

# THE HARMONIZATION OF CONTRACT LAW IN AFRICA: AN OVERVIEW<sup>1</sup>

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## 1. Introduction

During the late 20<sup>th</sup> century there has been 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 how sovereign states, businesses and citizens interact among themselves. Huge trade liberalization and a change from protectionist to open market economies have given the basis for the growth of transnational business activity while democratic values and institutions have been progressively strengthened.

The establishment of a legal and regulatory environment where private transnational exchanges can safely take place becomes 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 at the law itself are then core issues to be addressed in order to support further economic development in Africa.

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Such reforms after all 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, and updating the mandate of regulatory agencies. This process also gives the opportunity to eliminate uncertain provisions, promotes transparency, and improves competitiveness for domestic and international trade in addition to attracting more investment due to the reduction of the transaction costs.

Anyway, while any economic integration cannot occur without a previous political process, both at the national and international level, it 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>2</sup>.

Indeed, a supranational framework including business customs and instruments and 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 we first shortly review the concept of legal harmonization in general and with particular reference to the African situation. We 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. We 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 of this continent.

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<sup>2</sup> M. J. BONELL, *The UNIDROIT Principles and Transnational Law*, in *Uniform Law Review*, vol. 5, 2000-2, 199.

## 2. 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>3</sup>.

The more radical form of legal integration is uniformization, which is the legal technique aiming 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>4</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>5</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.

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

<sup>3</sup> See A. ROSSET, *UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter 7*, in *Uniform Law Review*, vol. 2, 1997, 441.

<sup>4</sup> See J. ISSA-SAYEGH, , *Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA*, in *Uniform Law Review*, vol. 4, 1999, 5.

<sup>5</sup> See J. ISSA-SAYEGH, , *op. ult. cit.*

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 the recourse to non-legislative or non-binding instruments of unification or harmonization of law has been developed<sup>6</sup>, for example, through model laws or model clauses and contracts drafted by taking into consideration the current trade practices, or even through international restatement of general principles of certain legal domain, such as the UNIDROIT Principles of International Commercial Contracts related to contract law, which have been quite successful.

Such emergence of a transnational commercial law, at the beginning perceived as non-binding soft law, is therefore now reinforced as its rules are recognized as binding when the parties have accepted it or are part of an activity governed by it. Then the application of substantive norms can 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 stays 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 get more 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 in adopting them and business actors to be facilitated in their commercial transactions.

### 3. The harmonization of commercial law in Africa

The problem of diversity of laws has been for a long time an important (even

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<sup>6</sup> See F. FERRARI, *How To Create One Uniform Contract Law*, in 5 *Vindobona Journal of International Commercial Law & Arbitration* (2001) 3-21.

if indirect) obstacle to the African economic development which 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>7</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>8</sup>.

The legal stratification proper to the African countries is the clear evidence of the possible differences that may exist within the same country. Firstly, the customary laws which have 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. Thirdly, after independence the African countries made different choices (some to the socialist pattern, others to the federal system) that increased 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>9</sup>. The above mentioned legal stratification shows us how the import 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 according to the family to which the legal system of the former parent country belongs<sup>10</sup>.

Despite of that, 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

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<sup>7</sup> A. N. ALLOTT, *Towards the Unification of Laws in Africa*, in (1965) 14 *Int. Comp. Law Quarterly*, 366-378.

<sup>8</sup> G. BAMODU, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa*, in (1994) *Journal of African Law*, vol. 38, n 2, 125-143.

<sup>9</sup> See A. GAMBARO and R. SACCO, *Sistemi giuridici comparati*, Turin, 1996; U. MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Studi in memoria di Gino Gorla*, Milan, 1994, vol. 1, 775-798; and, with particular reference to African law and its characteristics, R. SACCO, *Il diritto africano*, Turin, 1995; M. GUADAGNI, *Il modello pluralista*, Turin, 1996.

<sup>10</sup> G. BAMODU, *op. ult.cit.*



been transplanted into the legal systems of the former colonies. At the same time the same African countries engaged in their own legal developments involving the revaluation of customary law, the development of their own case law, and the transplants from other non-European legislations.

Over the past years the concerns about issues of conflict of laws in Africa have been mainly limited to internal conflicts problem within single countries<sup>11</sup>. But now African countries realized that it is in their interest to try 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 affect considerably trades, particularly into the region<sup>12</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 either to 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 further to international commercial transactions<sup>13</sup>.

Many issues arise with respect to the preparation and implementation of harmonizing legal instruments: the substantive scope of harmonization, the technical procedure, its formulation, the scope of application of the international instrument in the domestic legislative order and its monitoring<sup>14</sup>.

Paradoxically, the legal diversity existing among the African countries can be helpful for the purpose of legal harmonization. As we have seen before, the introduction of the European legal systems during colonization permits to create 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

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<sup>11</sup> A. N. ALLOTT, *The Unification of Laws in Africa*, in (1968) 16 *Am. Journal of Comparative Law*, 5; A. J. SANDERS, *The Internal Conflict of Laws in Botswana*, in (1984) 5 *Yearbook of African Law*, 137; I. O. AGBEDE, *Conflict of Laws in a Federation: the Nigerian Experience*; in (1973) 7 *Nigerian Law Journal*, 48; *Id.*, *Towards Unification of Municipal Laws in Africa: the Nigerian Experience*; in (1975) 8 *Verfassung Und Recht in Uebersee*, 423.

<sup>12</sup> M. NDULO, *Harmonisation of Trade Laws in the African Economic Community*, in (1993) 42 *Int. Comp. Law Quarterly*, 101-108.

<sup>13</sup> G. BAMODU, *op. ult. cit.*

<sup>14</sup> See generally J. ISSA-SAYEGH, *Quelques aspects techniques cit.*, 5.

comparative studies addressed the relationship between language and law and the problems to be faced in legal translation<sup>15</sup>.

Anyway, in the ambit of the harmonization of international contract law translation problems can be certainly reduced even by the use of definitions which propose to use a certain term or syntagm in a definite way rather than others. The same 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 also UNIDROIT in Article 1.10 of its Principles lists this kind of definitions for terms like *tribunal*, *établissement*, *débiteur*, *créancier*, *écrit*<sup>16</sup>. There is also the trend to promote an intercultural legal language not necessarily bound by a leading language like English may be<sup>17</sup>.

In this regard, the present African experience shows us how most of all the attempts to the harmonization of commercial laws have been pursued through the establishment of regional international organizations<sup>18</sup>.

The substantive scope of the area to be harmonized is determined not only by the choice of the international organization. Such choice will also take into the due consideration the mandate of the organization promoting the harmonization, the fact that other international organizations are working on similar issues (importance of avoiding duplication) and the technical constraints that are part of the domestic legal order (public policy exception, 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. Generally, and 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. Everything having taken into regards in the formulation of the instruments, the official working languages of the

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<sup>15</sup> See A. GAMBARO and R. SACCO, *op. ult.cit.*; R. SACCO, *Riflessioni di un giurista sulla lingua (la lingua del diritto uniforme, e il diritto al servizio di una lingua uniforme)*, in *Riv. dir. civ.*, 1996, I, 57; *Id.*, *Language and Law*, in B. POZZO (cur.), *Ordinary Language and Legal Language*, Milan, 2005; L. FIORITO, *Traduzione e tradizione giuridica: il Legal English dalla Common Law alla Civil Law*, available at <[www.translationdirectory.com/article572.htm](http://www.translationdirectory.com/article572.htm)> accessed on 15 October 2005.

<sup>16</sup> P. MURER, *Sul significato delle parole nell'universo di discorso giuridico. note intorno alla traduzione giuridica*, available at <[www.filosofiadeldiritto.it/NUOVO%20ARCHIVIO/MurerDot3-03-nuovo.htm](http://www.filosofiadeldiritto.it/NUOVO%20ARCHIVIO/MurerDot3-03-nuovo.htm)> accessed on 15 October 2005.

<sup>17</sup> UNIDROIT is promoting this approach to the harmonization of commercial law by not considering English the sole lingua franca for international business transactions.

<sup>18</sup> One of the first examples that can be recalled is the East African Community between Kenya, Uganda and Tanzania created immediately after the independence of such countries, that failed in the early '70s and that has been recently re-launched.

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 chose in the ambit of the African continent.

#### **4. The main programs for the harmonization of commercial law in Africa**

In the previous paragraph we 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. We now review the two main examples of legal harmonization currently ongoing in Africa, focusing on their implications on 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* - OHADA)<sup>19</sup> was established by a Treaty between African countries mainly in the French-speaking area<sup>20</sup> and belonging to the Franc zone, signed in Port Louis, Mauritius, on 7 October 1993 and entered into force on July 1995<sup>21</sup>. The objective is the implementation of a modern

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<sup>19</sup> See the OHADA's website at: <[www.ohada.com](http://www.ohada.com)> where the full text of all Uniform Act, as well as the related cas law and a selected bibliography can be found.

<sup>20</sup> 14 of the 16 present member countries are French-speaking countries.

<sup>21</sup> 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 if joining OHADA or not: see for a favorable approach on it J. A. YAKUBU, *Harmonising Business Laws in Africa: How Nigeria Can Benefit*, available on <[www.thisdayonline.com/archive/2004/09/29/20040929dev04.html](http://www.thisdayonline.com/archive/2004/09/29/20040929dev04.html)> accessed on 13 October 2005.

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>22</sup>, a Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* - CCJA)<sup>23</sup>, and a training school for judicial personnel and lawyers (*École Régionale Supérieure de Magistrature* - ERSUMA)<sup>24</sup>.

In particular, uniform law takes concrete form with the adoption of texts called uniform acts. These acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the States parties to the Treaty which established OHADA. 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). 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 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. They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws<sup>25</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 Commercial Code which was declared applicable to overseas territories by a law enacted on 7 December 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.

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<sup>22</sup> They are based in Yaounde, Cameroon

<sup>23</sup> This Court is based in Abidjan, Ivory Coast.

<sup>24</sup> The school is located in Porto Novo, Benin

<sup>25</sup> See S. BA, *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)*, available at <[www4.worldbank.org/legal/legop\\_judicial/ljr\\_conf\\_papers/Ba.pdf](http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Ba.pdf)>, accessed on 13 October 2005.



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 object.

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>26</sup>. This legislation is affecting business operations that are of particular interest for 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. It has jurisdiction over judicial (it rules on decisions rendered by the Courts of Appeal of the member States) and arbitration matters (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>27</sup>.

The OHADA law has a fundamental feature: it takes into consideration the complexity and the peculiarities of the African legal systems<sup>28</sup>. Even if the uniform acts are obviously strongly inspired by the French model, some member States

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<sup>26</sup> The bibliography on the OHADA is now extremely wide. The 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)*, Petites Affiches n 205, 13 octobre 2004; J. ISSA-SAYEGH, *L'intégration juridique des Etats africains dans la zone franc*, Penant 1997-1998, p. 5 et 120; ID., *Quelques aspects techniques* cit.; M. KIRSCH, *Dixième anniversaire de la signature du Traité concernant l'harmonisation du droit des affaires en Afrique (Libreville, 17 octobre 2003)*, Penant 2003, p. 389; L. BENKEMOUN, *Quelques réflexions sur l'Ohada, 10 ans après le Traité de Port-Louis*, Penant 2003, p. 133 ; C. SIETCHOUA DJUITCHOKO, *Les sources du droit de l'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)*, Penant 2003, p. 140; G. KENFACK DOUJANI, *L'abandon de souveraineté dans le traité OHADA*, Penant 1999-2000, p. 125 ; J.-J. RAYNAL, *Intégration et souveraineté : le problème de la constitutionnalité du traité OHADA*, Penant 2000, p. 5 ; B. BOUMAKANI, *Le juge interne et le droit OHADA*, Penant 2001-2002, p. 133.

<sup>27</sup> J. ISSA-SAYEGH, *Quelques aspects techniques* cit.

<sup>28</sup> See R. NEMEDEU: *OHADA: de l'harmonisation à l'unification du droit des affaires en Afrique*, available at <[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)>, accessed on 12 October 2005.

have been influenced by the English law and it would have been also unrealistic to totally disregard the 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 too<sup>29</sup>, to realize a synthesis acceptable for all the citizens of the member States.

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>30</sup>.

It should be remarked that in the area of commercial sale, none of the Contracting States to the Treaty was signatory 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 sale in the internal laws of the States and the only reference to a law in this area was references 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 in 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>31</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>32</sup>. Apart from provisions 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 the pre-contractual

<sup>29</sup> As R. NEMEDEU remarks in his paper quoted in the previous footnote, taking into account Islamic law has brought to special provisions with reference to interests in business transactions and testimonial evidence.

<sup>30</sup> Art. 202, Uniform Act Relating to General Commercial Law.

<sup>31</sup> On the will of the parties see A. S. ADJITA, *L'interprétation de la volonté des parties dans la vente commerciale (OHADA)*, available at [www.annuairis.com/droitdesaffaires.htm](http://www.annuairis.com/droitdesaffaires.htm), accessed on 12 October 2005.

<sup>32</sup> See generally G. K. DOUJANI, *La vente commerciale OHADA*, in *Uniform Law Review*, vol. 8, 2003-1/2, 191; B. ATOMINI, *La vente dans la législation OHADA*, available at [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), accessed on 12 October 2005.



negotiations as well as the rules related to capacity.

In 2003 the OHADA Council of Minister 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>33</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 litigations not submitted to an arbitration panel or to a specific court not contractually chosen by the parties<sup>34</sup>, and 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>35</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 (*rectius* uniformization) of contract law is underway: the adoption of a Uniform Act on the law of contract.

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>36</sup>.

In the Spring of 2002, further to a request by the Council of Ministers of the OHADA<sup>37</sup> for UNIDROIT to provide its expertise in preparing a draft law in the light

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<sup>33</sup> Art. 1, Uniform Act Relating to Contracts for the Carriage of Goods by Road. 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.

<sup>34</sup> Art. 27, Uniform Act Relating to Contracts for the Carriage of Goods by Road.

<sup>35</sup> See F. FERRARI, *The OHBLA Draft Uniform Act on Contracts for the Carriage of Goods by Road. First remarks on its sphere of application*, in *Revue de droit des affaires internationales*, (2001), 898-905; P.K. AGBOYIBOR, *L'OHADA a adopté un nouvel Acte Uniforme relatif au transport des marchandises par route*, in *Revue de droit des affaires internationales/International Business Law Journal*, 2003, 440-444.

<sup>36</sup> The other branches of law on which the Council of Ministers of the OHADA decided also to go ahead are 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.

<sup>37</sup> The decision was taken at the OHADA meeting held in Brazzaville (Republic of Congo) on February 2002.

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>38</sup>.

The drafting process was governed by two fundamental goals: to remain close as much as possible to the UNIDROIT principles – which have been chosen as model – considered that they proved to be successful 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 underlined 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>39</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 have to be retained for certain categories of contract, such as consumer contracts.

The other fundamental problem to be solved is if the Uniform Act on contracts should deal exclusively with commercial contracts or 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>40</sup>.

In drafting the future Uniform Act on contracts particular attention has been paid in particular to ensuring the compliance of the draft with other projects, especially with the one on a draft uniform act on consumer contracts – which is already

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<sup>38</sup> Source UNIDROIT, Governing Council, 84<sup>th</sup> session, Rome, 18-20 April 2005, Legal Co-operation Programme, Memorandum prepared by the UNIDROIT Secretariat, available at <[www.unidroit.org/english/governingcouncil/documents/2005session/cd84-12-e.pdf](http://www.unidroit.org/english/governingcouncil/documents/2005session/cd84-12-e.pdf)>, accessed on 13 October 2005.

<sup>39</sup> See M. FONTAINE, *Le projet d'acte uniforme OHADA sur les contrats et les principes d'UNIDROIT relatifs aux contrats du commerce international*, in *Uniform Law Review*, vol. 9, 2004, 253.

<sup>40</sup> M. FONTAINE, *op. ult. cit.*



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>41</sup>.

### **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. 19 African countries are its members<sup>42</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. 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.

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 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 the countries to develop their individual economies as well as their capacity to participate 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.

The COMESA objective is to deepen and broaden the integration process among member States through the adoption of more comprehensive measures among which the Treaty indicates the harmonization or approximation of the laws of the member States to the extent required for the proper functioning of the Common Market.

COMESA has also made a start at creating a uniform commercial law, but it

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<sup>41</sup> See the UNIDROIT document quoted on footnote 27.

<sup>42</sup> Member countries are Angola, Burundi, Comoros, Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

has not progressed nearly as far. 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. 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 it 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.

## 5. 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 put the same 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 the 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 gaining a high degree of success and respect at different levels. The text of the uniform acts already adopted want to reflect the economic reality and the life of African companies in order to foster trade and make it save for all economic operators, particularly individual traders, companies and the judges or arbitrators who will have to ensure their implementation

Scholars and legal professional are strongly contributing to the knowledge and the diffusion of the OHADA system. One of the most famous and old journal in French on African law – Penant – 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 showed their strong interest in joining the OHADA Treaty and adopting the uniform acts already in place, a case law on OHADA matters is rapidly developing and the member countries are very active in promoting the harmonization of further sector of business law. We think that this is the best evidence



of the quality and the success of the project.

The COMESA attempt is clearly far behind if compared to the OHADA one, due to the more economic orientation of the Treaty and the greater diversity among the member States, but anyway it must not be undervalued, even in view of the importance of the interested area.

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 uniformation 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 verso African economic environment provided that the political power takes its role in granting within the continent that political stability that was lacking up to now.

