The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer

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PRELUDE

Most West Africans would be united in the view that it would be good if the legal systems across West Africa were harmonized to facilitate commercial and economic transactions across national boundaries within the sub-region. To achieve this, there needs to be a movement in the legal community in the sub-region in favour of convergence. This convergence movement needs to be fuelled by a greater comparatist interest by the legal profession in the sub-region in the different legal systems in the sub-region; by more comparative law training in the legal education institutions of the sub-region; and finally by visionary law-making that anticipates the course of the convergence movement. Legislation in a particular jurisdiction which does not reflect the legal tradition and techniques of that jurisdiction alone but which reaches out towards the other jurisdictions in the sub-region would be forward-looking and more opportunity should be created for such activity. It is in the light of the last consideration that I think that the OHADA Preliminary Draft Uniform Act on Contract is a very promising venture. I had earlier made known my views on the draft from the point of view of a common law lawyer from the sub-region.[1] I think that those views will bear repeating and therefore I am going to re-present them at this colloquium.

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1 See 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", *Unif. L. Rev. / Rev. dr. unif.* (2004), 269.

I. – INTRODUCTION

An opportunity has arisen for the symbiotic advancement of the influence of the *UNIDROIT Principles of International Commercial Contracts* and progress in the harmonisation of aspects of the commercial law of West and Central African States. The UNIDROIT Principles, first published in 1994, have served varied useful roles since their publication, one of which has been adoption as a model for national reforming legislation.[2]

I was privileged to serve on the Working Group that elaborated these Principles and therefore am able to testify to the valiant effort made by all members of the Working Group, while bringing to the table their experience from their respective national legal systems, nevertheless to stand back from the particular prescriptions of their national legal systems on particular legal issues and rather propose solutions that were the most appropriate from a general contract law perspective, in the context of international commerce. The Working Group's product thus turned out to be a kind of contemporary international restatement of contract law principles in the context of international commercial intercourse, which was not in thrall to any particular legal tradition or family of legal systems. What was sought was not a common law or a civil law approach to the solution of contract law issues, but rather what worked. My own contribution was to apply the perspective of a common law lawyer from a developing country, more particularly from West Africa, to the broad enterprise outlined above. An imperative of that enterprise, of course, was its comparative internationalism. My international credentials were gained by serving as one of the representatives of Ghana to the United Nations Commission on International Trade Law in the 1970s, culminating in my serving as the alternate representative of Ghana to the Plenipotentiary Conference on Contracts for the International Sale of Goods in 1980 which adopted the *United Nations Convention on Contracts for the International Sale of Goods*.

Such was the success of the 1994 UNIDROIT Principles upon their promulgation, as measured by the widespread respect for them and resort to them by practising lawyers, arbitrators and judges,[3] their use as a pedagogical tool in

2 See 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", *Unif. L. Rev./ Rev. dr. unif.* (2004), 5 (7-8).

3 See *ibid.*, 36, where the author states (writing in 2004), that some 87 reported arbitral awards or court decisions have referred to the UNIDROIT Principles worldwide. According to Unilex (a case law database and bibliography relating to the UNIDROIT Principles), this figure now stands at 163 (<www.unilex.info>, accessed January 2008).

universities, their influence on national reform legislation, etc., that the UNIDROIT Governing Council decided in 1997 to establish a new Working Group to prepare an enlarged edition of the Principles. I was again privileged to be invited to serve on this Working Group. The new Working Group completed its task in 2004, resulting in UNIDROIT publishing in that same year an enlarged edition of its Principles. There is currently in session a further Working Group established in 2006 by the UNIDROIT Governing Council to elaborate further particular aspects of the UNIDROIT Principles to be embodied in another enlarged edition.

Given my membership of the working groups that fashioned these UNIDROIT Principles, it is particularly pleasing for me that the Principles are now to be put to use in my own sub-region. The *Organisation for the Harmonisation of Business Law in Africa* (OHADA by its French acronym) has requested the preparation of a draft Uniform Act on contracts on the basis of the UNIDROIT Principles and a highly respected member of both UNIDROIT Working Groups on the Principles, Professor Marcel FONTAINE, has undertaken the task of preparing such a draft.[4]

OHADA is a very interesting and ambitious organisation whose work is not sufficiently known to the Anglophones in its geographical area. Some effort is now being made to bridge this knowledge gap. For instance, a seminar was held in Accra (Ghana) on 4 November 2003, at the initiative of the Franco-Ghanaian Chamber of Commerce, to familiarise Ghanaian lawyers with OHADA's uniform law initiatives. At that seminar, a new book on "Business Law in Africa: OHADA and the harmonization process" was launched. An OHADA Resources Centre was also inaugurated in Accra. Similarly, on 30 April 2004, an OHADA Conference was organised in Lagos (Nigeria), by the Law Office of Professor Ademola Yakubu & Co, a firm of solicitors and consultants. Nevertheless, much remains to be done to enable Anglophone West Africa to participate in the harmonisation projects initiated by OHADA.

A predictable impediment to progress in bringing Anglophone West Africa into OHADA's projects is the perceived civilian nature of its legal thought. The common law traditions of Anglophone West Africa will need to be addressed before there can be any significant progress in bringing the Anglophones into the harmonisation movement. It is thus helpful that OHADA has chosen the UNIDROIT Principles as the basis for the elaboration of a Uniform Act on contracts. As already indicated above, the UNIDROIT

4 *Cf.* M. FONTAINE, "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts", *Unif. L. Rev. / Rev. dr. unif.* (2004), 573.

Principles are neither common law nor civilian but a genuine international synthesis of the contract law principles of the major legal systems in the world. The adoption of a Uniform Act based on them should facilitate its acceptance by the Anglophone common law countries as well.

II. – THE COMMON LAW JURISDICTIONS IN WEST AFRICA AND OHADA

From what has been indicated above, it is clear that relations between OHADA and the common law jurisdictions in West Africa may be at a critical stage. Can these Anglophone countries be persuaded to join in the harmonisation movement in the business law area initiated by OHADA? Only time will tell, but the prospects of this happening will be improved by the nature of the content of its new uniform laws. If these laws are perceived in Anglophone West Africa as devised for civilian lawyers, it will be impossible to persuade the legal profession in these countries to empathise with a harmonisation movement under the auspices of OHADA.

This is why the project which has been embarked upon by Professor Fontaine may hold a strategic significance for the process of harmonising business law in West and Central Africa. That process is of considerable importance for the sub-region in view of the economic integration objectives that have been espoused by the political directorates in the sub-region. The lessons of regional integrationist movements elsewhere, for instance in the European Union, teach that harmonisation of business laws among the member states of the region is an important component of successful integration. In West and Central Africa, the question is whether such integration can take place under the auspices of OHADA or, rather, under an organ of the Economic Community of West African States (ECOWAS) or some of the other African regional groupings in the other sub-regions of Africa. There is an advantage in adopting an already existing organisation to spearhead the harmonisation movement sub-region wide, but this can only be done if the existing organisation is not perceived to be irremediably in one camp within the sub-region.

The existing membership of OHADA consists of 16 States. These States are mostly Francophone, but Guinea-Bissau is Portuguese-speaking, while Equatorial Guinea is Spanish-speaking. There is one bilingual member State, Cameroon, which is both Anglophone and Francophone. The Francophone member States are: Benin, Burkina Faso, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Mali, Niger, Senegal and Togo. Thus, though these are predominantly West African States, there are

some Central African States and even an Indian Ocean island State. Despite the presence of the Anglophone western part of Cameroon in this grouping, it has a distinctly civilian feel to it. It is thus likely that before the Anglophones can come into their fold, their existing Uniform Acts may need some readjustment to reflect the legal tradition of the joining group. Successful work on these lines would open the door to wider cooperation with OHADA, say from the common law jurisdictions of East Africa and the Roman-Dutch jurisdictions of Southern Africa.

III. – TOWARDS THE HARMONISATION OF THE PRINCIPLES OF COMMERCIAL CONTRACTS IN WEST AFRICA, AND ULTIMATELY IN AFRICA

The project being implemented by Professor Fontaine bodes well for the harmonisation of the principles of commercial contracts in West and Central Africa, in particular, and indeed in Africa in general. Its successful implementation could well have strategic significance for the harmonisation of commercial laws in Africa. Since the project is founded on a restatement of the law on a global basis, it has the potential for bringing about the harmonisation of the principles of commercial contracts not only in the immediate sub-region of OHADA, *i.e.* Western and Central Africa, in the first instance, but also, ultimately, possibly on a continent-wide basis. What has to be added in are the specific requirements of the African region.

Professor Fontaine, in his own contribution to this colloquium, has already presented an overview of the UNIDROIT Principles. What I would like to highlight in relation to them here is the following advantage: by adopting and adapting these Principles, OHADA will give itself the ability to tap the growing worldwide case-law and literature on these Principles. Access to this comparative material will be valuable in the implementation of the Uniform Act on contracts when adopted. Reciprocally, experience from the OHADA member States can in the future be fed into the worldwide network of users of the Principles, thus enriching the knowledge of such users and expanding the range of tried solutions to commercial contract law issues arising under the Principles.

L'AVANT-PROJET D'ACTE UNIFORME OHADA SUR LE DROIT DES CONTRATS : LE POINT DE VUE D'UN JURISTE DE COMMON LAW *(Résumé)*

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Les Principes d'UNIDROIT offrent des solutions harmonisées, libérées des concepts particuliers aux systèmes nationaux, et considérées comme particulièrement aptes aux besoins du commerce international.

L'un des nombreux témoignages du succès des Principes est la requête adressée par l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) à UNIDROIT de préparer un avant-projet d'Acte uniforme sur les contrats, qui sera destiné à s'appliquer au sein des pays membres de cette organisation qui regroupe essentiellement des Etats francophones – mais aussi un Etat en partie anglophone, un Etat lusophone et un Etat hispanophone.

Si le Nigeria et le Ghana ont marqué un certain intérêt pour l'œuvre d'harmonisation de l'OHADA, beaucoup reste à faire dans les pays anglophones voisins pour que ceux-ci y participent pleinement, compte tenu de l'objection prévisible des divergences entre les traditions juridiques. A cet égard, les Principes d'UNIDROIT qui ne relèvent ni de la common law *ni de la civil law mais constituent une authentique synthèse des principes du droit des contrats des principaux systèmes juridiques dans le monde, sont un modèle particulièrement utile.*

Comme les exemples dans le monde le montrent – ainsi l'Union européenne – l'harmonisation du droit des affaires revêt une importance considérable pour le succès de l'intégration économique régionale. Alors que les Etats d'Afrique occidentale et d'Afrique centrale sont engagés dans de tels processus, l'harmonisation entreprise dans le domaine des contrats au sein de l'OHADA pourrait bien s'avérer stratégique pour l'ensemble de la sous-région – quitte à déterminer l'enceinte régionale la plus appropriée à cet effet. Le mouvement de convergence devrait être fortement soutenu par l'intérêt des professions juridiques, mais aussi par une volonté des décideurs de créer un système qui ne serait pas le reflet du seul droit national mais irait à la rencontre des traditions juridiques présentes dans la sous-région.

Enfin, et parce que le modèle offre des solutions harmonisées au niveau global, son rayonnement pourrait aller bien au-delà de la sous-région, pour intéresser – sous réserve des aménagements qui seraient nécessaires – l'Afrique toute entière.