm has fewer customers and fewer transactions, it is possible for the management to "hold the reins" and be

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55 See for example William Fox *International Commercial Agreements* (3rd ed, Kluwer Law International, The Hague, 1998) 87.

56 Elio F Martinez Jr "Representing a Small Business" (2009) 26 GPSolo 28 at 29.

57 Hanneke van Oeveren, above n 20, at 30 fn 124.

personally in control and assess the risk of individual transactions.[58] Smaller businesses may hereby have an increased ability to be selective in whom they deal with and operate on the basis of relationships rather than formal procedures. All 48 participants of the New Zealand studies stressed that "trust" was the essential element of their business relationship.

When asked whether documents for sale to a distributor included anything about dispute resolution or applicable law, one participant said:[59]

> No... Eventually, we will have to go there, but at the moment, the relationships are really personal, and I deal personally with all these people, and when you're sitting across the table face-to-face, you work it out. But if we get bigger and employ salespeople, then we need more detail. As I own the business, I can see the big picture, but for a salesperson, that is much harder to do.

The comment is illustrative of the (perceived) ability of the management of an SME to avoid the need for legal recourse by retaining oversight and by being directly in control of all aspects of their business' involvement in international commercial transactions:

> Learning by doing – no legal advice. I've read a lot of legal agreements. In an earlier life, I tried to set up a franchise business where we spent $50,000 on franchisee agreements and supplier agreements and everything else that goes with it, and I took it upon myself to learn what all that stuff meant to make sure we had a good contract. I spent a lot of time reading legalese… As long as you take time to understand or think through the implications of it, sometimes an innocent-sounding phrase can mean a lot more than it first looks. So, it's important to take time to really think about the implications of what they're saying. It's just logic.[60]

Being required to sign a contractual document or requiring the other party to agree to and sign a drafted contract may induce a sentiment of the agreement no longer being a flexible agreement in the hands of the negotiators

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58 Hanneke van Oeveren, above n 20, at 25.

59 Hanneke van Oeveren, above n 20, at 29 fn 117.

60 Study 2018: NZ Business 20 (production & retail).

but instead being constricted into a paper straightjacket requiring interpretation by lawyers.[61]

The ingenuity of SME management, an illustration of the potential advantages of SMEs but also of their relationship to written formally negotiated contracts is illustrated by one New Zealand SME. An SME that frequently deals with much larger overseas companies explained:[62]

> They are dealing with one person – me. I'm dealing with their finance department and their legal department, like 30, 40 or even 50 people... so you're dealing with 50 people, and they have lawyers on tap that are on the payroll, and they want to keep those guys busy. And that's why we say, yeah, you can go down that track [changing our standard contract], *but you're gonna be paying our legal fees as well*. (Emphasis added)

Small businesses find alternative ways to minimise the risk they take on in entering into an international transaction, which reduces the perceived importance of legal recourse. One of the most obvious and frequently recommended methods to minimise risk for a seller of goods or services is to require full payment before delivery or provision of the services.[63] One participant's response is illustrative:[64]

> Well, obviously, you mitigate it, you approach it differently, but the risk would be that it is much harder, or at least I perceive it to be much harder to enforce any payment. We just don't go there; it is sort of accepted in international transactions that there is a lot more cash on delivery, pay before it leaves.

This view was echoed by another participant who said:[65]

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61 Hanneke van Oeveren, above n 20, at 25.

62 Hanneke van Oeveren, above n 20, at 31 fn 126.

63 US Department of Commerce, International Trade Administration Finance Guide: A Quick Reference for US Exporters 4. That has been cooperated by the New Zealand and Singaporean 2018 studies. However, it is interesting to note that letter of credit is not a payment method that finds any favour with NZ MSMEs. None of the NZ MSMEs interviewed was partial to L/Cs.

64 Hanneke van Oeveren, above n 20, at fn 55.

65 Hanneke van Oeveren, above n 20, at 16 fn 56.

> ...our credit terms are payment before delivery, so we would never ship without the payment being complete or at the very least a letter of credit. So, no I would not say they are more risky but maybe that is just because we have mitigated against the risks.

Both participants considered the risk of international transactions, at least to a significant extent, to be mitigated by requiring full payment before delivery.[66]

Since "trust" is the core ingredient of the business relationship, New Zealand MSMEs seem to spend a considerable amount of time and energy of finding out about their potential contractual partner, including to travel to meet the potential new contract partner and asking around within the industry whether the potential partner is reliable.[67] As one participant explains:[68]

> There's a number of things we do. We start a dialogue with people. We talk to others who they know in that market about them. We may use [NZTE] to look and see whether they're legitimate or not.

This is echoed by a Singaporean MSME in the wholesale trading business:[69]

> We do the checks on buyers. We visit them at least once and know them well. [Or we know them through another company]. And then you can also check the market information, how are their payments and [for information about the customer]. Even banks, when you put the documents through the banks, the import/export documents, they also conduct a credit report on the buyer, and once they get a satisfactory credit report from the other bank, then the transaction takes place.

The ingenuity of many SMEs is striking. Despite being faced with a situation where it may be difficult if not impossible for them to access

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66 Hanneke van Oeveren, above n 20, at 16.

67 For example, study 2018: NZ Business 17 (film industry).

68 Study 2018: NZ Business 29 (agricultural product).

69 Study 2018: Singaporean Business C. Note also Singaporean Business D (manufacturing of technical instruments/machinery): "Our customers are very close with us so we visit them quite often, by emails, telephones and visits. So, we know the customers' staff very well. So, we when we visit we actually know the procession, their progress, their futures, what they are doing and how the business is going. So, from the how the business is going we know how the customer is performing and what is the risk of the customer."

effective dispute resolution for international transactions, they have managed to find ways to successfully mitigate the risks or "self-hedge" and still trade effectively across borders. Many SMEs trade successfully without recourse to international dispute resolution; there is a focus on performance rather than preparation for things going wrong. However, it must not be overlooked that doing business inevitably gives rise to the possibility of disputes. Furthermore, a tendency to "self-hedge" is not an ideal situation. For example, requiring payment before delivery and therefore avoiding using credit terms also has a limiting effect. Trade credits are important for growth and profitability. By allowing customers to pay on credit terms, firms can boost sales and increase profitability by being able to guarantee the quality of their products.[70] In fact, the advantages of advancing trade terms are even more pronounced for SMEs; this is because SMEs, because of their size, may have a less established reputation and have less bargaining power. It has been said that trade credit is necessary for SMEs to be able to compete with larger companies.[71] Similarly, reliance on trust also has a limiting effect. That is, SMEs are more limited in their choice of trading partners. OECD research suggests that SMEs are more likely to trade only with countries that are comparatively closer to home.[72] The implication of both a reliance on trust and inflexibility in trading terms is that SMEs may not be reaching their full potential on the international market.

V HOW CAN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION MEET THE NEEDS OF SMES

A The Status Quo is Not the Answer

The general presumption is that the current default international dispute resolution mechanism of cross-border litigation denies SMEs access to justice since SMEs are not sufficiently equipped and able to navigate the pitfalls of cross-border litigation. The New Zealand qualitative research is consistent

70 Michael Long and others "Trade Credit, quality guarantees and product marketability" (1993) Financial Management 122.

71 Nicholas Wilson & Barbara Summers "Trade credit terms offered by small firms: survey evidence and empirical analysis" (2002) 29 Journal of Business Finance and Accounting 317.

72 OECD Entrepreneurship at a Glance – 2017 (OECD Publishing 2017) 104 <http://www.oecd.org/sdd/business-stats/entrepreneurship-at-a-glance-22266941.htm> accessed 25 March 2019.

with that presumption. For example, SMEs generally lack the knowledge, inclination, resources or bargaining power to incorporate either a favourable jurisdiction clause or alternative dispute resolution processes (such as arbitration or mediation) into their contracts.[73]

The research also strongly suggests that education and sample contracts or dispute resolution clauses, as can be found on industry websites or in industry publications,[74] are a nearly futile exercise. SMEs often do not have the awareness that they should include a dispute resolution clause in their contracts or they do not have the "headspace" or the expertise to investigate those offered solutions. The question, therefore, arises whether there is a better solution to safeguard SMEs from potential dispute disasters. In other words, what is the best safety net for SMEs who do not include dispute resolution clauses in their contracts or dealings?

Despite these factors, the New Zealand research also indicates that at least New Zealand SMEs seem to have developed unique coping mechanisms in regard to their internationalisation. Surprisingly, to this date, SME lobby groups have not demanded a change to the legal landscape. Similarly, a number of the participants in the New Zealand study were not interested in modifications to dispute resolution systems; there was a sentiment of, "if it ain't broke, why fix it?"

However, effective access to justice is a crucial component of international trade. Access to justice will not only assist existing SMEs, but also encourage and enable new SMEs to trade across borders. Moreover, effective access to justice will enable SMEs to act on an even playing field with larger, more resourced players. As recognised by the G20 thematic group concerned with SMEs, "The challenge for governments is to provide and nurture an ecosystem for SMEs which allows them to interact with suppliers, partners and customers on a level playing field worldwide".[75] The increased

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73 See findings Hanneke van Oeveren, above n 20.

74 See for example the International Chamber of Commerce (ICC) Model Contracts and Clauses <https://iccwbo.org/resources-for-business/model-contracts-clauses/> and the International Trade Centre Model Contracts <http://www.intracen.org/itc/exporters/model-contracts/> accessed June 2019.

75 Dr Rudolf Staudigl *G20 2017 Business 20 Dialogue Think Big for Small: Small and Medium Enterprises as Pillar for Future-oriented, Sustainable Growth* (B20 Cross-thematic Group Small and Medium Enterprises (SMEs) Policy Paper, 2017) 1

participation of SMEs in international dispute resolution mechanisms will also allow SMEs to be considered stakeholders in international dispute resolution and for mechanisms to be adapted to further their needs.

B Default Positions as the Missing Link

Despite the current lack of access to justice for SMEs trading across borders, there are opportunities for a way forward. UNCITRAL has to mandate to further the progressive harmonisation and unification of the law of international trade. In light of this mandate, UNCITRAL has developed a range of instruments in the sphere of international commercial dispute resolution for SMEs, including its work on Online Dispute Resolution (ODR), the New York Convention, the Singapore Convention, and model laws related to both arbitration and conciliation (mediation). These instruments fundamentally create, improve and enhance the international dispute resolution mechanisms. These instruments act to reduce the differences in domestic laws as they relate to international dispute resolution. They also allow for an internationally more unified approach to dispute resolution. In addition, some of these instruments also directly refer to the interests of SMEs. For example, the UNCITRAL Technical Notes on Online Dispute Resolution specifically provide that:

> the Technical Notes are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications... .[76]

Unfortunately, what the instruments do not enable is direct access to the international dispute resolution mechanisms for SMEs. It remains the responsibility of States, both individually and collectively, to ensure access to justice for their citizens and entities.

Despite the many dispute resolution options available, there remains a missing link. As discussed early in this paper, many SMEs do not have a practice of using extensive contractual documents or including clauses

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<https://www.b20germany.org/fileadmin/userupload/documents/B20/B20CTGSMESFinalPolicy_Paper_2017-04-11.pdf> accessed 27 March 2019.

76 UNCITRAL Technical Notes on Online Dispute Resolution 2018 <http://www.uncitral.org/pdf/english/texts/odr/V1700382EnglishTechnicalNotesonODR.pdf> accessed 28 February 2019.

providing for alternative dispute resolution. This means that many SMEs either consider that they have real access to justice for international deals or take the risk of needing to resort to international litigation.

The authors of this article suggest that in order to allow SMEs to benefit from alternative dispute resolution mechanisms and to encourage SMES to trade internationally, it is essential that they have unconditional access to a dispute resolution mechanism that better suits their needs. The proposed solution is to replace the default dispute resolution mechanism of international litigation with an alternative that more fully suits the needs of SMEs. At this point, it is important to note that the creation of default positions does not and should not impinge on the party autonomy afforded to the parties in international commercial transactions. That is, the parties should always remain free to include a dispute resolution clause in their contract.

C The Default Position: BAT/MAT/BAMAT

In this section, we discuss one particular alternative default dispute resolution mechanism that could replace the current default of international litigation as a way of illustration.

A solution that has been discussed that would reap particular benefits for SMEs in regard to international dispute resolution is Gary Born's Bi/Multilateral Arbitration Treaty regime (BAT).[77] At its core, Born's proposal is a relatively simple one. States would agree to substitute international litigation with international commercial arbitration as the default dispute resolution regime between commercial entities trading between those states.

Such an agreement would be by way of a treaty. Of course, the treaty need not be bilateral – indeed, it would work best where many states were party to a single treaty, ie as a multilateral treaty. It does not need to operate as a standalone treaty – it could quite naturally fit into a preferential trade agreement or another multilateral treaty. It was recently recognised by the

77 See Butler and Herbert, above n 17, at 186; Gary Born & Petra Butler "Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution" 50 Years UNCITRAL (Vienna, July 2017 - forthcoming).

G20 Cross Thematic Group on SMEs that states ought to directly take into account the interests of SMEs when entering into trade agreements.[78]

Arbitration under a BAT would be the default dispute resolution mechanism. Parties would remain free to opt-out by (a) selecting some other forum (by way of a forum selection or choice of court clause), (b) prescribing an arbitration procedure that is different from the procedure mandated under the BAT, or (c) agreeing that the BAT would not apply to disputes arising between those parties (in which case the ordinary rules of private international law would apply, and the dispute would fall to be resolved by the courts).

A BAT would provide for those matters that can be subject to arbitration. It would provide for the types of transactions that would fall within its scope, namely, transactions between private enterprises located in the contracting states.[79] And it would carve out those subject matters over which, for reasons of public policy, States wish to retain judicial oversight.[80]

In addition, a BAT would prescribe those factors ordinarily found in a full arbitration agreement: the rules according to which the arbitration is to be conducted, the number of arbitrators, and the appointing mechanism. The BAT could also include provisions as to the use of Online Dispute Resolution to streamline the procedure. Born suggests the use of the UNCITRAL Rules of Arbitration[81] and the designation of the Permanent Court of Arbitration (PCA) as the appointing authority.[82] Those choices, he reasons, would create an environment providing maximal neutrality to international disputants.

Where a dispute was subject to the BAT, the courts in both states would decline to find jurisdiction, would stay any proceedings, and would refer the dispute to arbitration. This is in line with the current practice of national courts when faced with an arbitration agreement.[83] Similarly, state courts

78 Staudigl, above n 76, at 8.

79 See Draft Model Bilateral Arbitration Treaty (Draft Bat), art 1 "International Commercial Dispute".

80 For example: competition and employment matters.

81 Draft BAT, art 4(1)(a).

82 Draft BAT, art 4(1)(b).

83 See Article II(3) of the Convention on the Recognition and Enforcement of Arbitral Awards (New York, 1958) ("New York Convention"), and art 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985).

would recognise and enforce arbitral awards rendered in the course of arbitration under the BAT.[84]

Default arbitration under a BAT could ease many of the concerns raised in regard to cross-border litigation generally. The BAT could also alleviate issues that are of particular concern to SMEs, given the way they are dealing with the legal dimension of their business. In addition, a BAT could level the playing field between larger and smaller corporations. In particular, a BAT would be beneficial by:

(a) prescribing a dispute resolution mechanism, thus avoiding the costs associated with parties familiarising themselves with dispute resolution procedures in each of their trading partners states;
(b) prescribing a uniform procedure that sits independently from any national law. Proceedings that run according to a well-settled and a national set of rules, which the parties can vary by agreement, and before an arbitrator that the parties played some role in selecting will instil a greater sense of trust in the outcome; and
(c) enabling counsel local to each party to represent that party throughout the dispute. This reduces the need for parties to brief multiple counsels, thereby substantially reducing the cost of resolution.

As arbitration would be the default. There would be no cost for SMEs in setting up a dispute resolution mechanism – neither for drafting an arbitration agreement nor as part of a bargain when attempting to include a favourable dispute resolution clause in an agreement. The BAT could reduce the risks of international transactions without increasing administrative costs at the time of contracting. A BAT might also provide optional or mandatory means of alternative dispute resolution (for example negotiation, conciliation, mediation) prior to arbitration, giving SMEs the opportunity to engage in informal means of dispute resolution.[85] In particular, a BAT would also prevent parallel proceedings, allow for expert adjudicators, and provide for an easier means of enforcement of any award.

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84 Article III of the New York Convention; UNICITRAL Model Law on International Commercial Arbitration (1985) art 36.

85 See art 2(a) of the Draft BAT, which contains a requirement to negotiate in good faith. Resolving the dispute in an amicable way seems in line with Hanneke van Oeveren's findings, above n 20.

As might be expected with a proposal of this nature, the BAT presents several issues that seem to militate against its utility. Born identifies five: the apparent affront to the constitutional guarantee of access to justice, consent (or the apparent lack thereof), the mechanics of the arbitral process, the existence of regimes that already seek to address some of the problems with international litigation, and a fear of the unknown. Those "buts", however, do not present obstacles to the implementation of a BAT.[86]

VI CONCLUSION

SMEs are the most prevalent and arguably the most important business form in all countries. There is a wide international consensus that governments and organisations should work to promote and encourage SMEs to trade across borders. Empirical research undertaken primarily in New Zealand indicates that many SMEs do not have a practice of choosing alternative dispute resolution mechanisms to better suit the particular transaction at hand. This article recommends that States, in their international treaties, agree on an alternative default dispute resolution mechanism that would more adequately suit the needs of SMEs. UNCITRAL instruments, such as the New York Convention and the prospective Singapore Convention as well as the technical notes on ODR, are important tools that can be instrumentalised to minimise the dispute resolution risk for SMEs when trading cross-border. However, it might take more innovative ideas such as the BAT to create a cross-border dispute resolution regime that really removes the barriers for SMEs to trade cross-border.

In particular, future developments in dispute resolution mechanisms must focus on how to streamline access to justice for SMEs rather than focusing solely on the machinery of these instruments. Simplifying and solidifying access to international commercial justice for MSMEs can allow MSMEs to be more willing to internationalise and take more risks internationally, thus allowing them to more successfully compete with larger companies. An increased representation of MSMEs in international commercial dispute resolution would, in turn, encourage the further development of legal precedents, processes, and hard and soft laws that take into account the unique needs of MSMEs who are trading across borders. In order to promote

86 See in regard to a discussion of the "Buts" in Gary Born "BITS, BATS and Buts" (Kiev Arbitration Days 2012, Kiev 15, 16 November 2012); Butler and Herbert, above n 19, at 186; Born and Butler above n 80.

inclusive and sustainable international trade, the needs and interests of MSMEs can no longer be ignored.