

OHADA UNIFORM ACT ON CONTRACT LAW

EXPLANATORY NOTES TO THE PRELIMINARY DRAFT

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Addendum : Explanatory note to the amendment in the Introductory Chapter (Article 00/1) with a view to co-ordinating it with the preliminary draft Uniform Act on consumer contracts transmitted to the OHADA Permanent Secretariat in September 2005

In the event of the Uniform Act on contract law being applicable to all contracts, both commercial and non-commercial (the preferred solution), the special regimen provided for consumer contracts should nevertheless be borne in mind. The preliminary draft Uniform Act on consumer contracts sets out a body of special rules to govern the relationship between firms and consumers, which derogate in part from the provisions of the Uniform Act on contract law.

With a view to ensuring that the two preliminary drafts do not clash, the experts in charge, Professor Th. Bourgoignie and Professor M. Fontaine met to discuss the two projects. As a result, several amendments were made to the preliminary draft Act on consumer contracts.

Moreover, underscoring the extent to which the two texts are destined to interact, the preliminary draft Uniform Act on consumer contracts provides that "matters not regulated by this Uniform Act shall be governed by the provisions of the Uniform Act on contract law ..." (Article 14). The proposed amendment (Article 00/1) introduces a corresponding provision into the Uniform Act on contract law.

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I. INTRODUCTION – PRELIMINARY CONSULTATIONS

1. The *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) (Organisation for the Harmonisation of Business Law in Africa) already has several uniform acts to its name. The harmonisation process is proceeding in accordance with a blueprint agreed by the OHADA Council of Ministers. At its meeting in Bangui in March 2001, the Council decided that the harmonisation programme would also embrace "(...) competition law, banking law, intellectual property law, the law relating to commercial companies and interest groups, contract law, the law of proof."

As to the contract law project, the Council of Ministers, following its meeting in Brazzaville in February 2002, requested the OHADA Permanent Secretariat to approach the International Institute for the Unification of Private Law (UNIDROIT).

2. UNIDROIT is an independent intergovernmental Organisation. The Institute has been active since 1926 in the preparation of international instruments (Conventions, uniform laws, principles, etc.) in the field of international commercial law and uniform private law in general. Headquartered in Rome (Italy), UNIDROIT is mandated by its member States (59 States spanning the five continents, at different stages of economic development and representing the different legal traditions) to accomplish this task, and also works with non-member States, regional and worldwide intergovernmental Organisations and national institutions, particularly in the academic and professional field.¹

Among its more recent achievements, UNIDROIT numbers the *Principles of International Commercial Contracts*, which received wide acclaim right from the outset. This is why OHADA decided to approach UNIDROIT to assist it in drafting a uniform Act on contract law.

3. UNIDROIT agreed to the OHADA Council of Ministers' request and proposed that the author of these explanatory notes (emeritus Professor, former Director of the Centre for the Law of Obligations, Law Faculty, Catholic University of Louvain (Belgium); member of the UNIDROIT Study Group for the Preparation of the Principles) be entrusted with the preparation of a preliminary draft. The Swiss Government (Development and Co-operation Office) agreed to sponsor the project financially.

The objectives and methods to be adopted in the drafting processes were agreed jointly by the OHADA and UNIDROIT Secretariats and the Swiss Co-operation Office.

4. As to the methods adopted, it was deemed opportune that the rapporteur undertake an extensive round of consultations before embarking on the actual drafting of the future Act. While the UNIDROIT Principles were to serve as the model, it was nevertheless understood that account would have to be taken of certain unique features of African life.

With this in mind, the rapporteur completed three missions to nine OHADA member States selected by the Permanent Secretariat in November 2003 (Senegal, Mali, Burkina-Faso), February 2004 (Gabon, Congo-Brazzaville, Cameroon) and April 2004 (Togo, Guinea-Bissau, Guinea-Conakry). A "facilitator" was appointed by the Justice Minister in each country to organise a wide round of meetings between the rapporteur and specialists in the various legal communities: senior civil servants, magistrates, lawyers, notaries, academics, representatives of the business world, etc. ...

All in all, highly informative talks with more than a hundred interviewees enabled the rapporteur to collect facts, gauge reactions and invite suggestions on the current state of contract law in the countries concerned, on the draft Uniform Act itself, on the choice of the UNIDROIT Principles as the model, on the uniquely African features to be taken into account, and on the guiding principles to be adopted in drafting the future Act. A questionnaire prepared by the rapporteur served as a framework to facilitate these interviews.² Talks were also held directly with the OHADA Permanent Secretariat in Yaoundé.

These preliminary talks proved highly illuminating for the rapporteur. Moreover, many of those he spoke to expressed their appreciation at having been given an opportunity to air their views at this early stage of the project, rather than having to wait for the formal consultation process that will get underway once the preliminary draft has been submitted.

The countries thus visited had perforce to be limited in number. However, UNIDROIT provided the means of conducting more wide-ranging consultations in the form of a questionnaire that was sent out to interested parties in the other OHADA member States. A large number of replies were received.

The present preliminary draft has benefited from these numerous preliminary soundings.

II. THE UNIDROIT *PRINCIPLES*

5. Some introductory remarks are in order as to the model adopted by the OHADA Council of Ministers to serve as the basis for drafting a preliminary Act on contract law.

A. Drafting, content and scope of the UNIDROIT *Principles*

6. The UNIDROIT *Principles of International Commercial Contracts*, which were first published in 1994, are the fruit of many years' research and debate in the comparative law arena. They were drafted by a special Working Party made up of representatives of the main legal systems in the world; Africa was represented by two experts, one from Ghana, the other from Egypt. The UNIDROIT *Principles* are, in effect, a codification of texts covering the main areas of contract law (formation, validity, interpretation, performance and non-performance), with detailed comments and illustrations. The second edition, published in 2004, includes further provisions dealing in particular with agency, third party rights, assignment of rights, obligations and contracts, set-off and limitation periods.³

The comprehensive version of the 1994 edition of the UNIDROIT Principles (blackletter rules, comments and illustrations) currently exists in fifteen languages, while the blackletter rules alone are also available in many other languages. The 2004 edition already exists in English and French, with translations into many other languages already in hand. The UNIDROIT Internet website (www.unidroit.org/english/principles/contracts/main.htm) reproduces the comprehensive version of the 1994 edition of the UNIDROIT Principles (with comments) as well as the black-letter rules of the 2004 edition, together with extensive information as to their implementation.

¹ For further information, see the UNIDROIT Internet website: <www.unidroit.org>.

² The text of this questionnaire is appended to these Explanatory Notes.

³ In respect of this new edition, cf. M.J. BONELL, "UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law", *Uniform Law Review / Revue de droit uniforme* 2004, 5-40.

7. The UNIDROIT *Principles* propose a contract law tailored to the needs of the international commercial community to-day. They draw inspiration from a wide variety of sources: national law – especially recently reformed national law –, national and arbitral case law, comparative law, as well as some of the more significant solutions enshrined in existing international instruments, such as the 1980 Vienna Convention on Contracts for the International Sale of Goods. But the Principles do not stop there: they also innovate as and where needed. It should also be borne in mind that the UNIDROIT *Principles* are closely related to the Principles of European Contract Law (the two instruments were, in fact, drafted in parallel),⁴ which form the bedrock for the law of contractual obligations section to be included in the future European Civil Code.⁵

It should be recalled that the UNIDROIT *Principles* are not a binding instrument but a model for the use of legislators, contract parties, judges and arbitrators.

B. A warm reception for the Principles

8. The UNIDROIT *Principles* proved a success right from the start. Now, just ten years after they were first adopted, they are widely recognised the world over.

Instances of their use in contractual practice are legion. Single provisions may be used as contractual clauses; or parties may choose the *Principles* as the rules of law applicable to their contract. As to the latter, some recent model laws prepared by other international Organisations recommend that the UNIDROIT *Principles* be referred to in the applicable law clause,⁶ or that they be taken into account in applying and interpreting the rules in respect of the parties' rights and duties.⁷

The UNIDROIT *Principles* are frequently referred to in the national courts, but above all, in arbitral case law. Some one hundred such cases have been reported to date,⁸ and their number is increasing.

A great many symposia and seminars have discussed the UNIDROIT *Principles*, from both the academic and the professional angle. The *Principles* are, moreover, increasingly included in academic curriculae relating to international commercial law. Scholarly writings dealing with the UNIDROIT *Principles* abound, analysing the substance of the provisions, their links with national law or other international instruments, and their practical application in business circles and by the courts.⁹

⁴ *Principles of European Contract Law*, Parts I and II, O. LANDO and H. BEALE eds., The Hague, 2000; Part III, O. LANDO, E. CLIVE, A. PRÜM and R. ZIMMERMANN eds., The Hague, 2003 - cf. O. LANDO, "Principles of European Contract Law", *Revue de droit des affaires internationales*, 1997, 189-202; *Principes du droit européen du contrat*, version française préparée par G. Rouhette, Société de Législation Comparée, Paris, 2003. For a systematic comparison of the two instruments, cf. M.J. BONELL and R. PELEGGI, "UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: a Synoptical Table", *Uniform Law Review / Revue de droit uniforme*, 2004, 315-396.

⁵ Cf. Chr. VON BAR, "Le groupe d'études sur un code civil européen", *Revue internationale de droit comparé*, 2001, 127-139.

⁶ Cf. A. MOURRE / E. JOLIVET, "La réception des Principes d'UNIDROIT dans les contrats modèles de la Chambre de Commerce Internationale", *Uniform Law Review / Revue de droit uniforme*, 2004, 275.

⁷ Cf. J.-P. VULLIET, "Le Contrat-type pour les *Joint Ventures* contractuelles du Centre du Commerce International au regard des Principes d'UNIDROIT et d'autres normes d'unification du droit des contrats", *Uniform Law Review / Revue de droit uniforme*, 2004, 295.

⁸ Cf. cases published on the Internet website <www.unilex.info>.

⁹ See, in particular, the recent uniform law bibliographies published in *Uniform Law Review / Revue de droit uniforme*.

Finally, the UNIDROIT Principles have, since the early 1990s, become an incontrovertible point of reference for national contract law reformers. Their rules have, to varying degrees, provided inspiration in drafting Bills and legislative reforms in countries such as Russia, Estonia, Lithuania, Germany, Argentina and China.¹⁰

C. Advantages of the chosen model

9. It was in this context that OHADA, at the request of its Council of Ministers, opted for the UNIDROIT *Principles* as the model for the preparation of a Uniform Act on contract law.

This choice offers manifold advantages. On this point, the response recorded by the rapporteur in the course of his preparatory missions was wholly favourable.

The initiative is perceived as an opportunity to achieve harmonisation on the basis of an up-to-date instrument using innovative legal techniques developed by legal scholars from different legal systems around the world; an instrument that, moreover, has already gained a solid international reputation. These are considerable advantages for countries whose contract law has, on the whole, evolved little since independence. Besides, the use of a more universal type of law (rather than a law linked to a single legal tradition) is likewise perceived as a positive asset in the framework of globalisation, a concept that was much in evidence throughout the talks. This latter aspect is regarded as important at a time when OHADA may be about to open up to other countries in the region.^{10bis} And finally, the existence of a modern contract law incorporating rules recognised and appreciated worldwide is bound to reassure and attract potential investors.

At a colloquium in Dakar in 1977, Professor X. BLANC-JOUVAN wrote that the unification of the law of obligations met *"a veritable need, in light of the expansion of trade and commercial relations ... All agree that it is in the general interest to elaborate some sort of 'common law' ... It is true, however, that this is a difficult task, one that can only be achieved through compromise and mutual concessions. Such a uniform law cannot, therefore, reflect any of the existing laws: it must needs be a new and original law."*¹¹

III. CONTRACT LAW IN THE OHADA COUNTRIES TO-DAY

10. A brief overview of contract law in the OHADA countries to-day is appropriate at this junction. It draws on information gathered in the course of the rapporteur's missions in nine OHADA member States as well as on other sources made available to the rapporteur.

As a general rule, each country has retained the contract law left it as a legacy of the colonial period. That is to say, contract law in Guinea-Bissau reflects the Portuguese legal tradition, the Spanish tradition holds sway in Equatorial Guinea, the Belgian tradition in the

¹⁰ For further details on the different aspects of the widespread recognition given to the UNIDROIT *Principles*, cf. J.M. BONELL, *An International Restatement of Contract Law* (New York), 2nd ed., 1997, 229-254.

^{10bis} Cf. S.K. 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", *Uniform Law Review / Revue de droit uniforme*, 2004, 269-274.

¹¹ X. BLANC-JOUVAN, "La résistance du droit africain à la modernisation", *Revue sénégalaise de droit*, 1977, 33.

Democratic Republic of Congo and the French tradition in all the other countries.¹² Cameroon is special in that it incorporates both the French and *common law* traditions.

Only a very few countries have adopted a new contract law or a new law of obligations. Examples are Senegal (law of 10 July 1963 in respect of the general part of the Code of Civil and Commercial Obligations), Guinea-Conakry (the Civil Code of 1983) and Mali (law of 29 August 1987 laying down the general rules of obligations).¹³ All these texts have their own unique features, but by and large they follow the French tradition.¹⁴ Elsewhere, the texts brought in by the former colonial powers apply (or, where the English-speaking population of Cameroon is concerned, the *common law* as it stood at the time of independence).¹⁵

All the interviewees concurred that the doctrinal and jurisprudential developments in the former colonial capital continued to be monitored, but only to the extent that material conditions allowed (difficulty to keep up to date). In most countries in the region, scholarly writings are rare, and the local case law is hardly accessible. The legislative reforms that have taken place in Europe have had little or no fall-out locally.

As a result, the law of contractual obligations has scarcely evolved in almost half a century (apart from the new codifications in the three countries mentioned *supra*). Modernisation is clearly long overdue, and the adoption of an OHADA Uniform Act on contract law would be an opportunity to remedy that situation.

IV. BASIC PRINCIPLES

11. Two basic principles were retained as guidelines in preparing the current draft. These were submitted to all those interviewed by the rapporteur in the course of his consultations (see item 10 of the questionnaire), and met with a broad consensus.

A. Staying close to the model

12. To begin with, the Uniform Act should stick as closely as possible to the model provided by the UNIDROIT Principles.

One of the main advantages of drawing on the UNIDROIT Principles is that they constitute a first-rate codification of international repute.

The UNIDROIT Principles have already given rise to a substantial body of legal writings and been widely applied by the courts and tribunals. All this literature (as indeed the “comments” that accompany the black-letter rules in all official versions) as well as the case law will be immediately available to the OHADA member countries once their new contract law based on the *Principles* is in place. Moreover, since the UNIDROIT Principles have already been used in reforming the contract law of several other countries, OHADA’s new harmonised law will gain its entry into the much larger family currently engaged in legal harmonisation worldwide.

¹² On the introduction of the Civil Code in the former French colonies, cf. K. MBAYE, “Le destin du Code civil en Afrique”, in *Le Code civil 1804-2004, Livre du bicentenaire* (Paris), 2004, 515-537.

¹³ Outside the OHADA sphere, it is worth mentioning the important Malagasy law of 2 July 1966 on the general theory of obligations.

¹⁴ Although the Guinean Code of 1983 reveals the influence of Marxist thinking, it nevertheless remains closely tied to the French tradition. According to information received, a new Civil Code is now on the drafting board in Guinea aimed at a return to that tradition.

¹⁵ See, in respect of this “perfect stability” of the law of obligations in the majority of African States, R. DECOTTIGNIES, “La résistance du droit africain à la modernisation du droit des obligations”, *Revue sénégalaise de droit*, 1977, 61-62.

Another important point for the OHADA countries is that the *Principles*, which were drafted in English and French, are also available in other language versions, including Spanish and Portuguese, which will be of great assistance when it comes to preparing the corresponding language versions of the future Uniform Act.

For all these reasons, most of the provisions of the draft Act will adopt the original wording of the UNIDROIT *Principles*.

B. Taking account of uniquely African features

13. The foregoing general principle will, however, be appropriately adjusted by the second guiding principle retained: the draft must make allowance for uniquely African features, especially those peculiar to the OHADA member States. This issue loomed large in all the rapporteur's preparatory interviews.

But what are these "uniquely African features"? The concept needs clarifying, since it may take on different meanings in different settings.

14. Do the words "*uniquely African features*" allude to the traditional law of the African countries in question, as it existed in pre-colonial times and as it is still to some extent applied to-day?

Whereas traditional law is still much in evidence in areas such as family law, it is far more elusive in general contract law. The rapporteur's oft-repeated question during the preparatory talks ("*which rules would apply if I were to buy fruit in Bamako market?*") never received a clear-cut reply. While native rules still exist that govern local contractual relationships, they are certainly not widely known. Studies on traditional African law reveal, moreover, that while such law does propose original contracts in specific areas,¹⁶ it does not appear to have developed any general theory of contract law.¹⁷ There were those who held that such local usages as had survived were geared strictly to small-scale trade and were scarcely relevant for the purpose of a Uniform Act on contract law, which was to endow the OHADA countries with a common legal framework to enable them to compete on equal terms within a globalised economy.

15. The words "*uniquely African features*" may also refer to the current legal tradition in the various countries concerned.

The legal systems set in place by the colonial powers over a century ago¹⁸ survived largely unchanged after independence. Contemporary legal scholars in the OHADA countries reason much like their French, Spanish, Portuguese or English counterparts. There is truth in the assertion that the "specificity" of the law of countries such as Senegal, Togo or Gabon is that it subscribes to the French legal tradition, that that of Guinea-Bissau reflects Portuguese legal thinking, and so on.

Others, however, disagree with this view, stressing that although people had grown familiar with the imported law, it was not regarded as entirely appropriate.

¹⁶ Cf. for example the different contracts described by S.K. DATE-BAH, "Communication sur le droit des obligations civiles", *Revue sénégalaise de droit*, 1977, 81-89 (specific forms of contract for the sale of land, lease, warranty, labour, etc. ...). Cf. also MBAYE, *supra* note 12, 531 (the "shepherd's contract", the "weaver's contract", the "fisherman's contract", etc. ...).

¹⁷ DATE-BAH, *supra* note 16, 80; S. MELONE, "Les résistances du droit traditionnel au droit moderne des obligations", *Revue sénégalaise de droit*, 1977, 46, 47.

¹⁸ See, in respect of this process, in particular BLANC-JOUVAN, *supra* note 11, 23-30, MBAYE, *supra* note 12, 518-524. An earlier influence, of considerable importance in some regions, was that of Coranic law (cf. DATE-BAH, *supra* note 16, 80; MBAYE, *idem*, 520).

Moreover, these “unique features” provide no common denominator for the kind of harmonisation the OHADA countries have in mind. They are simply different “legal traditions” that exist side by side. Although the law of French origin predominates, the different traditions do not identify with each other. While the law of the Democratic Republic of Congo, which is of Belgian origin, is very similar to the French system, the law of Equatorial Guinea, of Spanish origin, is much less so, and the Portuguese-inspired law of Guinea Bissau even less. The legal system in the English-speaking part of Cameroon even belongs to an entirely different “legal family”, that of the common law.

In this sense, there is no common “specificity” for the draft to take into account.

16. It would appear, therefore, that the term “uniquely African features” should be understood as referring to a range of *de facto* circumstances and to the sociological setting in the different countries that may affect the choice of the “most appropriate legal rules”.

In this respect, two points were repeatedly stressed during the rapporteur’s preparatory consultations. Both strike at the heart of the matter.

17. The first point was widespread illiteracy. While the actual illiteracy rate may vary from country to country, it is always high.

Clearly, any legal rule intended to regulate such matters as formation of contract, proof, or the implementation of all manner of formalities must make allowance for the fact that a large number of those it addresses are illiterate. We shall return to this point in more detail later.¹⁹

18. In most countries, attention was also drawn to the generally *poor level of “legal culture”*. People are often unaware of the existence of legal rules or if they do, have only the haziest idea of what they are. When a problem arises or a dispute breaks out, they tend to give the law and the courts a wide berth in favour of other means of redress ... or they simply resign themselves to their fate. Added to this, it was often pointed out that the relative incompetence of a large section of the magistracy is no stranger to this phenomenon either.

Poor legal culture is, unfortunately, another of the “unique features” that characterise many of the OHADA countries. How can this problem be addressed in seeking to harmonise their contract law?

To provide a simplified contract law relying on a very few readily accessible legal rules would not, in the rapporteur’s view, be the right way of endowing the OHADA countries with the kind of legal (infra)structure, capable of attracting investors, that they need to compete in international trade. It would be better if the harmonised contract law contained sophisticated rules to deal with formation of contract, penalties for non-performance and transfer of obligations.

Moreover, the problem is not confined to the specific area of contract law alone. It arises generally, indeed it applies to the Uniform Acts already in existence, and many of those interviewed expressed concern with regard to the practical implementation of these Acts, which are little known to the general public (and even within certain legal circles) and are misunderstood when they are taken into consideration at all.

To remedy this situation, one should pursue and indeed step up initiatives to inform and educate. OHADA’s *Ecole Régionale Supérieure de la Magistrature* could be highly instrumental in

¹⁹ As early as 1977, illiteracy was identified at the Dakar symposium as the single most important factor to be taken into account in any attempt to adapt the law to everyday life in Africa: *cf.* the conclusions of Dean MELONE, *supra* note 17, 254.

this respect. We cannot hope even to begin to solve the problems of poor legal culture and incompetence unless we do so step by step, and by dint of unstinting effort.

A major information campaign will need to be launched after the Uniform Act on contract law is adopted. UNIDROIT can certainly provide support at that stage, and the plentiful commentaries to which the chosen model, the UNIDROIT Principles, have already given rise will no doubt prove invaluable in facilitating the process.

V. SOME IMPORTANT QUESTIONS

19. The rapporteur was asked to produce a preliminary draft *"together with notes ... explaining the solutions proposed but without constituting a fully-fledged commentary"*. A detailed commentary of the different articles was not in fact deemed useful, since such a commentary already existed, together with illustrations, in the UNIDROIT *Principles*, most provisions of which were reproduced word for word in the preliminary draft.

This explanatory document represents the *"notes"* in question. A number of general considerations relating to the draft were discussed *supra*. We shall now take an in-depth look at the main issues where special thought had to be given as to how the UNIDROIT *Principles* would be transposed into the draft, as well as to the points where the draft, at times, diverges from the model or indeed, supplements it.

We shall confine ourselves to essential issues. In the preliminary draft, each article is accompanied by a reference indicating whether the text is identical to that of the UNIDROIT *Principles* ("=U.Pr. Art. ..."), similar ("comp. U.Pr. Art. ...")²⁰ or "new".

20. In drafting the preliminary text, a number of important questions arose. Five of these stand out. Should the future Uniform Act introduce a special regime for commercial contracts, or should it establish an ordinary general law for all contracts, both commercial and non-commercial? Given the generally high illiteracy rate, should the contract law be formalistic in approach or not? Might not some of the innovations introduced by the Uniform Act based on the UNIDROIT *Principles* create problems in an African context? How should the draft deal with matters not covered by the UNIDROIT *Principles*? And how can proper coordination with the other uniform acts be ensured?

A. Commercial contracts or an ordinary general law for contracts?

21. Should the Uniform Act on contract law deal with commercial contracts alone, or should it also apply to contracts in general, that is to say, should it also cover non-commercial contracts (*contrats civils*)?

One's first reaction is likely to be that the future Act should govern only commercial contracts. OHADA, after all, was set up to harmonise *business law*. The model chosen, the UNIDROIT *Principles*, refers to international *commercial* contracts.

However, it became clear during the rapporteur's preparatory missions that, although opinions on this point were highly divided, a majority trend was nevertheless apparent. About one third of those interviewed would indeed prefer the Uniform Act on contract law to apply only to commercial contracts. The remaining two thirds, however, were in favour of extending its scope to all contracts, without distinction.

²⁰ In many cases, any changes apparent in "similar" texts are purely a matter of form.

22. First of all, we need to understand the question itself. What is at stake here is a general regime for contracts, that is to say, common rules on formation, performance, non-performance, interpretation, etc. ..., not the fate of any particular contract. Specific rules will anyhow continue to exist for certain kinds of typically "*civil*" contract such as contracts of marriage, as well as for "commercial" contracts such as brokerage or agency contracts. What needs to be established is whether the OHADA countries will, in future, have a single, ordinary law on contracts applicable to all commercial and non-commercial transactions, or whether the new rules will apply only to commercial contracts, leaving non-commercial transactions to the respective domestic law.

23. Following are the main arguments advanced by both camps, respectively.

- In favour of duality:
 - OHADA is competent only in matters of business law. One interviewee said that "interference" in the area of non-commercial contract law would "unjustifiably change the nature of the Organisation and its legislative output".
 - Commercial law and non-commercial law pursue different goals; the need of the former for simplicity and speed is not shared by the latter.
 - Unification would further complicate the transfer of jurisdiction from the national courts to the Abidjan Court and aggravate the problem of access to justice.²¹

- In favour of a unified contract law:
 - There are precedents for broadening the scope of OHADA Uniform Acts to "*civil*" areas, for example in arbitration, secured transactions and recovery procedures. Article 2 of the OHADA Treaty authorises the Council of Ministers to define the scope of what is understood by the concept of "*business law*".
 - To have two separate contract laws would create problems in delimiting their respective areas of competence: several interviewees raised the problem of mixed contracts between retailers and consumers.
 - There is no general theory of commercial contracts; the only general theory of contracts is that enshrined in the Civil Code which serves as a common core for private law as a whole.
 - Unification would be instrumental in modernising the civil codes.
 - The debate on the "commercial" vs. the "non-commercial" divide is "outdated".²² Codes or laws covering the full range of civil and commercial obligations already exist in several countries, such as Switzerland and Italy, and also in Senegal and Mali.

24. The rapporteur takes the view that this important conceptual issue of the scope of application of the future Uniform Act should be settled by means of OHADA's consultation and decision-making procedures. Speaking strictly from a personal point of view, however, he believes that the following points should be borne in mind.

²¹ On this concern, *cf.* also L. BENKEMOUN, "Quelques réflexions sur l'OHADA, 10 ans après le Traité de Port-Louis", *Recueil Penant*, 2003, 135-137.

²² Likewise, X. BLANC-JOUVAN, "L'influence du Code civil sur les codifications étrangères", *in: Le Code civil 1804-2004, Livre du bicentenaire* (Paris), 2004, 498.

Like most of the interviewees, the rapporteur's preference goes to a unified contract law, that is to say, a Uniform Act covering both "*civil*" and commercial contracts.

The obstacles referred to in respect of OHADA competence should not prove insuperable. The Council of Ministers has some discretionary power as to the scope of application of business law; on several occasions in the past, Uniform Acts have been extended to cover non-commercial operations (see *supra*). It should also be pointed out that the decision taken by the Council of Ministers in Bangui in 2001 referred to the drafting of a Uniform Act on "*contract law*", a general formula implying no restrictions.

The concern expressed by some with regard to the gradual extension of the competence of the Joint Court of Justice and Arbitration (and to the corresponding decline of the powers of national Supreme Courts, as well as to possible impediments to access to justice) may well have some grounds in reality. However, these are issues that should not be decisive in solving a problem relating to a particular Act. They are general in scope and appropriate remedies should be found within the framework of a review of the competences and means of action of the Court.

25. Ultimately, it is important to remember that to opt for a Uniform Act confined to commercial contracts alone would mean that non-commercial contracts would continue to be governed by national law. The resulting co-existence, in each country, of two separate contract laws would create a situation that would be regrettable, complex and unusual all at the same time.

Regrettable, because non-commercial contracts would continue to be subject to rules which, in most countries, have barely evolved since independence, whereas commercial contracts would be governed by rules incorporating the most recent advances. That would be tantamount to depriving those citizens not engaged in trade from the benefits of legal modernisation.

Complex, because the co-existence of two separate contract laws would create problems in delimiting the respective areas of competence; suffice it to think of "*mixed*" contracts between retailers and consumers. The resulting legal uncertainty would exacerbate the ignorance of the law touched upon above.

Unusual, because there is hardly any historical precedent for such a situation, in which two fully-fledged but very different systems of contract law co-exist.²³ Nearly always and everywhere, a single general contract law prevails, applicable both to "*civil*" (non-commercial) and commercial contracts, with some clearly defined exceptions where appropriate. The need for simplicity and speed is widely recognised in commercial law, but contract law makes no specific provision for this. Almost the only example that springs to mind is that of proof.²⁴

It should be stressed, moreover, that at present there is only one general contract law that applies to all OHADA countries. In those countries that are still governed by the civil codes of the former colonial powers, the ordinary contract law rules stipulated by those codes apply both to commercial and non-commercial contracts, with some exceptions. The Senegalese law of

²³ One such exception was the time when some countries of the European Socialist bloc had separate codes for international commercial contracts. Czechoslovakia even had three: a civil code, an economic code (for State contracts) and a code for international commercial contracts.

²⁴ Another example might be that of notice, which could be somewhat less formalist in commercial law; however, the current preliminary draft, like its model, includes no requirements as to form for notice in the event of non-performance (*cf.* Art. 1/9, applicable among others to Arts. 7/5 and 7/14). On the other hand, the preliminary draft makes general use of the presumption of solidarity (Art. 10/8, 1°), reserved in some laws for commercial undertakings alone.

10 July 1963 deals with both “civil” and commercial transactions. Likewise the law of 29 August 1987 in Mali, which establishes a general law of obligations. In English-speaking Cameroon, the *law of contracts* makes no such distinction. Guinée-Conakry has an important “Code of economic activity” which regulates certain types of commercial contract, but the general system of contractual obligations is that laid down by the Civil Code.

26. As to drafting, the “unified” solution would create few problems. Essentially, it would involve appropriate drafting of the provision on the scope of application of the Uniform Act, and bearing in mind the few cases where special rules would be appropriate for commercial and non-commercial contracts. Such cases, as we have seen, are relatively rare.

In view of the rapporteur’s stated preference, the preliminary draft makes an *a priori* case for a Uniform Act applicable to both commercial and non-commercial contracts.²⁵ A variant has however also been included, in which the Act would apply only to commercial contracts but where national legislators would have discretion to extend its scope to contracts in general (which in the rapporteur’s view would be preferable).

27. The question of “unity” or “duality” takes on an additional complexion in relation to the draft Uniform Act on consumer contracts. In the worst hypothesis, the OHADA countries would end up with not two, but indeed three different contract laws! However, we shall see that this is an unlikely scenario (*cf. infra*, n° 69 et 70, with regard to the coordination between the draft Uniform Act on contract law with other Uniform Acts).

B. The question of formalism

28. In view of the generally high illiteracy rate, should the contract law be formalistic or non-formalistic in approach?

As mentioned *supra*, illiteracy is a widespread problem in the OHADA countries, albeit to varying degrees. Most citizens can neither read nor write. How and to what extent should this affect the drafting of a contract law capable of addressing African realities? This question arises whenever the law prescribes, or might prescribe, written form, whether dealing with formation of contract, requirements relating to evidence or formalities connected with the performance of the contract, such as notice.

29. On this point, the UNIDROIT Principles reject all formalism. According to Article 1.2, “Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.”²⁶

30. Does the illiteracy prevalent in the OHADA countries automatically suggest minimal formalism as the obvious solution? Or should we, on the contrary, accept that illiterate people deserve special protection when contracting obligations, and that such protection must perforce derive from requirements of form?

Opinions on this key issue gathered during the fact-finding missions differed widely.

²⁵ This is why the reference made in two articles of the Unidroit Principles to the “trade concerned” (Arts. 4.3 and 5.1.7) has been replaced by a reference to the broader concept of “sector concerned” (Arts. 4/3 and 5/7 of the preliminary draft), and why, in other provisions, references to “place of business” (U.Pr., Arts. 1.10, 1.12 and 6.1.14) have been added to references to “establishment” (preliminary draft, Arts. 1/9, 1/11 and 6/18).

²⁶ *Cf.* also Arts. 1.10 (form of notice) and 1.11 (definition of “writing”), which have become Arts. 1/9 and 1/10 in the preliminary draft.

31. On the one hand, the "oral tradition" is well-established in Africa and does not get in the way of economic transactions. Many of the region's most well-to-do businessmen are illiterate. One interviewee even confided that illiterates were the most cunning people and that "an illiterate person was able to explain the workings of a letter of credit much better than a banker or a professor of law could" !

Some of those interviewed, in particular in economic circles, advocated the less formalism the better.²⁷ Illiteracy is part of the African reality: therefore the law should be kept as simple as possible. In contractual matters, no specific requirements as to form should apply, whatever the amounts involved. OHADA law is often too complicated. Procedures need to be simplified; this was what a United States-backed project in Guinea-Bissau set out to do before the 1998 war, with a view to reducing the formalism inherited from Portuguese law.

32. On the other hand, a minority of interviewees came out in favour of general, absolute formalism in writing.²⁸ This view was defended particularly by notaries, who advocated broad formalism (stressing the advisory role they would be able to play).

33. Between these two extremes, most interviewees favoured a certain degree of formalism in contract law.

34. There is, of course, the precedent set by the Vienna Convention on Contracts for the International Sale of Goods. Article 11 espouses the solution adopted by the 1964 Hague Sales Conventions in rejecting all formalism: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." However, this celebration of consent of the parties and freedom of form was only accepted by the Diplomatic Conference to adopt the Convention provided that any Member State whose laws required contracts of sale to be concluded in or evidenced by writing was free to declare Article 11 inapplicable where any contract party has its place of business in that State (Articles 12 et 96). This compromise was intended primarily to placate the USSR and other countries of the Socialist bloc at the time. Nine of the 63 countries currently Parties to the Vienna Convention have made declarations to this effect.²⁹

What is more surprising is that none of the seven African Contracting Parties to the Vienna Convention (Egypt, Ghana, Guinea, Lesotho, Mauritania, Uganda, Zambia) have made use of this opportunity to disapply Article 11.

As to the OHADA countries themselves, they have made liberal use of the Vienna Convention texts in drafting the sales provisions of the Uniform Act on commercial law in general (see *infra*, n° 59), for example, in matters of party consent and freedom of form. Article 208 provides that "A contract of sale may be in writing or concluded orally; there is no requirement as to form. If not evidenced in writing, it may be proved by any means, including by witnesses". Clearly, this closely echoes Article 11 of the Vienna Convention (except in that it rules out evidence by witnesses if written evidence exists).

²⁷ Cf. also the opinion of Dean MELONE: "L'idée générale est d'enlever à l'écrit le rôle prépondérant comme système de preuve. C'est donc une régression du formalisme qu'il faut organiser ...", *supra* note 17, 51). The author stresses the importance of the spoken word and gestures in contract formation in an illiterate society (*ibid.*, 50).

²⁸ One of the interviewees held that the requirement of writing was in keeping with the precepts of Coranic law, important in some regions.

²⁹ Voices are being heard in China for the country to renounce this declaration. Cf. W. XIAOLIN / C. BAASCH ANDERSEN, "The Chinese Declaration as to Form of Contracts under CISG – Time to Withdraw ?", *Uniform Law Review / Revue de droit uniforme*, 2003, 870-873.

One commentator noted that *“The acceptance of the principle of consent of the parties in an act governing commercial sales is not at all surprising. This rule, sanctioned by tradition, is justified primarily by the need for speed and trust that characterises all business transactions. In practice, therefore, it is synonymous with speed and economy. By facilitating the conclusion of contracts, party consent boosts commercial activity and the exchange of services and wealth.”* Nevertheless, *“business life cannot do without writing ...”* and the authors of the Uniform Act *“showed their wisdom in stipulating that, while upholding the principle of party consent, reliance on the written form was not excluded for all that.”*³⁰

In pre-existing OHADA law, therefore, commercial sales are based on party consent, even though the text gives a measure of importance to the written form. However, this only applies to contracts concluded between commercial operators (Article 202).³¹

34. It is evident, judging from these arguments and taking the example of commercial sales, that the problem is a complex one and that possible solutions are legion. Which solution should we adopt?

Again, it should be emphasized that the issue here is one of general contract law, that is to say, general rules that will apply where no special rules exist. Nothing in the future Uniform Act on contracts will endanger the existence of special rules for specific contracts, such as property sales, certain types of company or consumer contracts.

Besides, a certain degree of formalism may be retained for non-commercial contracts, whilst having no, or less stringent, requirements as to form for commercial contracts. An Act that covered both commercial and non-commercial contracts could well provide different rules for each category in this regard.

What, then, might such “common” protective requirements as to form for non-commercial contracts in a largely illiterate society look like?

35. Some examples are evident in existing laws, such as Article 20 of the Senegalese law, which requires written evidence by two witnesses testifying to the identity and presence of the contract party and certifying that the nature and effects of the transaction were made known to him. In Togo, much reliance is placed on the procedure whereby the parties appear before the mayor or the prefect, seconded by a sworn interpreter.³² There are some who claim, however, that such systems do not work well in practice: the contracting party in question is often loath to resort to this formality in case it shows a lack of trust in the other party, and because anyway the procedure is no guarantee that further claims may not be made later in bad faith. Others draw attention to the cost of resorting to third parties and to the practical difficulties that may arise: not all villages boast their own notary or even people who can read and write.

Another option would be to fix a monetary threshold below which any requirements as to form would not apply, as is currently the case in Article 1341 of the French Civil Code.

36. *In fine*, then, what is the position taken in the preliminary draft?

³⁰ J.R. GOMEZ, “Un nouveau droit de la vente commerciale en Afrique”, *Recueil Penant*, 1998, 156-157; cf. also E. NSIE, “La formation du contrat de vente commerciale en Afrique”, *Recueil Penant*, 1999, 6; A. PEDRO SANTOS / J. YADO TOE, *OHADA, Droit commercial général* (Bruxelles), 2002, 351-352.

³¹ Other provisions of the existing Uniform Acts take either a very liberal or a more restrictive stance with regard to formation or evidence in certain types of contract such as commercial lease, agency and sureties (cf. *infra*, n° 63, 64, 65, 68; cf. also n° 70 in respect of the draft Uniform Act on consumer contracts).

³² In traditional law, the presence of witnesses stresses the social character of the contract which in this way receives the community’s seal of approval (cf. MELONE, *supra* note 17, 47).

As we have seen, the question of form arises at different levels of contract law, chiefly as a condition for formation or in terms of evidence. The preliminary draft adheres to this distinction (Article 1/3).

- First of all, should the actual conclusion of the contract be subject to requirements as to form? This is the case, for instance, of so-called solemn agreements such as, in systems based on French law, donations or mortgages.

The rapporteur takes the view that the principle of consent by the parties, which is already in force in all the OHADA countries, should be maintained as part of the general regime. A contract is as a rule formed by mutual consent of the parties. This principle is universally applied, and is a *conditio sine qua non* for the smooth operation of a market economy. Article 1/3, 1° of the preliminary draft, which takes its cue from the UNIDROIT Principles on this point (Article 1.2, first sentence), enshrines this fundamental principle.

- As to evidence, on the other hand, the rapporteur felt the preliminary draft should not take position on this issue.

Another project is currently in the pipeline for a OHADA Uniform Act on evidence, and clearly that is the proper place for any rules on this subject. The Act on contracts would merely refer to these where appropriate. Article 1/3, 2° of the preliminary draft refers to the relevant provisions on evidence. Should the Act on contracts enter into force before the Act on evidence, reference will be made to the rules currently applicable in the different Member States. The Uniform Act on evidence would then take over as soon as it entered into force.

However, it would be a good thing if the Act on evidence were drafted bearing the Act on contracts and the arguments relating thereto in mind, and if the experts engaged in some form of consultation in due course. The discussion *supra* (n° 28-35) was included for this purpose, even though the preliminary draft remains silent on the question of evidence.

C. How will some of the new ideas be received?

37. The introduction, in the OHADA countries, of a Uniform Act based on the UNIDROIT *Principles* will bring many changes in the way in which the contract law currently in force is understood and applied. In itself this is nothing new; much the same happened in other sectors concerning which Uniform Acts were drafted. However, contract law lies at the core of legal culture and any changes in the way of thinking about it may touch sensitive chords. How will some of the guidelines and remarkable solutions advocated by the UNIDROIT *Principles* be received in the OHADA countries if the Uniform Act were to espouse them?

The rapporteur prepared a set of questions pertaining to some of the positions elaborated by the UNIDROIT *Principles*, both in respect of its guiding principles and on specific points. Generally speaking, interviewees' reactions were favourable, raising hopes that the new texts will be well received. Some issues, however, would benefit by closer examination.

1. Good faith – protection of the weaker party

38. The UNIDROIT *Principles* place strong emphasis on good faith (Article 1.7) and some of its consequences: inconsistent behaviour (Article 1.8), negotiations in bad faith (Article 2.1.15), duty of the parties to co-operate (Article 5.1.3), mitigation of harm (Article 7.4.8). This trend is indicative of recent developments not only in international commercial law, but also in the domestic contract law of countries such as France and Belgium (good faith traditionally plays a key role in German law).

OHADA countries with a civil law tradition are already familiar with the principle of good faith performance of contracts, which is enshrined in their Civil Codes. Would they be prepared to accord it the even more central role it is given by the UNIDROIT *Principles*?

On this point, opinions were almost uniformly positive. The preliminary draft accordingly does not depart from the aforementioned provisions in the *Principles* (cf. Articles 1/6, 1/7, 2/15, 5/3 and 7/26).

39. Although designed for commercial contracts, the UNIDROIT *Principles* nevertheless incorporate provisions on abuse by the dominant party, e.g. with respect to “gross disparity” (Article 3.10), exemption clauses (Article 7.1.6) and liquidated damages (“agreed payment for non-performance” – Article 7.4.13).

Here again, interviewees were unanimous in welcoming the prospect of protecting the weaker party under the new uniform law. Corresponding provisions have therefore been included in the preliminary draft (Articles 3/10, 7/6 and 7/31).

This question has a bearing on the problems discussed *supra* with regard to the scope of application of the future Uniform Act. One of the reasons given by those in favour of separate rules for commercial and non-commercial contracts was that private citizens are in greater need of protection against unfair contracts and abusive clauses than commercial operators. The UNIDROIT *Principles* have opted for the incorporation into commercial contract law itself of provisions to protect the weaker party. If the Uniform Act were to extend its scope of application to non-commercial contracts, as the rapporteur suggests it should, private citizens would immediately be afforded such protection.

This argument should also be borne in mind in drafting the Uniform Act on consumer contracts (cf. *infra*, n° 69-70).

2. Fundamental change in circumstances

40. The UNIDROIT *Principles* make provision to renegotiate the contract in the event of a change in circumstances (“hardship” – Article 6.2.1 to 6.2.3). However, some legal systems within OHADA, based on French law, reject the notion of “*imprévision*”.

The approach taken by the *Principles* was largely approved (around three quarters of interviewees took a favourable view). Many recalled the devaluation of the CFA franc, which has left bitter memories. Re-negotiation of the contract when there is a change in circumstances would, in any event, be in keeping with the African reality. Such a provision on hardship would be particularly useful in the unstable climate that characterises Africa to-day.

Yet there is still a minority opposed to the concept. Opponents argue that the possibility of calling contracts into question is likely to aggravate the very instability it is intended to combat. Bad faith is always lurking round the corner.

The rapporteur for his part sides with those in favour, and suggests that the provisions on change in circumstances be maintained word for word.³³ It should be stressed that the system thus set in place includes a range of safeguards against improper use. Article 6/22 of the preliminary draft opens with an unambiguous statement of the principle underlying the text: “Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions ...”. A highly

³³ The rapporteur proposes to replace the term “hardship” (which is justified in the UNIDROIT *Principles* which are intended to govern commercial contracts where this is a common notion) by the term

restrictive list of conditions that will nevertheless justify renegotiation of the contract follows, and the relevant procedure (prior re-negotiation between the parties, intervention of the courts) is designed to frustrate any attempt at improper use (Articles 6/23 and 6/24).

3. Termination of contract for non-performance

41. Another solution adopted by the UNIDROIT *Principles* differs on an important point introduced by the French Civil Code in a large number of OHADA countries. In the event of fundamental failure to perform by one party to a synallagmatic contract, the other party may terminate the contract. The provisions drawn from the French Civil Code (Article 1184) require such termination to be authorised by the courts. The UNIDROIT *Principles* on the contrary stipulate that “*The right of a party to terminate the contract is exercised by notice to the other party*” (Article 7.3.2).

Again, opinions differ on this point, but with a clear majority in favour the *Principles* solution.

A minority of interviewees (around a third) would prefer the judiciary nature of termination to be maintained. This, they argue, would discourage abuse and prevent arbitrary termination by the dominant party.

A majority, however, are in favour of termination by simple notice. This solution is seen as serving the need for speed, simplifying procedures and easing the workload in the courts. It is in keeping with OHADA’s attempts to take certain matters out of the judicial sphere and indeed with the facts, since the courts are only resorted to when the termination is in dispute.

42. The rapporteur, rallying to this majority view, accordingly retained the principle of termination by notice advocated by the UNIDROIT *Principles*.

It should be recalled that termination by notice is the solution applied in virtually all jurisdictions in comparative law. The details differ, but unilateral termination for non-performance is possible in German, Swiss, Dutch, Italian and Portuguese law, in Quebec, in common law and in a key international instrument such as the Vienna Convention on Contracts for the International Sale of Goods (Articles 49 et 64). While termination by the courts may prevent abuse, it also has a major drawback in that it may delay the resolution of what may be an acute contractual crisis by months if not years: often, the aggrieved party urgently needs to be released from the contract in order to find another partner. In Belgium, recent case law, buttressed by scholarly opinion, recognises the validity of termination by unilateral notice in certain cases, notwithstanding the provisions of Article 1184 of the Civil Code that is still in force.³⁴ A similar trend seems to be breaking surface in France as well.³⁵ Legal practice for its part tends to achieve the same result by expressly stipulating termination clauses.

As to the risk of abuse, it should be borne in mind that termination of the contract is not necessarily sought only by the dominant party. But a system based on termination by the courts makes it easy for the dominant party to persist in its failure to perform on the assumption that the other party will hesitate to resort to the courts to obtain termination.

“*bouversement des circonstances*” (fundamental change in circumstances), which is better suited to the French version of the preliminary draft.

³⁴ Cf. S. STIJNS / D. VAN GERVEN / P. WERY, *Chronique de jurisprudence – Les obligations: les sources (1985-1995)*, *Journal des Tribunaux* (Bruxelles), 1996, 740-742.

³⁵ Cf. Chr. JAMIN, “Les conditions de la résolution du contrat: vers un modèle unique?”, in: M. Fontaine / G. Viney (eds.), *Les sanctions de l’inexécution des obligations contractuelles* (Bruxelles et Paris), 2001, 451-512.

The system of termination by notice, on the other hand, comes complete with a range of safeguards. It only applies to cases of “*fundamental non-performance*” within the meaning of Article 7/13; in the case of delay, an additional period for performance is provided for (Article 7/5). Recourse to the courts is always possible: if not *a priori*, then *a posteriori*. Unjustified termination of the contract by one of the parties may lead to an action for breach of contract.³⁶

43. There remains, however, the problem of how to bring the inclusion of ordinary law provisions on termination for non-performance by simple notice into line with the sales provisions in the Uniform Act on commercial law in general (*cf. infra*, n° 61).

4. Cause and consideration

44. The UNIDROIT *Principles* are silent on the notions of “*cause*” (familiar to some civil law systems) and “*consideration*” (typical of the common law systems). Can the Uniform Act likewise do without?

The knowledge that “*cause*” had been discarded came as a considerable surprise to many adherents to the French legal tradition: how could any contract law work without the fundamental concept of “*cause*”? Yet the reaction of common lawyers in Cameroon was much the same with respect to “*consideration*” – they seemed quite unable to imagine a contract that did not include this notion.

These two reactions amply illustrate the difficulties with which the drafters of the UNIDROIT *Principles* had to contend. The concept of “*cause*” is known to some countries belonging to the roman-germanic tradition (such as France, Spain or Portugal), but by no means to all: it has no place in German law;³⁷ it is quite unknown in the common law countries. As to the concept of “*consideration*”, this is typical of the common law and non-existent in roman-germanic law. Clearly, no harmonised contract law that aims to be universal in scope can afford to adopt either one of these concepts, each being too specific a feature of their respective legal systems. In the rapporteur’s view, the problem within OHADA is much the same: neither of these concepts is common to all the member States.

However essential the concepts of “*cause*” and “*consideration*” may seem to the legal systems that apply them, it should be emphasized that it is perfectly feasible to construct a viable contract law without incorporating either. German law is a case in point. Likewise the UNIDROIT *Principles*, and, the rapporteur submits, the preliminary draft Act modelled on it. That is not to say that the solutions which French law and common law associate with the notions of “*cause*” and “*consideration*”, respectively, have been set aside; they are simply achieved by other means.

45. What role does the concept of “*cause*” play in French law, and how does the preliminary draft set about achieving its objectives?

- The concept of “*cause*” first and foremost aims at combating illegality by invalidating contracts with an unlawful cause or an unlawful object. The preliminary draft

³⁶ It should be noted that for much the same reasons, a contract can be terminated by one of the parties by giving notice to the other party (Art. 3/16), without having to go through the courts (judicial control is also exercised *a posteriori*). Likewise, set-off is also effected by notice to the other party (Art. 8/3), whereas in French law, it operates automatically. This generalised notice system reconciles the need for speed on the one hand and security on the other hand.

³⁷ *Cf.* K. ZWEIFERT et H. KÖTZ, *An Introduction to Comparative Law*, ed. 1977, II, 69; German law only recognises the concept of “*cause*” in the context of unjust enrichment. *Cf.* also H. KÖTZ / A. FLESSNER, *European Contract Law*, Oxford, 1997, I, 54: “*The concept is quite unknown elsewhere in Europe ...*”.

achieves the same result using the general clause in Article 3/1 (“Any contract or term that is contrary to (a) the ordre public or good moral standards; or to (b) mandatory provisions of the law, except where the law provides otherwise; is void”).

- A whole body of case law has developed in France dealing with the absence of *cause*.³⁸ The courts terminate contracts or contract clauses where they find no reciprocal obligation to be performed by the other party. In the preliminary draft based on the UNIDROIT *Principles*, such situations can be satisfactorily addressed by applying, on a case-by-case basis, provisions dealing with matters such as initial impossibility (Article 3/3), irregularities of consent, especially mistake (Articles 3/4 to 3/9), gross disparity (Article 3/10), omitted terms (Article 4/8), price determination (Article 5/7) or non-performance of obligations (Articles 7/1 to 7/31).
- The French (but not Belgian) courts’ practice of using the concept of “*cause*” in its objective meaning (reciprocity) to justify, *ex post facto*, some of the mechanisms typical of synallagmatic contracts (defence of withholding performance, termination for non-performance) is by no means necessary. It suffices to apply the rules set out in the preliminary draft (Articles 7/3 and 7/13), which work well without any need for conceptual justification.
- The rule on “*billets non causés*” (documents stating an obligation without mentioning its “*cause*” – Article 1132 of the French Civil Code) refers to evidence; the courts must establish that the contract is neither unlawful nor gratuitous. Such evidence may be brought simply by referring to the notion of “unlawful act” (*cf.* Article 3/1 of the preliminary draft) or to the definition of liberalities (which is supplied by the law on liberalities), with no need to refer to “*cause*”.³⁹
- The issue of “*cause*” also arises with reference to so-called “abstract” obligations, characterised by some as acts “detached from their cause”. In this regard, the concept of “*cause*” takes on yet another meaning, that of the other legal relationship with which the abstract act is connected, but without being affected by some events which may affect the other relationship. The system of abstract acts works very well without this justification; all that is needed is a formula whereby certain defences may not be relied upon.

46. What, on the other hand, is the role played by “consideration” in common law and what would happen if the provisions of the preliminary draft were applied?

- The requirement of “consideration” is intended chiefly to ensure that only promises in respect of which the beneficiary has undertaken a reciprocal obligation have legal force. The common law only enforces “bargains”.⁴⁰

The main consequence is that gratuitous obligations have no binding force, unless entered into solemnly (“deeds”).

Since it contains no requirement comparable to “consideration”, the preliminary draft does not *a priori* deny binding force to gratuitous contracts. Neither, however, does it prevent each national legal system from applying its own special rules on liberalities. In the civil law

³⁸ *Cf.* J. GHESTIN, *Droit civil, La formation du contrat*, 3^{ème} éd., 1993, 842-890.

³⁹ Again, the ambiguity of this concept will have been noted, a different sense being attached to the notion in these two situations.

⁴⁰ *Cf.* KÖTZ et FLESSNER, *supra* note 37, 57-58; CHESHIRE, FIFOOT & FURMSTON’S *Law of Contract*, 14th ed., 2001, 79-82.

countries, these rules are restrictive. Those common law regions already members of OHADA or likely to become so in the future would likewise be able to continue applying their own rules now in force.

- A further consequence of the doctrine of “consideration” is that it denies binding force to any offer to contract, because there is no reciprocal obligation.

This is not exclusive to common law; some civil law countries likewise regard an offer as capable of being revoked until it has been expressly agreed to. On this point, the divide is not as deep as the divide between the main legal systems in general.⁴¹

This whole issue is, of course, grist to the mill of a lively debate, with those seeking freedom of action for the offeror holding out against those favouring legal security for the offeree. The Vienna Convention on Contracts for the International Sale of Goods incorporates a compromise that was taken up in Article 2.1.4 of the UNIDROIT *Principles*, which in its turn found its way into the preliminary draft. This compromise, which achieved broad consensus worldwide, appears preferable to the cut-and-dried solution proposed by the common law.

- The doctrine of “consideration” also got in the way of any contractual terms in favour of third parties, the beneficiary offering no reciprocal performance.

This has proved a serious drawback in practice. In English law, the 1999 *Contract (Rights of Third Parties) Act* sets out to remedy this situation.⁴² Accordingly, the provisions in the preliminary draft on contractual terms in favour of third parties (Articles 5/12 to 5/17) should be acceptable to common lawyers.

47. The preliminary draft, based on the UNIDROIT *Principles*, would, therefore, appear to offer all the mechanisms needed to achieve some of the objectives for which certain legal systems resort either to “cause” or to “consideration”.

It might be added that even in the countries concerned, maintaining the concept of “cause” has met with criticism and changing attitudes.

48. In those legal systems that use it, charges of ambiguity are frequently levelled at the concept of “cause”. Is it the “cause” of the contract or the “cause” of the obligation that is referred to? Is the “cause” the reciprocal performance or the motive? What is its relationship with the concept of “purpose”? Belgian law still regards “cause” only as a condition for the formation of the contract, but rules out any reference to it during the lifetime of the contract (in particular with regard to the kinds of problem relating to performance to which synallagmatic contracts are prone). There exists an “anti-causalist” trend both in France and in Belgium which argues against maintaining the concept. As far back as 1923, ROUAST wrote that “*the concept of cause ... is noted for the obscurities left by a century of comments as ingenious as they are sterile.*”⁴³

More recently, Professor GHESTIN identified no fewer than six “modern interpretations” of “cause”!⁴⁴ He criticises the flaws inherent in the concept: “... the use made in French practice of

⁴¹ For a recent comparative study on this issue, cf. C. DELFORGE, “La formation des contrats sous un angle dynamique. Réflexions comparatives”, in: *Le processus de formation du contrat* (M. Fontaine, dir.) (Bruxelles), 2002, 404-424.

⁴² Cf. CHESHIRE, FIFOOT & FURMSTON, *supra* note 40, 88, 499-516.

⁴³ ROUAST, “A propos d’un livre sur la cause des obligations”, *Revue trimestrielle de droit civil*, 1923, 395.

⁴⁴ GHESTIN, *supra* note 38, 826-839.

the concept of "cause" casts doubt on its value. The notion is so obscure, the definitions so diverse depending on the intended purpose, that litigants, judges and legal scholars see it as a heaven-sent opportunity when casting about for legal arguments. They pick that element from a fertile doctrine that is most likely to buttress whatever theory they are defending, and do not hesitate to bandy their preferred definition of "cause" about from one contract to another, or from one function to another. While of real service in particular circumstances ..., in practice, "cause" more often than not leads to confusion." ⁴⁵

The concept is judged equally severely from outside. Leading comparativists contend, in respect of "cause" in French law, that "it is clear that it means quite different things in different contexts ... in many cases it is perfectly dispensable and contributes nothing to the proper resolution of the conflict of interests involved" ⁴⁶.

Several of those interviewed by the rapporteur admitted that they would happily forego treating such a vague notion as an essential part of the contract.

49. The concept of "consideration" has also come in for its share of (sometimes severe) criticism in the very countries that use it.

In England, the need for "consideration" is frequently called in question. Back in the eighteenth century, Lord Mansfield called for the notion to be abandoned.⁴⁷ More recently, another author wrote: "... English law would lose nothing if the doctrine of consideration were to be abolished. The civil law systems have been able to develop a perfectly adequate law of contract without consideration ..." ⁴⁸. As mentioned above, it was felt necessary in 1999 to introduce legal reforms to remedy the adverse effects of the doctrine of "consideration" in the matter of contractual terms by third parties (*cf. supra*, n° 46). On the other hand, the need for "consideration" is much reduced by admitting a purely token exchange ("peppercorn consideration") ⁴⁹.

In the United States, the legal treatment of undertakings not involving an exchange has changed considerably under the impact of the notion of "promissory estoppel" and of the "reliance" doctrine. Such a contract may become binding if the beneficiary relied on it and acted accordingly.⁵⁰

50. The idea of abandoning these two notions was not perceived by the group of international jurists who drafted the UNIDROIT *Principles* as a sacrifice but as a way of solving a great many problems.

The rapporteur takes the view that this solution has nothing but advantages. A contract law governed by the UNIDROIT *Principles* is perfectly viable and workable. All the functions that "cause" and "consideration" are expected to perform, respectively, can be accomplished in a more direct fashion. In this area, the preliminary draft is true to its model.⁵¹

⁴⁵ *Ibid.*, 947.

⁴⁶ KÖTZ / FLESSNER, *supra* note 37, I, 55.

⁴⁷ *Cf.* CHESHIRE, FIFOOT & FURMSTON, *supra* note 40, 80-81.

⁴⁸ CHLOROS, "The Doctrine of Consideration and the Reform of the Law of Contract", 17 *International Comparative Law Quarterly* (1968), 164.

⁴⁹ *Cf.* A. FARNSWORTH, *United States Contract Law* (New York), 1991, 71.

⁵⁰ *Ibid.*, 74-75.

⁵¹ It would in any case have been impossible to re-introduce the notion of "cause" in the preliminary draft, as some suggested should be done. Something that is regarded as essential to a contract cannot simply be grafted onto another system without causing considerable upheaval. *A fortiori*, the proposal

D. Matters not covered by the UNIDROIT Principles

51. The first edition of the UNIDROIT *Principles*, published in 1994, dealt with the main chapters of contract law: formation, validity, interpretation, content, performance and non-performance.

At the time, certain matters were omitted. Most of these have now been incorporated in the second edition which appeared in 2004. Provisions have been added dealing mainly with agency, third party rights, assignment of rights, obligations and contracts, set-off and limitation periods. It may be noted that some of these matters more properly belong to the general doctrine of obligations rather than to that of contractual obligations as such. The authors of the UNIDROIT *Principles* nevertheless elected to incorporate them into this code of international contracts on account of the many instances in which these rules are applied in contractual practice.

All those interviewed during the rapporteur's exploratory missions were in favour of including these matters in the future OHADA Uniform Act on contracts, and the preliminary draft reflects this preference.

52. Nevertheless, a careful scrutiny will reveal the persistence of a number of gaps in the UNIDROIT *Principles*. While some of these gaps will no doubt be filled by a third edition, this will not be for some years yet. Ways therefore had to be found in the meantime to fill these gaps in the OHADA draft.

New provisions have accordingly been drafted on the following: illegality (Article 3/1), nullity (Articles 3/12 to 3/14), privity of contracts (Articles 5/10 and 5/11), promise for another (Article 5/18), expiry of time of performance (Article 6/6), party to whom the obligation must be discharged (Article 6/8), performance to the detriment of a seizing creditor (Article 6/9), performance by a third party (Article 6/10), merger (Articles 9/2 to 9/3), conditional, joint and several and alternative obligations (Articles 10/1 to 10/21), protection of obligees and third parties (oblique action) [Articles 13/1 to 13/4], paulian action [Articles 13/5] and simulation [Articles 13/6 to 13/8]⁵².

53. In drafting these new texts, the rapporteur referred to other, recent codifications: first of all, to the *Principles of European Contract Law* (which have already filled some of the gaps), the new Dutch Civil Code (*Nieuwe Burgerlijke Wetboek*) and, last but not least, to the outstanding Civil Code of Quebec (*Code civil du Québec*) of 1991, whose clear and concise style of drafting is eminently suited to incorporation into the UNIDROIT *Principles*.⁵³ Other sources of inspiration were provided by some of the provisions of the general part of the Senegalese Code of civil and commercial obligations, as well as in the Malian general law of obligations.

made by one of the interviewees to satisfy everyone by including both notion of "*cause*" and consideration would appear to be wholly impracticable.

⁵² Two further gaps remain unfilled. First, the UNIDROIT *Principles* make no provision for tenders ("*offres réelles*"). The rapporteur takes the view that to make such provision would require a quite complex system with considerable administrative (creation of a deposit office) and procedural (intervention of a bailiff and a court) implications which it would be difficult to integrate into the present draft Uniform Act. The rapporteur is, however, at the disposal of OHADA with a view to submitting relevant texts. There are good recent models to draw upon, specifically in the new Dutch Code and in the Quebec Civil Code. The other gap concerns subrogation agreed by the debtor, which the rapporteur felt there was no point in including. On the one hand, such a mechanism is rarely applied. On the other hand, it is a mechanism which, in the shape provided for by the French Civil Code (Art. 1250, 3°), is highly formalistic and accordingly quite out of step with the spirit of the preliminary draft. If a relevant provision were nevertheless called for, the new Dutch Code offers a more flexible (perhaps too flexible) model (Art. 6. 150 d).

The rapporteur has attempted to incorporate these new provisions into the *Principles* in as rational a manner as possible.

54. Three apparent gaps remain, which the rapporteur did not feel needed to be filled, as has been amply demonstrated in comparative law. The preliminary draft does not deal with indivisible obligations, subrogated payment, and novation and delegation.

- The historical origin of the rules on *indivisible obligations* differs from that of joint and several obligations, but at this stage of their development, the two systems are highly similar. In French law, in particular, very few differences persist, and most of these rare divergences are fairly negligible.⁵⁴ The two sets of rules usually seem to overlap.

The new Dutch Civil Code (*N.B.W.*) was regarded as a good example to follow in that it would obviate the need for yet more rules. Article 10/8(2)(a) brings the matter of indivisible obligations into the orbit of joint and several obligations, subjecting them to the same rules; the only difference of note is dealt with in Article 10/12.

- The provisions on payment in the French Civil Code include rules on *conventional subrogation by the obligee* (Article 1249-1252). If a third party pays the obligor's debt, it can ask the obligee to subrogate it to its rights, thereby transferring the obligation in a manner very similar to that for assignment of rights. There are some slight differences owing to the fact that the two mechanisms evolved independently from each other but there is no overriding ground for any of these.⁵⁵ Here again, there is an overlap which cannot but make the rules more unwieldy. Factoring companies, in particular, find themselves having to choose between two similar, yet not identical, techniques. Their ultimate decision will often be dictated by the greater degree of rigidity of the assignment rules in the French Civil Code.

The texts incorporated into the UNIDROIT *Principles* and reproduced in the preliminary draft form a workable, up-to-date set of rules to govern assignment of rights (Articles 11/1 to 11/15) designed to meet practitioners' requirements. They obviate the need for corresponding rules on subrogated payment. German legislators had already reached the same result over a century ago: the *B.G.B.*, which includes an efficient system for assignment of rights, does not deal with subrogated payment as such. A third party wishing to take over the obligee's rights vis-à-vis the obligor by agreement can equally well do so by means of assignment.

None of this need prevent a legislator from dealing with legal subrogation in specific cases, such as insurance contracts (*cf.* Article 42 of the Insurance Code of the member States of the Inter-African Conference on Insurance Markets (CIMA). Indeed, the preliminary draft itself makes one such provision in Article 10/11(3), dealing with passive solidarity.

- The preliminary draft likewise does not deal with *novation* and *delegation*, as addressed in Articles 1271 to 1281 of the French Civil Code.

Novation is an outdated institution and very unwieldy (the old obligation is discharged, a new obligation must be "reconstructed" from scratch). It is now very little used in practice.

⁵³ An English-language version of this already exists, which should facilitate the translation of texts produced under the auspices of OHADA.

⁵⁴ Here, the secondary effects of solidarity spring to mind in that they are only in part echoed by the effects of *indivisible obligations*.

⁵⁵ Why should the right to set up assignments of claims against third parties be subject to requirements as to form (Art. 1690 of the French Civil Code), whereas subrogation by agreement is not?

Even in the absence of rules, however, novation by substitution of "*objet*" (subject matter of the obligation) is still possible by agreement (contractual freedom). As to novation by substitution of a new creditor or debtor, this is appropriately covered by the rules on assignment of rights and on transfer of obligations in the preliminary draft (Articles 11/16 to 11/23).

The new provisions on debt transfer also obviate the need for special rules for the old system of "delegation", with its two variants ("*novatory* delegation and "*imperfect*" delegation).⁵⁶

E. Co-ordination with other OHADA Uniform Acts

55. Good legislation takes care to ensure that its various component parts form a harmonious and well-co-ordinated whole. The concepts used must have common definitions, and specific rules must be devised bearing in mind the general principles from which they intend to deviate.

These are concerns that take on special importance now that OHADA is preparing to adopt a common contract law when several pre-existing Uniform Acts already deal with certain special contracts, and when several other projects, likewise dealing with contracts, are in the pipeline.

56. The adoption of a Uniform Act on contracts should therefore prompt us to re-examine some of the provisions of these pre-existing or future Uniform Acts.

That, at least, is the idea. During his preliminary talks, the rapporteur asked interviewees how they would resolve certain incompatibilities, especially as regards the provisions dealing with commercial sales. One solution would have been for the preliminary draft to align itself on these pre-existing uniform rules. This, however, would have two drawbacks. First of all, from a rational point of view, it would be disputable to attempt to bring the ordinary law into line with any such special regime, rather than the reverse. Second, the more the preliminary draft were to be adjusted, the more it would depart from the model represented by the UNIDROIT *Principles*, and the proposed Uniform Act would suffer accordingly and lose some of the benefits of adhering to a tried and tested system of harmonised law (*cf. supra*, n° 9 and 12).

That is why the overwhelming majority of interviewees suggested that it would be best to propose amendments to the pre-existing uniform texts wherever divergences appear that deviate from the new ordinary law rules in ways not justified by any special characteristics of the matter in hand.

The drafting of such amendments to other Uniform Acts exceeds the rapporteur's brief which was to prepare a preliminary draft Uniform Act on contracts. He nevertheless submits the results of some preliminary thinking on the matter. In his view, the following Acts and draft Acts are the most likely to raise problems.⁵⁷

1. Uniform Act relating to general commercial law

57. This very important Uniform Act deals with many matters which in no way impinge on the present preliminary draft, such as the status of traders or the trade and personal property credit

⁵⁶ Without the rigidity of delegation, Article 11/20, 1° allows a transaction similar to that of perfect delegation, while Article 11/20, 3° allows a transaction similar to imperfect delegation. Article 11/20, 2° proposes a third solution.

⁵⁷ No account has been taken of the new Uniform Act on the carriage of goods by road. It would on the other hand be advisable to give a careful reading to the Uniform Act on commercial companies and "economic interest groups"

register. However, it also addresses several kinds of commercial contract: commercial lease and business, commission, brokerage, agency and commercial sale.

Special rules for each of these contracts were crafted well before the preliminary draft Uniform Act on contracts came into being and obviously pay no heed to any future ordinary law on contracts in the OHADA countries. While it is proper for special contracts to have their own special rules, it is equally clear that any special system must dovetail with the general system from which it derogates. In light of the adoption of a Uniform Act on contracts in general, a review of some of the provisions of the Uniform Act relating to general commercial law is, accordingly, in order.

58. The main sticking-points concern *contracts of commercial sale* (Articles 202 to 288 of the Uniform Act relating to general commercial law).

These texts are based on the Vienna Convention on contracts for the international sale of goods, but have been altered in parts. The UNIDROIT *Principles* for their part, which served as a model for the preliminary draft on contracts, likewise take their cue from the Vienna Convention in many important areas, and also made alterations. Not surprisingly, given their very different background and drafting history, these respective changes do not match. The net result is that many aspects of commercial sale would be governed by rules that differ from those provided by the ordinary law of contracts, often for no good reason dictated by the special nature of the contract of sale. Such discrepancies should be ironed out.

59. The most glaring problems arise with some of the provisions relating to formation of contract (Articles 210 to 218).⁵⁸ Since these take their inspiration from the same source, they are close to the corresponding articles in the preliminary draft (Articles 2/1 to 2/11). None of the differences that do exist have any justification whatsoever. These provisions on contract formation express nothing specific to the contract of sale. As in the Vienna Convention (and even in the earlier 1964 Hague Convention), they were introduced as part of international uniform law with a view to palliating the lack of a general law on contract formation at the international level. This argument will no longer apply once the OHADA texts on commercial sales are accompanied by new common rules on formation of contracts in general, applicable to this particular type of contract (*cf.* Article 205 of the Uniform Act relating to general commercial law).

The rapporteur would therefore propose rescinding Articles 210 to 218 of the Uniform Act relating to general commercial law, there being no further use for them.

59. Article 208 relating to commercial sales endorses the principle of freedom in matters of proof. This provision has a direct bearing on the considerations set out above in respect of the problem of illiteracy and the degree of formalism required (*cf. supra*, n° 28-36).⁵⁹ It is not inconceivable that this lack of formalism may be retained, but care should be taken to ensure that it fits in with the choices made as to the ordinary law rules to be incorporated in the future Uniform Acts on contracts in general and on proof.

Another provision of the Uniform Act relating to general commercial law that stands in need of review is Article 209, which gives a rather archaic definition of the word “writing”, mentioning telex and telegram, with a daring reference to telefax. This wording will clearly have to give way to the far more modern definition contained in Article 1/10 of the preliminary draft.

⁵⁸ On these provisions, *cf.* in particular GOMEZ / NSIE / PEDRO SANTOS / J. YADO TOE, *supra* note 30.

⁵⁹ *Cf.* GOMEZ, *ibidem*, 156-157.

60. The rules on price fixing in matters of commercial sale provided by Article 235 differ from the far more flexible provisions of the Vienna Convention (Article 55). On the other hand, the preliminary draft on general contract law (Article 5/7) follows the example of the UNIDROIT Principles, which is closer to the Convention. Care should be taken to bring these respective texts into line. There is no reason for stricter price fixing requirements in matters of commercial sales than those that apply under the ordinary law rules.⁶⁰

61. Two further texts came in for particular scrutiny during the preliminary talks. Article 254 of the OHADA provisions on commercial sales allows the buyer to petition the competent court to terminate the contract under certain circumstances in which the seller is at fault; Article 259 gives the seller the equivalent right in case of the buyer's default.

Both these texts are likewise based on the Vienna Convention (Articles 49 and 64), but apparently re-introduce the notion of intervention by the courts to terminate contracts in the event of non-performance,⁶¹ an option not contemplated in the Vienna Convention.

The rapporteur discussed this issue generally, in the context of the preliminary draft (*cf. supra*, n° 41-43). The UNIDROIT *Principles* provide for termination for non-performance by simple notice, on certain conditions. In light of the considerations discussed above, and in keeping with the preference expressed by the majority of interviewees, the preliminary draft opts for a solution that by-passes the courts (Article 7/14). Articles 254 and 259 of the OHADA rules on commercial sales will have to be reviewed accordingly; if termination requires no intervention by the courts in ordinary law, there is no reason why it should do so in matters of commercial sale.

The same reasoning applies to the need for revision of Articles 245, 246 and 247 of the Uniform Act on general commercial law.

62. Several other provisions relating to commercial sales will also need to be reviewed. While generally close to the texts proposed in the preliminary draft, they are never quite identical, for no discernable reason. In particular, this applies to Articles 207 (usages; comp. preliminary draft, Article 1/8), 209 (definition of "writing"; comp. preliminary draft, Article 1/10), 222 (time of performance; comp. preliminary draft, Article 6/1), 274 to 282 (limitation periods; comp. preliminary draft, Articles 12/1 to 12/11)⁶² and, in general, to all the provisions on sanctions (comp. preliminary draft, Articles 7/1 to 7/31). All these provisions should be rescinded or amended, as appropriate.

63. The provisions of the Uniform Act relating to general commercial law dealing with *commercial lease* pose fewer problems from the point of view of harmonisation. On the whole, these would appear to be justified in view of the special nature of the subject matter. It would probably be wise, however, to bring Article 1/3 of the preliminary draft, which deals with form, into line with the future Uniform Act relating to proof. Special attention should be paid to Article 101, which provides for intervention by the courts in the event of non-payment of the rentals (comp. Article 7/4 and *cf. supra*, n° 41-43 and 61).

⁶⁰ The inflexibility of Article 235 of the Uniform Act relating to general commercial law is criticised by GOMEZ, *ibidem*, 159-162.

⁶¹ This was no doubt what the drafters intended. However, paragraph 2 of Article 254 is so formulated as to cast doubt on this: it refers to the "right (of the buyer) to *consider the contract terminated*"; *cf.* PEDRO SANTOS / YADO TOE, *supra* note 30, 425, as well as the Commentary A. PEDRO SANTOS in *OHADA, Traité et actes uniformes commentés et annotés* (Bruxelles), 2002, 224.

⁶² *Cf.* GOMEZ's critical comments as to the limitation period established by the Uniform Act on commercial sales, *supra* note 30, 174.

64. The Uniform Act relating to general commercial law also applies to contracts dealing with *commission, brokerage and agency*.

At first glance, none of the provisions relevant to such contracts (Articles 160 to 175, 176 to 183 and 184 to 201) call for any adjustment, dealing as they do with problems specific to these forms of commercial relationship.

Nevertheless, several of the provisions common to these three types of contract (Articles 137 to 159) deserve closer inspection. The text dealing with form of mandate (Article 144) will have to be brought into line with Article 1/3 of the preliminary draft and with the future Uniform Act relating to proof, while that of Article 145 on the application of usages must be harmonised with Article 7/14 of the preliminary draft.

The bulk of adjustments will, however, concern Articles 143 to 155 relating to the “*mandate*” of an intermediary and to the legal effects of such acts. These texts mix up “*mandate*” (relations between agent and principal) and “*agency*” (relations with third parties). All matters dealing with “*agency*” will need to be reviewed with Articles 2/23 to 2/32 of the preliminary draft in mind.

2. Uniform Act organizing securities

65. A first scrutiny of this Uniform Act shows that the following provisions deserve special attention:

- Art. 4 : form of contract, illiterate contract parties. Here again, co-ordination with Article 1/3 of the preliminary draft and the future Uniform Act on proof is of the essence, on the understanding that the commitments entered into by a guarantor are of sufficient weight to justify the setting in place of a system of special protection.
- Arts. 13 and 14 : expiry of period for performance. This should be brought into line with Article 6/6 of the preliminary draft. As to terminology, the preliminary draft uses the expression “*time of performance*”.
- Art. 15 : joint and several obligations. Here, there would appear to be no issue of compatibility with Articles 10/7 to 10/11 of the preliminary draft.
- Art. 16 : subrogation. This text introduces a cause for legal subrogation that is perfectly compatible with the preliminary draft (*cf. supra*, n° 54).
- Art. 25 : novation pursuant to a change of object or cause. Neither of these two concepts features in the preliminary draft (*cf. supra*, nos. 44-50 and 54). Paragraph 3 of Article 25 should be redrafted.
- Art. 26 : none of the references in this text to set-off, release of debt and merger pose any problems in terms of Articles 8/1 to 8/5, 5/9 and 9/1 to 9/3 of the preliminary draft.

3. Uniform Act organizing simplified recovery procedures and measures of execution

66. Here, it is important to ensure proper co-ordination with the preliminary draft of Articles 37 (suspension of limitation period; comp. preliminary draft, Art. 12/5) and 39 (partial performance; comp. preliminary draft, Art. 6/3).

Article 6/9 of the preliminary draft (performance to the detriment of a seizing creditor) would appear to sit comfortably with this Uniform Act.

4. Uniform Act organizing collective proceedings for wiping off debts

67. Part of the text relating to contract law may have to be revised. This might be the case, for example, of Article 106 (which refers to termination of the sale), and of the treatment of set-off in Article 68, with regard to 8/1 to 8/5 of the preliminary draft.

5. Draft Uniform Act relating to proof

68. See *supra* (Nos. 28-36) as to the advisability of formalism in the contract law in view, in particular, of the high illiteracy rate. The preliminary draft on contracts does refer to the provisions applicable to proof (Article 1/3, 2°), but care should be taken to ensure that this Act fits in with the uniform contract law.

It was noted elsewhere that some of the existing Uniform Acts already contain provisions on the form of certain contracts (*cf. supra*, n° 59, 63, 64 and 65 ; *cf. also infra*, n° 70). Clearly, all these texts will have to be screened to ensure their compatibility with the future ordinary law rules embodied in the Uniform Acts on proof and on contracts in general.

The future Uniform Act on proof will no doubt take account of new means of communication and new ways of concluding contracts, such as electronic commerce. In preparing the UNIDROIT *Principles* 2004, on which much of the preliminary draft is based, the drafters were at pains to ensure that its provisions were compatible with these new techniques.⁶³ Particular attention will have to be paid, for example, to the definition of the term "writing" (*cf. Art. 1/10 of the preliminary draft, mentioned supra*, n° 59).

6. Draft Uniform Act relating to consumer contracts

69. Attention has been drawn (*cf. supra*, n° 27) to the disturbing prospect of the OHADA countries finding themselves with three separate contract laws if the Uniform Act on contracts were to be restricted in scope to commercial contracts alone and if the current system for non-commercial contracts were to be maintained, and if a free-standing system were to be adopted for consumer contracts in the relevant Uniform Act.

As to the latter point, however, this scenario seems unlikely. The draft Uniform Act on consumer contracts is not intended as a fully autonomous system for such contracts. What it does is formulate rules that will afford greater protection for certain aspects of contractual relationships than is the case at present; in addition, the draft also deals with matters not directly related to contract law such as advertising, lotteries and consumer associations.

70. The derogations that are being proposed to the ordinary law do, however, require some scrutiny. These texts were drafted at a time when plans for a Uniform Law on contracts modelled on the UNIDROIT *Principles* were still in the future. Some lack of coordination is therefore not to be wondered at. There is a certain amount of overlap, divergences arise for which there is no need and in general, a certain lack of synchronisation exists. In some instances, the preliminary draft on consumer contracts offers even less protection to the weaker party than the ordinary rules proposed by the preliminary draft on contracts in general!

The OHADA Permanent Secretariat suggested that the rapporteur's comments should be available in good time, that is to say, while the preliminary draft on consumer contracts was still on the drawing-board. The rapporteur in fact submitted a memorandum to the Permanent Secretariat on 28 June 2004.

⁶³ *Cf. M.J. BONELL, supra* note 3, 19.

The following articles of the preliminary draft on consumer contracts should be reviewed bearing in mind the preliminary draft on contract law: Articles 8, 17 and 23 (general contract terms; comp. preliminary draft, Articles 2/19 to 2/22), Art. 11 (exemplary damages; comp. preliminary draft, Article 7/11), Article 15 (good faith; comp. preliminary draft, Article 1/6), Article 21 (no formalism; comp. preliminary draft, Article 1/3), Article 24 (mistake and fraud; comp. preliminary draft, Articles 3/4 to 3/8), Articles 25 and 51 (fraud and abuse of a weaker party; comp. preliminary draft, Article 3/10), Articles 53 to 58 (unfair terms; comp. preliminary draft, Articles 7/6 and 7/31), Article 126 (types of evidence; comp. preliminary draft, Article 1/3), Articles 127 to 131 (limitation periods; comp. preliminary draft, Articles 12/1 to 12/11), Article 132 (calculation of periods; comp. preliminary draft, Article 1/11). As to Articles 21 and 126, these will also have to be coordinated with the future project on proof.

VI. INCORPORATION OF THE UNIFORM ACT ON CONTRACTS INTO NATIONAL LAW

71. The future Uniform Act will provide the States Party to OHADA with a new law on contractual obligations, encompassing certain aspects which come within the general theory of obligations (for example, transfer of obligations and extinctive prescription – *cf. supra*, n° 51).

How the Act is incorporated into national law will depend on whether the new provisions are to be applicable in general (which would be preferable in the rapporteur's view) or confined to commercial contracts alone (*cf. supra*, n° 21-27).

72. If the new Act is to be an ordinary law on contracts in general, i.e. covering both commercial and non-commercial contracts, its provisions will supersede the systems currently in place for the subject-matter in hand.

It should be borne in mind that the reform will apply only to the subjects addressed by the Uniform Act, i.e., the law on contractual obligations and some matters falling within the general theory of obligations. National provisions will continue to apply in respect of all other matters, in particular tort liability, quasi-contracts, special contracts (always allowing for the fact that some of these are already governed by other Uniform Acts) and the general parts of the law of obligations not dealt with in the Uniform Act under consideration (for example, matters relating to proof, which are intended to be governed by their own Uniform Act – *cf. supra*, n° 36).

73. If the new Act is to apply only to commercial contracts, the current laws (or non-codified rules) will remain intact, but their scope of application will be reduced to exclude commercial contracts. These will henceforth be governed by the provisions of the Uniform Act.

APPENDIX

QUESTIONNAIRE

submitted during the preliminary consultations

1. OHADA harmonises business law. The planned Uniform Act should therefore only refer to commercial contracts, like the UNIDROIT *Principles*. Accordingly, other, non-commercial contracts would be governed by domestic law. Would such a dual system be acceptable, or would it be better to extend the scope of the new Uniform Act to all contracts, i.e., both commercial and non-commercial contracts?
2. The second edition of the *Principles* on international commercial contracts, which will be published by UNIDROIT in 2004, will include new chapters on certain matters that fall within the orbit of the law of obligations in general rather than within that of contract law in particular: transfer of obligations, set-off, limitation periods. Should these also be incorporated into the draft Uniform Act on contracts?
3. How should OHADA's provisions on commercial sales, which incorporate a number of general principles of contract law (e.g. as regards formation) be reconciled with the new Uniform Act on contract law?
4. Although designed for commercial contracts, the UNIDROIT *Principles* nevertheless contain provisions dealing with abuse by the stronger party, such as "gross disparity" (Art. 3.10), exemption clauses (Art. 7.1.6) and liquidated damages ("agreed payment for non-performance" (Art. 7.4.13)). Should such provisions also feature in the OHADA draft?
5. The UNIDROIT *Principles* eschew all formalism, both substantive and evidentiary (Art. 1.2). Should the OHADA draft retain this option, in view of the problem of illiteracy and, more generally, the lack of "legal culture"?
6. The UNIDROIT *Principles* set great store by good faith (Art. 1.7) and some of its consequences: the duty to collaborate (Art. 5.3), mitigation of harm (Art. 7.4.8), penalties for negotiating in bad faith (Art. 2.15). Should this approach, so typical of recent trends in international commercial law, be retained in the OHADA draft?
7. The UNIDROIT *Principles* do not refer to the civil law concept of "*cause*" nor indeed to the common law concept of "*consideration*". Can the OHADA draft also dispense with them? Many legal systems manage perfectly well without them.
8. The UNIDROIT *Principles* contemplate the possibility of renegotiating a contract in the event of a change in circumstances ("*hardship*" – Arts. 6.2.1 to 6.2.3). However, some legal systems based on French law reject the concept of "*imprévision*". Is the approach adopted by the Principles acceptable in the framework of a harmonised OHADA business law?
9. The UNIDROIT *Principles* provide for a wide range of remedies for non-performance: withholding performance (Art. 7.1.3), cure by the non-performing party (Art. 7.1.4), right to performance (Arts. 7.2.1 to 7.2.5), termination (Arts. 7.3.1 to 7.4.13). These articles were to some extent inspired by the Vienna Convention. To what extent would they need to be adapted

to fit into the OHADA framework? Bearing in mind, in particular, that termination for non-performance is not ordered by the courts (Art. 7. 3. 1); the court only intervenes *a posteriori*.

10. The UNIDROIT *Principles* are the fruit of a consensus reached within a group of legal experts from different parts of the world. They were swiftly given a warm welcome by legislators and a great many arbitral tribunals. Literature and case law already abound. If the OHADA countries wish to make the most of this achievement, the Uniform Act on contract law should stick to these Principles as closely as possible, except where African reality absolutely requires otherwise. Do you agree with this approach in principle?

11. Any other comment with respect to the UNIDROIT *Principles* will of course be most welcome, where it refers to areas requiring adjustment in the framework of harmonisation within OHADA.