

2007

## Trends on the Harmonization of Contract Law in Africa

Salvatore Mancuso

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [Contracts Commons](#)

---

### Recommended Citation

Mancuso, Salvatore (2007) "Trends on the Harmonization of Contract Law in Africa," *Annual Survey of International & Comparative Law*: Vol. 13: Iss. 1, Article 7.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol13/iss1/7>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# TRENDS ON THE HARMONIZATION OF CONTRACT LAW IN AFRICA<sup>1</sup>

SALVATORE MANCUSO<sup>2</sup>

## I. INTRODUCTION

During the late 20<sup>th</sup> century, there was an increased interdependence between the nations of the world. Unprecedented trade liberalization at the multilateral, regional and bilateral level, accompanied by the quick development of new information technologies, have changed the way sovereign states, businesses and citizens interact among themselves. Huge trade liberalization, and a change from protectionist to open market economies, has created the basis for the growth of transnational business activity. At the same time, democratic values and institutions have been progressively strengthened.

The establishment of a legal and regulatory environment where private transnational exchanges can safely take place has become essential for developing countries to attract further investment, as well as to promote the development of the local private sector. Legal and judicial reforms, directed both at the domestic judicial institutions and the law itself, are then core issues to be addressed in order to support further economic

---

1. Paper presented at the International Conference of Club OHADA of Cairo (Egypt) – *Institut du Droit des Affaires Internationales* (I.D.A.I.), Faculty of Law, University of Cairo (Egypt), on “Africa, Legal and Economic Integration” Cairo, Egypt (Apr. 8, 2006).

2. Salvatore Mancuso was born in Palermo (Italy) on 26 October 1963. He got his Bachelor of Law at the University of Palermo (Italy) and has obtained its Ph.D. in Comparative Law at the University of Trieste (Italy). He is Professor of Comparative Law and International Business Law at the University of Macao (P.R. of China), and he has been a lecturer at the Universities of Trento, Salerno and Palermo (Italy), Asmara (Eritrea), and Shanghai (P.R. of China). He has published a book and several articles on Comparative and African Law. He is also a lawyer, admitted to the Italian Bar, partner and founder of the law firm Castellucci e Mancuso, located in Milan, Rome (Italy) and Asmara (Eritrea).

development in Africa. These reforms should support economic growth by facilitating transnational business transactions, and may include different measures from writing, or revising commercial codes, bankruptcy statutes and company laws, to updating the mandate of regulatory agencies. This process also gives the opportunity to eliminate uncertain provisions, promote transparency, and improve competitiveness for domestic and international trade. In addition, reforms may attract more investment due to the reduction of the transaction costs.

While any economic integration cannot occur without a previous political process, both at the national and international level, economic integration cannot subsist without a solid legal framework. Today, international legal instruments developed within multilateral institutions and applicable to certain cross-border transactions have become increasingly important to the development of a substantive transnational law. The term "transnational law" is used as referring to "*all kinds of principles and rules of non-national. . . character used in international business practice as an alternative to domestic law.*"<sup>3</sup> Indeed, a supranational framework, including business customs and instruments dealing with international trade and private international commercial law is slowly emerging. This international legal framework developed through several intergovernmental and business organizations or legal research centers (such as UNIDROIT, UNCITRAL, The Hague and the International Chamber of Commerce) reinforces the trend for seeking harmonized solutions to multi-jurisdictional issues. The reason is that following a single set of rules, instead of having to consider various state laws, is more efficient, reduces transaction costs, and thus facilitates the development of economic activities.

Taking into consideration both the need for domestic legal reform in commercial matters and the importance of promoting harmonized commercial solutions for Africa, in this paper I first review the concept of legal harmonization in general and with particular reference to the situation in Africa. I then provide an overview of OHADA and COMESA, the two main initiatives of regional integration in Africa having implications in the harmonization of commercial law in general, and in the law of contract in particular. I conclude by affirming the interest of further exploring the possibilities related to the harmonization/uniformization of the law of contracts in Africa to enhance the opportunities for the development on this continent.

---

3. Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 5 UNIF. L. REV. 199 (2000) (emphasis added), available at <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (last visited Apr. 6, 2007).

## II. THE CONCEPT OF LEGAL HARMONIZATION

Harmonization processes are different and can take many forms at the domestic, international, or multilateral level. For instance, such a process can be embodied in (a) the revision of a national code, (b) the creation of an international code (like the *Convention on the International Sales of Goods* - CISG by UNICTRAL), (c) an international restatement (like the UNIDROIT *Principles of International Commercial Contracts*), (d) the adoption of regional choice of law conventions (like the Rome Convention on the Law Applicable to Contractual Obligations), (e) the adoption of uniform private rules (like the *Uniform Customs and Practices on Documentary Credits* – UCP).<sup>4</sup>

The more radical form of legal integration is “uniformization,” which is the legal technique aimed at eliminating the differences between the national provisions by replacing them with a unique and identical text for all the States involved in the legal integration process. This process can be pursued in two different ways: the text is submitted to national parliaments who may adopt it as is, modify it or even reject it, or the adopted text contains the principle of supra-nationality, by which the uniform norm is directly integrated into the domestic legal order.<sup>5</sup>

Harmonization is a less radical technique than uniformization. It basically consists of changing domestic provisions from various countries that are not similar in order to make them all coherent, or update them with a reform. Therefore, while respecting the particularities of the various national legal systems, harmonization gives the opportunity to reduce their differences in selected areas, and to enhance legal cooperation between the countries.<sup>6</sup> Generally, this kind of result is obtained through directives or recommendations adopted by an international organization who then passes them on to its member states for implementation (e.g. the European Union). Member states remain free to choose the most suitable form of adoption of the new regulations, as long as the result is the incorporation of the new harmonized rule, thus leaving them much more flexibility.

---

4. See Arthur Rosett, *UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven*, 2 UNIF. L. REV. 441 (1997), available at <http://www.unidroit.org/english/publications/review/articles/1997-3.htm> (last visited Apr. 6, 2007).

5. See Joseph Issa-Sayegh, *Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA*, 4 UNIF. L. REV. 5 (1999), available at <http://www.unidroit.org/french/publications/review/articles/1999-1.htm> (last visited Apr. 6, 2007).

6. *Id.*

Since the emergence of modern international trade, attempts towards the international unification of law have mainly taken the form of instruments with binding value for the States, such as supranational legislation or binding international conventions. However, despite some remarkable outcomes, the majority of bilateral or multilateral conventions on legal unification or harmonization have generally not been very effective, as witnessed by their subsequent limited use or even failure. The reason may be that the development of a really successful solution for legal harmonization does not comply with the rigidity of the usual treaty-making process, where unification cannot be made beyond the terms of the treaty and amendments are difficult to be adopted. Therefore, a trend towards non-legislative or non-binding instruments of unification or harmonization of law has been developed.<sup>7</sup> For example, model laws, model clauses and contracts drafted by taking into consideration the current trade practices, or international restatement of general principles of certain legal domains, such as the UNIDROIT Principles of International Commercial Contracts, have been quite successful.

The emergence of a transnational commercial law, perceived as non-binding soft law at the beginning, is now strengthened as its rules are recognized as binding when the parties have accepted it or are part of an activity governed by it. The application of substantive norms can then be pursued through the adoption of the above mentioned international instruments or through custom, practice, usage and principles. Therefore, while the whole concept of a modern *lex mercatoria* remains questionable, the success of some supranational norms, which often reconcile differences between distinct legal traditions, is undoubtedly increasing. As economic activities become increasingly global, there is a strong incentive for the law to follow the same pattern. The appeal of transnational legal solutions lies in the potential reduction in complexity, more widely dispersed expertise, and strong reduction of transaction cost with subsequent efficiency.

In the future, supranational and transnational legal norms and rules related to international trade and commerce will gain importance, provided that they promote flexibility, good standard practices as well as reducing, as much as possible, the differences between common law and civil law principles. The importance and authority of those legal instruments also tends to get more widely acknowledged when they cover specialized fields of law and when they take into consideration both practical and academic perspective. This will lead legal professionals to be confident

---

7. See Franco Ferrari, *How To Create One Uniform Contract Law*, 5 VINDOBONA J. INT'L COMM'L L. & ARB. 3, 3 - 21 (2001).

in adopting them and business actors to be facilitated in their commercial transactions applying them.

### III. THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA

The problem of diversity of laws has been an important (even if indirect) obstacle to the African economic development that, for a long time, has not been taken into proper consideration by the African States. Since the attainment of independence, the issue of harmonization of laws in Africa has been addressed. Professor Allott observed that, “*the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny.*”<sup>8</sup>

The diversity of laws in Africa can be examined from three different perspectives: diversity within each country, diversity among the African countries and diversity between African and non-African countries.<sup>9</sup>

The legal stratification proper to the African countries is clear evidence of the possible differences that may exist within the same country. First, the customary laws, which had been applied in African countries prior to colonization and are still applied today, present large differences even among the same customary laws applied within a country. In the second place, colonization has brought into the African countries different western legal systems imposed upon customary laws and still coexisting with them. Third, after independence, the African countries made different choices (some to the socialist pattern, others to the federal system) that increased a lack of uniformity within the same country.

The comparative studies have now identified the African legal systems as a legal family with specific peculiarities and different from the other world legal systems.<sup>10</sup> The above mentioned legal stratification shows us how the importing of western legal systems has given a specific imprint to the legal system of each African State that differentiates it from the others, and gives rise to a sub-classification of the African legal systems

---

8. Anthony N. Allott, *Towards the unification of laws in Africa* 14(2) INT. COMP. LAW QUARTERLY 366, 378 (1965).

9. Gbenga Bamodu, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa* 38 J. AFRICAN L. 125, 125 (1994).

10. See ANTONIO GAMBARO & RODOLFO SACCO, *SISTEMI GIURIDICI COMPARATI* (1996); Ugo Mattei, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in 1 STUDI IN MEMORIA DI GINO GORLA 775-798 (1994); and, with particular reference to African law and its characteristics, RODOLFO SACCO, *IL DIRITTO AFRICANO* (1995); MARCO GUADAGNI, *IL MODELLO PLURALISTA* (1996).

according to the family to which the legal system of the former parent country belongs.<sup>11</sup>

Nevertheless, even if the African legal systems can be assimilated to the one of the respective colonizing country, it must not be assumed that the legal rules in African countries are the same as the European country from which they received the legal system. Since the reception of the European laws during the colonial period, there have been several legal developments in the European countries that have not been transplanted into the legal systems of their former colonies. At the same time, the same African countries engaged in their own legal development involving the revaluation of customary law, the development of their own case law, and transplants from other non-European legislation.

Over the past years, the concerns about issues of the conflicts of law in Africa have been mainly limited to internal conflicts within single countries.<sup>12</sup> But now, African countries have realized that it is in their interest to attempt to remove, as much as possible, the problem of diversity in all the forms which can affect their participation both in intra-regional and extra-regional trade, considered that either the diversity of national laws and the complexity of private international law rules existing in the region considerably affect trade, particularly into the region.<sup>13</sup> Being in the interest of the African countries to promote trade and investment, they should also deal with the legal facilitation of this goal, directing their activities of legal harmonization of the substantive law relating to trade and investment activities, and to the procedural aspects of international trade law relating to the protection and the enforcement of the rights acquired to further international commercial transactions.<sup>14</sup>

Many issues arise with respect to the preparation and implementation of harmonizing legal instruments: the substantive scope of harmonization, technical procedure, the formulation of legal instruments, the scope of application of the international instrument in the domestic legislative order and its monitoring.<sup>15</sup>

---

11. Bamodu, *supra* note 9 at 127.

12. Anthony N. Allott, *The Unification Of Laws In Africa*, 16 AM. J. COMP. L. 51 (1968); A. J. Sanders, *The Internal Conflict Of Laws In Botswana*, 5 Y.B. OF AFRICAN L. 137 (1984); I. Olewola Agbede, *Conflict Of Laws In A Federation: The Nigerian Experience*, 7 NIGERIAN L. J. 48 (1973); A. J. Sanders., *Towards Unification Of Municipal Laws In Africa: The Nigerian Experience*, 8 VERFASSUNG UND RECHT IN ÜBERSEE 423 (1975).

13. Muna Ndulo, *Harmonisation Of Trade Laws In The African Economic Community*, 42 INT'L & COMP. L. Q. 101, 103 (1993).

14. Bamodu, *supra* note 9

15. See generally Issa-Sayegh, *supra* note 5.

Paradoxically, the legal diversity existing among the African countries can be helpful for the purpose of legal harmonization. The introduction of the European legal systems during colonization permits the creation of a sub-classification of the African legal systems according to the family to which the legal system of the former colonizing country belongs. This means that it is possible to identify two or three blocks of African countries (countries belonging to common law, civil law and mixed jurisdictions) where the laws are quite similar, and that can constitute a good start point for regional legal harmonization.

The problem related to different languages shall be also addressed. Several comparative studies addressed the relationship between language and law and the problems to be faced in legal translation.<sup>16</sup> For the purposes of harmonizing international contract law, translation problems can be certainly reduced by the use of definitions which propose to use a certain term or syntagm in a definitive way. The International Chamber of Commerce, in the last revision of its INCOTERMS, puts a series of such definitions both of terms borrowed from the English language, and of terms coming from other national languages, before their description. In the same way, UNIDROIT, in Article 1.10 of its Principles, lists this kind of definition for terms like *tribunal*, *établissement*, *débiteur*, *créancier*, and *écrit*.<sup>17</sup> There is also the trend to promote an intercultural legal language not necessarily bound by a leading language, such as English.<sup>18</sup> In this regard, the present African experience shows us how most attempts to harmonize commercial laws have been pursued through the establishment of regional international organizations.<sup>19</sup>

The substantive scope of the area to be harmonized is determined not only by the choice of the international organization, but also takes into due consideration the mandate of the organization promoting the har-

---

16. See Gambaro & Sacco, *supra* note 10; Rodolfo Sacco, *Riflessioni di un giurista sulla lingua (la lingua del diritto uniforme, e il diritto al servizio di una lingua uniforme)*, RIVISTA DI DIRITTO CIVILE 57 (1996); Rodolfo Sacco, *Language and Law*, in ORDINARY LANGUAGE AND LEGAL LANGUAGE (Barbara Pozzo ed., 2005); Lorenzo Fiorito, *Traduzione e tradizione giuridica: il Legal English dalla Common Law alla Civil Law*, 9 Translation J. 3 (2005), available at <http://www.translationdirectory.com/article572.htm> (last visited Apr. 3, 2007).

17. Paola Murer, *Sul significato delle parole nell'universo di discorso giuridico. note intorno alla traduzione giuridica*, IROCERVO, (3) 2003, available at <http://www.filosofiadeldiritto.it/NUOVO%20ARCHIVIO/MurerDot3-03-nuovo.htm> (last visited Apr. 3, 2007).

18. UNIDROIT is promoting this approach to the harmonization of commercial law by not considering English the sole *lingua franca* for international business transactions.

19. One of the first examples of this is the East African Community between Kenya, Uganda and Tanzania, created immediately after the independence of those countries, which failed in the early 1970s, but has been recently re-launched. See About EAC..., [http://www.eac.int/about\\_eac.htm](http://www.eac.int/about_eac.htm) (last visited Apr. 3, 2007) (describing the East African Community).



monization, and the fact that other international organizations are working on similar issues (indicating the importance of avoiding duplication) and the technical constraints that are part of the domestic legal order (such as public policy exceptions, domestic procedural issues). On the technical front, the procedures used to elaborate and create a new instrument vary widely and depend on the institutional structure of the organization. To simplify the process, the permanent secretary or a committee of experts or working group mandated by the decision-making body will present a draft or submit recommendations, member states then present their comments and proposed modifications after internal consultations, and the decision-making body adopts the final draft. This taking into regard in the formulation of the instruments, the official working languages of the organization, and the style and wording that will be used.

Determining the scope of application of the new instrument is often problematic and again varies according to the type of organization and its mandate. For instance, are member states automatically bound by the instrument once it is adopted by the organization or must they first sign and ratify it? When are the provisions of the international instrument considered in force and enforceable in domestic law? Another issue is the application of the instrument. Is there a supranational tribunal charged with overseeing the uniformity of application or the conformity of the national provisions implementing the instrument? Is there a consultative body charged with giving recommendations regarding the application of the instrument? Are the member states bound by those recommendations?

We will see now the solutions chosen in the ambit of the African continent.

#### IV. THE MAIN PROGRAMS FOR THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA

In the previous paragraph, I have outlined some of the main issues that must be answered to determine the substance, scope and concrete applicability of a new legal instrument designed to harmonize different provisions. I now review the two main examples of legal harmonization currently ongoing in Africa, focusing on their implications for the law of contracts.

a. *OHADA*

The Organization for the Harmonization of African Business Laws (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, hereinafter "OHADA")<sup>20</sup> was established by a Treaty between African countries, mainly in the French-speaking area<sup>21</sup> and belonging to the Franc zone, signed in Port Louis, Mauritius, on October 7, 1993 and entered into force on July, 1995.<sup>22</sup> The objective is the implementation of a modern harmonized legal framework in the area of business laws in order to promote investment and develop economic growth. The Treaty calls for the elaboration of uniform acts to be directly applicable in member states, notwithstanding any provision of domestic law. OHADA consists of a Council of Ministers assisted by a Permanent Secretary,<sup>23</sup> a Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage*, hereinafter "CCJA"),<sup>24</sup> and a training school for judicial personnel and lawyers (*École Régionale Supérieure de Magistrature*, hereinafter "ERSUMA").<sup>25</sup>

In particular, uniform law takes concrete form with the adoption of texts called Uniform Acts.<sup>26</sup> These acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the State parties to the Treaty that established OHADA.<sup>27</sup> The Council of Ministers, a body established under the Treaty, discusses and adopts the acts on the advice of the Common Court of Justice and Arbitration (CCJA).<sup>28</sup> It is useful to keep in mind that national parliaments are excluded from the proceedings for adopting uniform acts. The Council of Ministers has sole competence in this area. This makes it possible to avoid the drawbacks of indirect procedures that could lead to the adoption of conflicting legal

---

20. See OHADA.com – Le portail du droit des affaires en Afrique – Organisation pour l'Harmonisation du Droit des Affaires in Afrique, <http://www.ohada.com/> (containing the full text of all Uniform Acts, as well as the related case law and a selected bibliography).

21. Of the present members, 14 out of 16 are French-speaking countries.

22. Treaty on the Harmonisation of Business Law in Africa, Oct. 7, 1993, J.O. OHADA N° 4 du 1<sup>er</sup> novembre 1997, at 1 (hereinafter "OHADA Treaty"). The 16 countries that have joined OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. Membership negotiations are underway with the Democratic Republic of Congo that showed its intention to join the OHADA in 2004. Nigeria is also currently debating whether or not to join OHADA: for a favorable approach, see John Ademola Yakubu, *Harmonising Business Laws in Africa: How Nigeria Can Benefit*, THIS DAY, Sept. 29, 2004, available at <http://www.thisdayonline.com/archive/2004/09/29/20040929dev04.html> (last visited Apr. 4, 2007).

23. They are based in Yaounde, Cameroon.

24. This Court is based in Abidjan, Ivory Coast.

25. See OHADA Treaty, *supra* note 22, at arts. 27 – 41. The school is located in Porto Novo, Benin.

26. See OHADA Treaty, *supra* note 22, at arts. 5 – 12.

27. *Id.*

28. *Id.*

texts that would be difficult to implement. The acts become effective immediately after they are published in the Official Gazette of OHADA, without the need for additional domestic legislation from the States parties.<sup>29</sup> They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws.<sup>30</sup> All the domestic legislation not in compliance with the OHADA Uniform Acts is repealed by the enactment of the new Uniform Act.<sup>31</sup>

The institutional organization provided by the OHADA Treaty is quite simple, and all the competencies are well defined. Anyway, despite the high level of integration, close to uniformity, the OHADA leaves to the member States a role of extreme importance: their domestic legal systems remain fully in force apart from what is covered by the uniform acts, and the determination and imposition of criminal sanctions set forth in the uniform acts is the responsibility of each member State. Through this enforcement, we can correctly say we have a “*harmonisation forte-ment uniformisante*.”<sup>32</sup>

The legislation applicable to general commercial law and to other aspects of business law was, prior to harmonization, the product of two successive legislative periods.

The first period covers the entire legislation in force at the time of independence of each of the African States, made up essentially of the French Civil and Commercial Codes, the second of which was declared applicable to overseas territories by a law enacted on December 7, 1850, which modified conditions laid down in 1850 relating to the conduct of commercial activities. Though this commercial law already had genuine uniform characteristics, failure to extend some rules in force in the parent State or their maladjustment to the administrative organization of overseas territories obviously made this legislation inadequate, and in any case, obsolete.

---

29. *Id.*

30. *Id.*; see also Seydou Ba, Conference Paper, Towards an Agenda for a Just and Equitable Society in the 21st Century: Comprehensive Legal and Judicial Development, International Conference Organized by the World Bank: How Can Effective Strategies be Developed for Law and Justice Programs? Are There Models for Legal Reform Programs? The Example of the Organization for the Harmonization of Business Law in Africa (OHADA), (June 5 – 7, 2000).

31. OHADA Treaty, *supra* note 22, at art. 10 (“*Les Actes uniformes sont directement applicables et obligatoires dans les Etats parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure.*”); see Joseph Issa-Sayegh, *La portée abrogatoire des Actes uniformes de l’OHADA sur le droit interne des Etats-Parties*, N° 39-40 SPECIAL REVUE BURKINABÉ DE DROIT, 51 (2001).

32. This definition is from Roger Masamba, *L’OHADA et le climat d’investissement en Afrique*, 2006 PENANT 137.

The second period starts from the independence of the African States, where some countries took different measures to regulate the carrying on of specific activities. Various texts have been therefore enacted in Burkina Faso, Cameroon, Central African Republic, Congo, Gabon, Guinea, Ivory Coast, Mali, Niger, Senegal and Togo, while Senegal and Mali were concerned with codification processes. So, general commercial law was the subject of extremely diverse regulations with regard to both its sources (laws, decrees, ordinances, etc.) and objectives.

Up to now, the Uniform Acts that have been adopted relate to General Business Law, Company Law and Pooling of Economic Interest, Organization of Securities, Bankruptcy Law, Debt Collection and Enforcement Law, Accounting Law, Arbitration and Contracts for the Carriage of Goods by Road.<sup>33</sup> This legislation is affecting business operations that are of particular interest to foreign investors.

This new legal framework also provides a mechanism for the settlement of disputes, one of the goals of the Treaty being to establish judicial security in the countries involved. The CCJA is the highest level of jurisdiction for all matters involving the application of the Treaty, as well as the Uniform Acts.<sup>34</sup> It has jurisdiction over judicial (ruling on decisions rendered by the Courts of Appeal of the member States) and arbitration matters (holding a supervisory role to the appointed arbitrators and granting enforceable status to the award), thus ensuring the harmonized interpretation of the Treaty, Uniform Acts and corresponding regulation and arbitration agreements.<sup>35</sup>

The OHADA law has a fundamental feature: it takes into consideration the complexity and the peculiarities of the African legal systems.<sup>36</sup> Even

---

33. The bibliography on the OHADA is now extremely wide. The law journal "Penant" dedicates most of each quarterly issue to doctrine and cases related to OHADA. For a general overview on the OHADA, see *L'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)* 2004 PETITES AFFICHES 205; Joseph Issa-Sayegh, *L'intégration juridique des Etats africains dans la zone franc*, 1997 PENANT 823; Issa-Sayegh, *supra* note 5; Martin Kirsch, *Dixième anniversaire de la signature du Traité concernant l'harmonisation du droit des affaires en Afrique (Libreville, 17 octobre 2003)*, 2003 PENANT 389; Laurent Benkemoun, *Quelques réflexions sur l'Ohada, 10 ans après le Traité de Port-Louis*, 2003 PENANT 133; Celestin Sietchoua Djuitchoko, *Les sources du droit de l'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)*, 2003 PENANT 140; Gaston Kenfack Douajni, *L'abandon de souveraineté dans le traité OHADA*, 1999 PENANT 125; Jean-Pierre Raynal, *Intégration et souveraineté : le problème de la constitutionnalité du traité OHADA*, 2000 PENANT 5; Benjamin Boumakani, *Le juge interne et le droit OHADA*, 2002 PENANT 133.

34. OHADA Treaty, *supra* note 22, at arts. 13 – 20.

35. Issa-Sayegh, *supra* note 5.

36. See Robert Nemedeu, *OHADA: de l'harmonisation à l'unification du droit des affaires en Afrique*, available at [http://www.univ-nancy2.fr/recherche/actualites/04-05/ohada\\_janvier\\_2005.pdf](http://www.univ-nancy2.fr/recherche/actualites/04-05/ohada_janvier_2005.pdf) (last visited Apr. 4, 2007).

if the uniform acts are obviously strongly inspired by the French model, some member States have been influenced by English law, and it would have been also unrealistic to totally disregard customary law, even it plays a smaller role in commercial law than in other branches of law, like family law or land law.

Indeed, the Treaty is also influenced by English law, as well as by German law, Portuguese law and Islamic law,<sup>37</sup> to realize a synthesis acceptable for all the citizens of the member States.<sup>38</sup>

The OHADA Uniform Acts have already addressed the issue of contract law. Book 5 of the Uniform Act Relating to General Commercial Law is entirely dedicated to the commercial sale, namely “to contracts of sale of goods between traders, be they natural persons or corporate bodies.”<sup>39</sup> It should be remarked that in the area of commercial sale, none of the Contracting States to the Treaty were signatories to the Vienna International Convention of 11 April 1980 on the Uniform Act relating to the Commercial Sale of Goods. Furthermore, there was no codification relating to commercial sales in the internal laws of the States, and the only reference to a law in this area was to the provisions of the Civil Code or to some texts specific to the regulation of exclusive sale or purchase contracts (e.g. Decree of 7 December 1970 in Senegal). It was therefore essential to introduce into the positive law of the member States to the Treaty, a law that is as close as possible to the provisions applicable now in most of the States. This text, which is very pragmatic, gives prominence to the will and conduct of the parties above all mandatory rules.<sup>40</sup> It sets up a modern framework that integrates the related international conventions to encourage and facilitate domestic and international sales, and where the commercial sale is ruled in detail, from its formation to its termination, passing through its execution.<sup>41</sup> Apart from provisions

---

37. *Id.* (Author Robert Nemedeu remarking that taking Islamic law into account has brought with it special provisions with reference to its interests that need to be taken into account in business transactions and testimonial evidence), [http://www.univ-nancy2.fr/recherche/actualites/04-05/ohada\\_janvier\\_2005.pdf](http://www.univ-nancy2.fr/recherche/actualites/04-05/ohada_janvier_2005.pdf) (last visited Apr. 4, 2007).

38. The OHADA Uniform Acts need some readjustments to be suitable to African countries belonging to the Common Law tradition. For a Common Law approach to OHADA laws, see Samuel Kofi Date-Bah, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa. Reflections on the OHADA Project from the Perspective of a Common Lawyer from West Africa*, 9 UNIF. L. REV. 269 (2004).

39. OHADA, Uniform Act Relating to General Commercial Law art. 202, J.O. Ohada N°1 du 1er octobre 1997, at 1 (1997) available at <http://www.ohada.com/textes.php?categorie=11>.

40. On the will of the parties, see Akrawati S. Adjita, *L'interprétation de la volonté des parties dans la vente commerciale (OHADA)*, 2002 PENANT 473.

41. See generally Gaston Kenfack Douajni, *La vente commerciale OHADA*, 8 UNIF. L. REV. 191 (2003); Belery Atomini, *La vente dans la législation OHADA*, available at

clearly inspired by the Vienna Convention, the Uniform Act also provides for solutions regarding the transfer of ownership, the transfer of risks and the period of limitation for commercial sales which is fixed by Article 274 at two years, with effect from the date when the action may be instituted.

Moreover, like the Vienna Convention (and according to the common law tradition) the Uniform Act does not take into consideration pre-contractual negotiations as well as the rules related to capacity.

In 2003, the OHADA Council of Ministers adopted the Uniform Act on Contracts for the Carriage of Goods by Road. This Uniform Act applies to all contracts for the carriage of goods by road when the merchandise pick-up and delivery points, as shown in the contract, are located in an OHADA Member State, or in two States where at least one of them is an OHADA Member State. The Uniform Act is applicable irrespective of the domicile and nationality of the parties to the transportation contract.<sup>42</sup>

The carriage of goods by road is also ruled in detail, from its formation to its execution, and the Uniform Act deals with the carrier liability and the disputes; it also provides for solutions regarding the conflict of jurisdictions in case of litigation not submitted to an arbitration panel or to a specific court not contractually chosen by the parties,<sup>43</sup> and for the period of limitation for commercial sales, which is fixed by Article 25 at two years with effect from the date when the delivery took – or should have taken – place, provided however that a written objection is raised to the carrier within 60 days from the date of delivery or 6 months from the date of the merchandise pick-up if the delivery has not taken place.<sup>44</sup>

These are the initiatives already in place with reference to contract law in OHADA. But a more important and decisive step towards the harmonization of contract law is underway: the adoption of a Uniform Act on the law of contract.

---

[http://www.cefod.org/Droit\\_au\\_Tchad/Revuejuridique/Revue2/vente\\_ohada\\_rjt%202.htm](http://www.cefod.org/Droit_au_Tchad/Revuejuridique/Revue2/vente_ohada_rjt%202.htm) (last visited Apr. 4, 2007).

42. OHADA, Uniform Act Relating to Contracts for the Carriage of Goods by Road art. 1 (2004), available at <http://www.ohada.com/textes.php?categorie=891>. The following are excluded from the field of application of this Uniform Act: the transportation of dangerous goods, funeral transportation, removal transportation and transportation of goods carried out under the terms of international postal agreements.

43. *Id.* at art. 27.

44. See Franco Ferrari, *The OHBLA Draft Uniform Act on Contracts for the Carriage of Goods by Road*, 7 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 898 (2001) (giving the first remarks on its sphere of application); Pascal K. Agboyibor, *L'OHADA a adopté un nouvel Acte Uniforme relatif au transport des marchandises par route* 4 INT'L BUS. L. J. 440 (2003).

## 170 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII]

In the meeting held in Bangui on March 2001, the Council of Ministers of the OHADA decided that the further steps towards the harmonization of business law shall include – *inter alia* – the law of contract.<sup>45</sup>

In the spring of 2002, responding to a request by the Council of Ministers of the OHADA<sup>46</sup> for UNIDROIT to provide its expertise in preparing a draft law in the light of the UNIDROIT Principles of International Commercial Contracts, Professor Marcel Fontaine, the Belgian member of the UNIDROIT Principles working group, undertook to prepare, on behalf of UNIDROIT, a draft OHADA Uniform Act on Contract Law. The work on the operational phase of the project started in October 2003, and in September 2004, a preliminary draft accompanied by an Explanatory Note was submitted to the UNIDROIT Secretariat, which transmitted both documents to the Permanent Secretariat of OHADA. In accordance with the OHADA institutional procedures, these documents must now be sent to the member States for comments, upon which they shall be discussed by the national committees in plenary session, amended if necessary, examined by the CCJA and, ultimately, adopted by the OHADA Council of Ministers.<sup>47</sup>

The drafting process was governed by two fundamental goals: to remain close, as much as possible, to the UNIDROIT principles – which had been chosen as the model – considering that they proved to be recognized and appreciated internationally,<sup>48</sup> but at the same time they needed appropriate adjustments to accommodate the special features of Africa, and to take into account the specificities of the African countries. In this connection, it has been emphasized that widespread illiteracy and poor “legal culture” are the issues to be taken into particular consideration due to their relevant extent in the African countries.<sup>49</sup> Consequently, taking into consideration the generally high illiteracy rate, it has been preferred to adopt a non-formalistic approach like the one used in the UNIDROIT principles more than a formalistic one, even though specific rules may

---

45. The Council of Ministers of the OHADA also decided to go ahead on other branches of law, including: banking law, competition law, intellectual property law, the law of co-operative and mutual aid companies, the law of civil companies and the law of evidence.

46. The decision was made at the OHADA meeting held in Brazzaville (Republic of Congo) on February, 2002. See Preparation by UNIDROIT of a draft OHADA Uniform Act on Contracts, <http://www.unidroit.org/english/legalcooperation/ohada.htm>.

47. UNIDROIT, Memorandum prepared by the UNIDROIT Secretariat, Legal Co-operation Programme, Governing Council, 84<sup>th</sup> session, Rome, 18-20 April 2005, available at <http://www.unidroit.org/english/governingcouncil/documents/2005session/cd84-12-e.pdf> (last visited Oct. 13 2005) (reserved access area).

48. See Marcel Fontaine, *Avant-projet d'acte uniforme OHADA sur les contrats et Note explicative* presented to the UNIDROIT (unpublished manuscript) (on file with author).

49. See Marcel Fontaine, *Le projet d'acte uniforme OHADA sur les contrats et les principes d'UNIDROIT relatifs aux contrats du commerce international*, 9 UNIF. L. REV. 253 (2004).

have to be retained for certain categories of contract, such as consumer contracts.<sup>50</sup>

The Draft Uniform Act on contract law does not proceed with a radical change of the law of contract inherited from the colonial legislator (basically the French Civil Code or the law of contract based on the common law principles), but it rather tends toward modernization through the application of the general principles of contract law to the new economic background.<sup>51</sup>

In any case, the Draft Uniform Act maintains the same approach as the UNIDROIT principles, giving to the parties the possibilities to exclude the application of the act, to derogate from any of its provisions or to change its effects, unless the Act expressly indicates differently, so confirming the supplementary nature of the future Act.<sup>52</sup>

The other fundamental problem to be solved is if the Uniform Act on contracts should deal exclusively with commercial contracts, or whether it should be extended to cover contracts in general. It has been pointed out that various important considerations support the solution of a unique regulation, failing which the OHADA countries might find themselves burdened with two complete but separate systems of law of contractual obligations that differ on many important areas.<sup>53</sup>

In drafting the future Uniform Act on contracts, particular attention has been paid to ensure the compliance of the draft with other projects, especially with the one on a draft uniform act on consumer contracts – which is already before the OHADA national committees – and on a draft uniform act on evidence of legal acts, which has been included in the harmonization program adopted by the OHADA Council of Ministers.<sup>54</sup>

---

50. Fontaine, *supra* note 48.

51. Felix Onana Etoundi, *Les Principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats*, 10 UNIF. L. REV. 683 (2005).

52. See OHADA, Draft Uniform Act on Contract Law, art. 1/2, available at <http://www.unidroit.org/french/legalcooperation/OHADA%20act-f.pdf> (last visited Apr. 4, 2007); Etoundi, *supra* note 51.

53. Fontaine, *supra* note 48; but see Etoundi, *supra* note 51.

54. See the UNIDROIT, *supra* note 47.



*b. COMESA*

The Treaty establishing COMESA was signed on 5th November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8th December 1994.<sup>55</sup> There are 20 African member countries.<sup>56</sup>

The history of COMESA began in December 1994 when it was formed to replace the former Preferential Trade Area (PTA), which had existed from the earlier days of 1981.<sup>57</sup> Its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states.<sup>58</sup>

The Treaty establishing COMESA binds together free independent sovereign States which have agreed to co-operate in exploiting their natural and human resources for the common good of all their peoples. In pursuing that goal, COMESA recognizes that peace, security and stability are the basic factors in providing investment, development, trade and regional economic integration. Experience has shown that civil wars, political instabilities and cross-border disputes in the region have seriously affected the ability of countries to develop their individual economies as well as their capacity to participate in and take full advantage of the regional integration arrangement under COMESA.

Therefore, in pursuing the aims and objectives stated in Article 3 of the COMESA Treaty, the member States of COMESA have agreed to adhere to some basic principles listed in Article 6 of the Treaty, among which the recognition and observance of the rule of law must be noticed.<sup>59</sup>

The COMESA objective is to deepen and broaden the integration process among member States through the adoption of more comprehensive measures, among which is, as the Treaty indicates, the harmonization or

---

55. See COMESA – Looking Back, [http://www.comesa.int/about/vision/vision\\_chapter\\_1/view](http://www.comesa.int/about/vision/vision_chapter_1/view); see also COMESA, Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993 (hereinafter “COMESA Treaty”), available at [http://www.comesa.int/comesa%20treaty/comesa%20treaty/Multi-language\\_content.2005-07-01.3414/en](http://www.comesa.int/comesa%20treaty/comesa%20treaty/Multi-language_content.2005-07-01.3414/en) (last visited April 6, 2007).

56. Member countries are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. See COMESA – COMESA Member States, <http://www.comesa.int/countries> (last visited April 6, 2007).

57. See COMESA – Looking Back, *supra* note 55.

58. *Id.*

59. COMESA Treaty, *supra* note 55, at arts. 3, 6(g).

approximation of the laws of the member States to the extent required for the proper functioning of the Common Market.<sup>60</sup>

COMESA has also begun to create a uniform commercial law, but it has not progressed nearly as far as OHADA. COMESA has a court of justice that has played a part in developing a "Common Market Law," but this court is available only to public authorities and governments, as opposed to private litigants.<sup>61</sup> While COMESA provides other services to private-sector companies, and facilitates international trade through reduced customs barriers, it has done relatively little to unify the legal systems of its member states. However, such a task might be even more difficult for COMESA than for OHADA, because COMESA includes a number of countries where *sharia* is applicable, and in which expectations about specific commercial matters - particularly credit - diverge considerably from the rest of Africa.

## V. MODERN LAW AND TRADITIONAL LAW

Any discussion about African law would be incomplete without addressing the issue of customary law.

In our field, this issue gives rise to the following questions: What is the value of the contract under customary law? Are there elements of harmonization in African traditional law? Can customary law on contracts be considered harmonized?

Dealing with these issues in African customary law can be misleading without making several important preliminary statements: African customary law does not have a general theory of obligations and does not know the contract in the modern sense; but rather it knows very well the concept of "exchange" (and also the one of barter, obviously), and it has some idea of consideration,<sup>62</sup> but the freedom of contract is strongly limited in traditional societies due to their community features. The same conclusion of a contract is not strictly linked to the declaration of will, being rather based on two factual elements different from simple consent: the form (from the presence of witnesses even to different sacred

---

60. *See id.* at art. 4(6)(b).

61. *See id.* at Ch. 5.

62. There is consideration, for example, between the grant of the woman's hand to the suitor and the performance that he has to execute in her favor. There is consideration also in the case of donations, because in several cultures a gift creates the necessity of a well regulated counter-gift.

formalities), and the fulfillment of one or both of the contractual performances.<sup>63</sup>

Therefore there are elements of a “customary law of contract” that should be taken into consideration when speaking about contract in the ambit of African customary law.<sup>64</sup>

In the African traditional systems, the contract holds extreme importance. Through it, people, families, clans, and tribes enter into transactions (sometimes even fundamental) for the existence of the person or the group. Quite often, a contract involves magical or sacred aspects, or more simply it receives special importance or becomes untouchable because it has been concluded or even approved with the chief’s intervention.

Under customary law, the contract is not concluded by a simple consent from the parties, but it requires the presence of a witness who will also give evidence about the existence of the contract. The requirements then related to its form are reduced to the presence of such witness, rather than to the written document.

Sometimes the contract is also an event: marriages,<sup>65</sup> exchanges or transfers of land, transactions related to the access, share, rights of use and/or passing for pastures and water resources. They require negotiations that last for a great deal of time, and are even celebrated for a long time after being concluded.

Even the simplest agreement is seen by the African like an engagement that does not involve only “economic” aspects, but has also implications of personal nature (like honor, reputation, and respect with the counterparty or the community).

It is more difficult for an agreement entered into according to customary law – and therefore with such characteristics – to reach a “pathological”

---

63. See SACCO, *IL DIRITTO AFRICANO*, *supra* note 10. On the law of contract in African customary law, see Andrew B. Lyall, *Traditional Contracts in German East Africa: the Transition from Pre-Capitalist Forms*, 30 *J. AFRICAN L.* 91 (1986); Isaac A. Schapera, *Contract in Tswana Law*, in *IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW* (Max J. Gluckman ed., 1969); and Yash P. Ghai, *Customary Contracts and Transactions in Kenya*, in *IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW* (Max J. Gluckman ed., 1969).

64. The existence of a “customary law of contract” is also admitted by Stanislaus Melone, *Les resistances du droit traditionnel au droit moderne des obligations*, 21 *REVUE SÉNÉGALAISE DE DROIT* 47 (1977).

65. There are a lot of African experiences where the choice of the bride is the result of an agreement between the families of the two spouses, in which the family of the husband pays a “price” to get his future wife.

stage. A contract often does not exclusively involve the interests of the individual, but rather those of the entire group, being it a family a clan or a tribe. African customary laws have then developed internal mechanisms for the settlement of disputes at different levels and with reference to the different typologies (here the word is used not with reference to the contractual type but to the people who entered into it) of contract. These mechanisms are inspired by the principle that today we could define as “preservation of contract,” and to which customary laws offer the instruments to determine the terms of such settlements that, if necessary, are created at the moment, thanks to their extreme flexibility. Customary law indeed does not need parliaments, does not have prearranged and strict ways for its approval, and therefore it can more easily adapt itself to real cases. Therefore, a dispute related to a contract between people belonging to the same group is settled within that group with the intervention of the heads of the families or the elders of the group, to whom the settlement of the case or the finding of a new contractual balance satisfactory for both parties is referred.

Moreover, a case related to a contractual relation involving different groups can be solved on the basis of principles very similar to those just examined. This kind of case is first examined and discussed within the same group to verify the possibility of a conciliatory solution that takes into consideration the claims of the other group. If this first stage does not reach a solution, the case is still treated on the same grounds, even though it is at a higher level. The representatives of the groups involved, the council of the elders of the tribes, the representatives of the different clans or tribes that compose the group, meet to find a solution for the case. The conflict always represents the *extrema ratio* for the settlement of a dispute, and cases of conflict arising from the lack of solution of contractual disputes are really very few. Looking at contract law in African customary law through the lens of modern contract law of the western tradition, it could undoubtedly be said that elements like typologies (here in the sense of contractual types), requirements for formation, and requisites are different among the various customary laws, but it can also be said that there are a group of very general principles related to the formation of a contract, its execution, and to the settlement of the related disputes, that are common in African customary law.

However, granted that all this is true, here comes the most difficult question: how can it be helpful to this investigation on the harmonization aspect of modern contract law?

The answer to this question should be investigated starting from a fundamental point.

Customary law in general and African customary law above all is transnational.

It is transnational because it does not take into account the States' borders drawn on the maps.

It is transnational because the group to which it belongs is often located in an area belonging to two or more countries.<sup>66</sup> It is therefore transnational because it does not respect geographic borders, does not belong to a territory, but rather to the group that obeys it, and it grows and evolves for and with that group.

If it is true that African customary law as a whole presents those previously examined common principles, then it should be inferred that Africa and the Africans are in principle predisposed to a legal environment where contract law has common principles.

It should not be forgotten indeed that the African tends to reject, or simply to ignore and not apply, rules and instruments aseptically transplanted from other experiences and that do not pertain to his culture and tradition. The same difficulty to introduce rules like the multiparty system, that are taken for granted by the western jurists, is a direct evidence of this.

Thus, the interaction between the layer of African customary law and the modern (harmonized) state law in the area of contract law will be surely profitable, just because the latter will find in the customary law that vital *humus* from which it can sponge, to develop and affirm itself. Moreover, Article 1/8 of the OHADA Draft Uniform Act on the Law of Contract contains a specific reference to the value of usages and customs as a further source of regulation for the contract.<sup>67</sup> It is undoubted that such a reference gains particular value in the African context when referring to traditional law. The future Uniform Act jurisprudence – when approved – will reveal what position customary law may have in the area of harmonized contract law within OHADA, if any.

---

66. The examples are many: among the others the Maasai, the Tutsi, the Hutu, the Touareg, the nomadic peoples of the Ogaden, and the Dankali regions can be mentioned.

67. OHADA, Draft Uniform Act on Contract Law, art. 1/8, (“1) *Les parties sont liées par les usages auxquels elles ont consenti ainsi que par les pratiques qu’elles ont établies entre elles.* 2) *Elles sont liées par tout usage qui est largement connu et régulièrement observé par les parties à des contrats de même nature, à moins que son application ne soit déraisonnable.*”), available at <http://www.unidroit.org/french/legalcooperation/OHADA%20act-f.pdf> (last visited Apr. 4, 2007).

## VI. CONCLUSION

African countries became aware of the necessity to harmonize commercial laws to promote trade and investment within their territories by creating a suitable legal environment. This can also give the opportunity to avoid the imposition of foreign national laws and contractual obligations with which their entrepreneurs and companies are unfamiliar, or which would put them in a disadvantaged position towards their foreign counterparts.

The realization of the objective of establishing fair and equitable rules for the governance of international business transactions may sometimes necessitate the promotion of harmonization initiatives, especially when the existing legal framework on which they will be inserted does not reflect the desirable level of fairness, confidence and international compromise.

The OHADA process for the harmonization of commercial laws is playing a remarkable role, having undoubtedly gained a high degree of success and respect at different levels. The texts of the Uniform Acts already adopted seek to reflect the economic reality and the life of African companies in order to foster trade and make it safe for all economic operators, particularly individual traders, companies and the judges or arbitrators who will have to ensure their implementation. Scholars and legal professionals are strongly contributing to the knowledge and the diffusion of the OHADA system. *Penant*, one of the most famous and oldest journals in French on African law, is now almost entirely dedicated to contributions related to OHADA and to the analysis of the related case law. Conferences and seminars are often organized even in Europe to enhance the awareness of the OHADA framework by legal professionals and business actors.

Other countries have showed their strong interest in joining the OHADA Treaty and adopting the Uniform Acts already in place, case law on OHADA matters is rapidly developing and the member countries are very active in promoting further harmonization of sectors of business law. I believe this is the best evidence of the quality and the success of the project.

COMESA is clearly far behind when compared with OHADA, due to the more economic orientation of the OHADA Treaty and the greater diversity among the member States. However, it must not be undervalued, especially in view of the importance of the interested area.

178            ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XIII]

The results already achieved show how it is therefore essential for African countries to further explore all the possible opportunities related to the harmonization or unification of the law of contracts in Africa to increase the opportunities for the development of this continent.

The growing contribution of the African countries within the international organizations can only facilitate this process directed to increase the confidence of the African economic environment, provided that the political power takes its role in granting, within the continent, that political stability that is presently lacking.