

THE UNIDROIT PRINCIPLES AND LEGAL CERTAINTY OF COMMERCIAL TRANSACTIONS IN THE PRELIMINARY DRAFT OHADA UNIFORM ACT ON CONTRACT LAW (Abstract)

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The Organisation for the Harmonisation of Business Law in Africa (OHADA), of which 16 Francophone Western and Central African countries are members, is engaged upon a process of sweeping legislative reform and has asked UNIDROIT to assist it in preparing a draft Uniform Act on contracts based on the UNIDROIT Principles of International Commercial Contracts. Professor Marcel Fontaine* was mandated by UNIDROIT to undertake this task with the financial support of the Swiss Government. A preliminary draft was submitted to the Permanent Secretariat of OHADA in early 2005, together with an Explanatory Note**, and these texts are now being examined by the national commissions in the various OHADA member States.

The author of this study weighs up the approach taken in this venture and assesses the provisions drafted to date in the light of the realities of African life and with OHADA's operational track record in mind. He hails the reform of general contract law – a fundamental area of the law – as an important stepping stone towards legal reconstruction within OHADA. The choice of the UNIDROIT Principles – a body of rules that has no specific connection with any particular legal tradition in the OHADA countries but instead offers modern, equitable solutions that enjoy wide international support – as the source of inspiration augurs well for contractual security and foreseeability, both important considerations from the point of view of economic operators and investors within the region.

However, while recognising the importance of the contractual security thus provided, the author argues that greater attention should nevertheless be paid to the stability of commercial relations. This would imply some recognition of the realities of African life, in particular its practices and usages, which should be left to be assessed by the national courts in the member States – or to arbitration. The preliminary draft Act already contains provisions (Articles 1/8 and 4/2) with this in mind, but it would be useful if the rules of interpretation of the Uniform Act (Article 1/5) could supplement these provisions by referring to the “national application” of the Act and to the “national law of the place where the contract is to be performed” in addition to the general principles on which the future Uniform Act on contract law is based, in particular the UNIDROIT Principles of International Commercial Contracts.

As to the question of whether, in addition to commercial contracts, the future Uniform Act ought also to encompass private, non-commercial contracts (“contrats civils”), the author recalls that this is a highly topical issue just now. After assessing the pros and cons of one and the other option, he comes out in favour of a Uniform Act that sets out general principles applicable to all commercial contracts, for most of which specific rules already exist. Something of this nature is implicit in the idea of a general theory of commercial contracts

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** A condensed version of the Explanatory Note appears in an article by Professor Fontaine, “The Draft OHADA Uniform Act on contracts and the UNIDROIT Principles of International Commercial Contracts”, *Uniform Law Review / Revue de droit uniforme*, 2004, 573 et s. This article may be accessed on UNIDROIT Internet website à : <http://www.unidroit.org/english/publications/review/articles/articles-main.htm> > .

within the ambit of OHADA, and there would seem to be no legal obstacle to embracing such a solution.

While it is true that the Civil Code would be divested of a highly significant legal tradition, that of a general theory of commercial and non-commercial (civil) obligations, such a development would appear to be more in line with the goal pursued by OHADA and with its scope as defined in Article 2 of the Treaty, which is strictly confined to economic activities, while “civil contract” law should be left to the domestic law and courts of the member States, which are loath to jettison all their traditional jurisdictional powers.

In this way, the author argues, the spirit and substance of the preliminary draft Uniform Act on contracts as inspired by the UNIDROIT Principles may be preserved while ensuring that the rules are applied in a way that is compatible with the realities of life in the OHADA countries.

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