

UNIFORM LAW REVIEW

REVUE DE DROIT UNIFORME

a publication of / *une publication de* UNIDROIT

International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

www.unidroit.org

NS - Vol. IX

2004-3

**The Draft OHADA Uniform Act
on Contracts and the UNIDROIT Principles
of International Commercial Contracts**

Marcel Fontaine

The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts

Marcel Fontaine *

INTRODUCTION

A highly ambitious harmonisation project is currently in progress in the field of contract law. The sixteen (soon to become 17¹) African member countries of the *Organisation for the Harmonisation of Business Law in Africa* (known by its French acronym, OHADA) will shortly be asked to adopt a Uniform Act on Contracts based on the Principles of International Commercial Contracts elaborated by UNIDROIT.

Following a short overview outlining what is OHADA, how it operates and what it has achieved so far (Section I), Section II will sketch the background of the current project, Section III will explain the nature and significance of the UNIDROIT *Principles* in general, while Section IV will take a closer look at how these Principles may be used as a model for the harmonisation of contract law. Section V will then go on to describe the methods and principles adopted in drafting the project and finally, Section VI will touch upon some of the main issues that will need to be resolved.

I. – OHADA

OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) was instituted by Treaty of 17 October 1993, and its current membership consists of Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Congo (Brazzaville), Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo and the Union of the Comoros. The Democratic Republic of Congo (Kinshasa) has announced its intention of joining the Organisation in 2004.

Four major institutions have been set in place. The *Council of Ministers*, the Organisation's executive and legislative body, is made up of the member countries' Finance and Justice Ministers and is responsible for adopting the Uniform Acts. The *Permanent Secretariat* is

* 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*. The above is a translation of the French version of the article, "Le projet d'Acte uniforme OHADA sur les contrats et les Principes d'UNIDROIT relatifs aux contrats du commerce international", reproduced in *Unif. L. Rev. / Rev. dr. unif.*, 2004, 253.

¹ Following the accession of the Democratic Republic of Congo, scheduled for 2004.

the administrative body that implements the texts adopted. The *Joint Court of Justice and Arbitration*, as the Supreme Court, interprets and applies uniform OHADA law and administers the arbitral procedures that come within its ambit. In addition, OHADA has set up a regional magistrates' school (*Ecole Régionale Supérieure de la Magistrature*).

Article 2 of the Treaty contains a list of subjects for harmonisation, leaving it up to the Council of Ministers to add to these where appropriate. Drafting of the texts is entrusted to experts reporting to the Permanent Secretariat. The texts thus proposed are submitted to member States' Governments. National committees have been set up in all these countries to vet each project. Member States relay their comments to the Permanent Secretariat, upon which the national committees seek a consensus at a plenary session. The member States are then once more invited to comment on the outcome. The draft, together with these comments, is then submitted to the Court of Justice and Arbitration for an opinion and to see whether it squares with the Treaty. It is then adopted by the Council of Ministers and the new Uniform Act enters into force in accordance with the provisions of Article 9 of the Treaty; it is immediately applicable in and binding on all member States.

The harmonisation process is now well in hand. Uniform Acts have already been adopted relating to arbitration, general commercial law, commercial companies and economic interest groups, accounting law, securities, simplified recovery procedures and measures of execution, collective proceedings for wiping off debts, and road transport.²

II. – THE DRAFT UNIFORM ACT ON CONTRACTS

The harmonisation process is proceeding in accordance with a blueprint agreed by the Council of Ministers. At its meeting in Bangui in March 2001, the Council decided that the Programme for the harmonisation of business law would also include “ (...) *competition law, banking law, intellectual property law, non-trading company law, co-operative company law and mutual insurance company law, contract law, the law of evidence.*”

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

Uniform Law Review readers will require no introduction to UNIDROIT. Its more recent achievements include the widely acclaimed *Principles of International Commercial Contracts*. Small wonder, then, that OHADA decided to turn to UNIDROIT with a view to securing its assistance in preparing a draft Uniform Act on contract law.

UNIDROIT acceded to the OHADA Council of Ministers' request and proposed that the author of this article be entrusted with the preparation of a preliminary draft. The Swiss Government (Development and Co-operation Office) agreed to take on financial sponsorship of the project.

² See, for further information on OHADA and its harmonisation work, J. ISSA-SAYEGH et J. LOHOUES-OBLE, *OHADA – Harmonisation du droit des affaires*, Bruxelles (2002); B. MARTOR / N. PILKINGTON / D. SELLERS / S. THOUVENOT, *Le droit uniforme africain des affaires issu de l'OHADA*, Paris (2004). Also <<http://www.OHADA.com>>, the OHADA website offering all the adopted texts, an extensive bibliography and case law relating to the Uniform Acts.

III. – THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Choosing the UNIDROIT *Principles of International Commercial Contracts* as the model for the future OHADA Uniform Act on Contracts was no doubt a judicious move.

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

The UNIDROIT *Principles*, it will be recalled, were first published in 1994, 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 a Ghanaian³ and an Egyptian expert. The UNIDROIT *Principles* are, in effect, a codification of texts covering the main areas of contract law (formation, validity, interpretation, performance and non-performance) accompanied by detailed comments and illustrations. The second edition, published in 2004, includes further provisions dealing in particular with agency, assignment of rights, obligations and contracts, set-off and limitation periods.⁴

The UNIDROIT *Principles* propose a contract law tailored to the needs of the contemporary international commercial community. They draw inspiration from a wide variety of sources: national law – especially recently reformed national law –, national and arbitral case law, comparative law, and some of the more important 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 innovate as and where needed. Finally, it should 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),⁵ which form the bedrock for the law of contractual obligations section to be included in the future European Civil Code.⁶

The UNIDROIT *Principles* are not, of course, a binding instrument. They are intended as a model for legislators, contract parties, judges and arbitrators.

B. Wide recognition of the *Principles*

The UNIDROIT *Principles* proved a success right from the start. Today, just ten years after they were first published, 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 UNIDROIT *Principles* as the law applicable to their contract. As to the latter, some recent model laws prepared by other international organisations

³ S.K. DATE-BAH, Judge at the Supreme Court of Ghana; cf. his contribution on "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", *Unif. L. Rev. / Rev. dr. unif.*, 269.

⁴ UNIDROIT Principles of International Commercial Contracts 2004 (Rome) / *Principes d'UNIDROIT relatifs aux contrats du commerce international 2004 (Rome)*. For the text of the new edition, without the comments, in English and French, see *Unif. L. Rev. / Rev. dr. unif.*, 2004, 124-189; cf. also the UNIDROIT website: <<http://www.unidroit.org>>.

⁵ *Principles of European Contract Law*, Parts I and II, O. LANDO / H. BEALE (eds.), The Hague (2000), Part III, O. LANDO / E. CLIVE / A. PRÜM / 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*, French version prepared by G. Rouhette, Société de Législation Comparée, Paris (2003).

⁶ Cf. Chr. VON BAR, "Le groupe d'études sur un code civil européen", *Revue internationale de droit comparé* (2001), 127-139.

recommend that the UNIDROIT *Principles* be referred to in the applicable law clause,⁷ or that they be taken into account in applying and interpreting the rules in respect of the parties' rights and obligations.⁸

The UNIDROIT *Principles* are frequently referred to in the national, but above all, arbitral case law. Some one hundred such cases have been reported to date,⁹ and their number is increasing.

A great many symposia and seminars have discussed the UNIDROIT *Principles*, either from an academic or a 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 their provisions, their links with national law or other international instruments, and their practical application by economic operators and the courts.¹⁰

Last but not least, 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.¹¹

IV. – THE UNIDROIT PRINCIPLES AS A MODEL FOR THE OHADA DRAFT UNIFORM ACT

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 contracts.

In this way, the Organisation's own harmonised contract law will reflect the solutions offered by a modern instrument using innovative legal techniques developed by legal scholars from the 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 universally oriented type of law (rather than one linked to a single legal tradition) is also an important asset in the framework of globalisation, an important point at a time when OHADA may be about to open up to other countries in the region. And finally, the existence of a modern contract law incorporating rules recognised and appreciated world-wide is apt to reassure and attract potential investors.

V. – METHOD OF DRAFTING THE UNIFORM ACT AND GUIDING PRINCIPLES

A. Drafting method

It was deemed opportune for the rapporteur to undertake an extensive round of consultations before embarking on the actual drafting of the future Act. While the UNIDROIT *Principles* were to

⁷ Cf. A. MOURRE / E. JOLIVET, "La réception des Principes d'UNIDROIT dans les contrats modèles de la Chambre de Commerce Internationale", *Unif. L. Rev. / Rev. dr. unif.*, 2004, 275.

⁸ Cf. J.-P. VULLIETY, "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", *Unif. L. Rev. / Rev. dr. unif.*, 2004, 295.

⁹ Cf. the decisions published on Internet site <www.unilex.info>.

¹⁰ See, in particular, the bibliographies regularly published in this *Review*.

¹¹ As to these different aspects of the recognition achieved by the UNIDROIT *Principles*, cf. M.J. BONELL, *An International Restatement of Contract Law*, New York, 2nd ed. (1997), 229-254.

serve as the model, it was nevertheless understood that account would have to be taken of certain uniquely African features.

With this in mind, the rapporteur completed three missions to a sample of nine OHADA member States selected by the Permanent Secretariat. A “facilitator” was appointed by the Justice Minister in each country to organise a large number 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 were held with over one hundred people enabling the rapporteur to collect facts, gauge reactions and gather suggestions on the current state of contract law in the different 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.

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

B. Guiding principles

Two basic principles will inform the draft:

(1) Staying close to the model

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 represent a high-quality codification of international renown. The UNIDROIT *Principles* have already given rise to a sizeable body of legal writings and been widely applied by the courts and tribunals. All this literature (as well as the “comments” that accompany the black letter rules in all official versions) and the case law will be immediately available to the OHADA member countries once their new contract law based on these *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 a much larger family engaged upon legal harmonisation world-wide.

A not unimportant point, moreover, as far as the OHADA countries are concerned, is that the *Principles*, which were drafted in English and French, are also immediately available in other language versions, including Spanish and Portuguese.

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

(2) Taking account of uniquely African features

That general principle will, however, be appropriately adjusted by the second guiding principle adopted: the draft must make allowance for uniquely African features, especially those peculiar to the OHADA member States.

But what are these “uniquely African features”? This needs clarifying, since the concept may have different meanings depending on the perspective.

(a) Does “uniquely African features” allude to the traditional law of the African countries in question, as it existed prior to colonisation and as it is still applied to this day in several areas?

Whereas traditional law is still in evidence in areas such as family law, it is quite difficult to identify its content in general contract law. While there still exist native rules that govern local contractual relationships, these are certainly not widely known. Studies dealing with traditional African law reveal, moreover, that while such law does propose original contracts in specific areas, it does not appear to have developed any general theory of contract law.¹²

(b) The words “uniquely African features” may also refer to the current legal tradition in the various countries concerned.

The legal systems bestowed by the colonial powers were set in place over a century ago and survived largely unchanged following independence. Contemporary legal scholars in the OHADA countries reason in much the same way as French, Spanish, Portuguese or English lawyers do. It is certainly not inaccurate to say that the “specificity”, or unique features, of the law of countries such as Senegal, Togo or Gabon subscribe to the French legal tradition, or that those of Guinea-Bissau reflect Portuguese legal thinking, and so on.

However, these “unique features” provide no common denominator for the harmonisation that the OHADA countries have in mind. They are little more than a set of different “legal traditions” existing side by side. The legal system in the English-speaking part of Cameroon even belongs to another “legal family”, the common law family.

If we accept that fact, it is clear that there is no common “specificity” that the draft can take into account.

(c) In fact, “uniquely African features” should be understood as meaning a range of *de facto* circumstances and sociological realities prevailing in the different countries and which may affect the choice of “most appropriate legal rules”.

In this regard, two points were repeatedly stressed during the preparatory missions undertaken by the rapporteur. Both strike at the heart of the matter.

– The first point was *wide-spread illiteracy*. While the level of illiteracy may vary according to the country, it is always considerable.

Clearly, then, no legal rule intended to regulate the formation of contract, the modalities of evidence, the implementation of all manner of formalities can fail to make allowance for the fact that a large number of those it addresses are illiterate. We shall return to this point later.

– In most countries, attention was also drawn to the generally poor level of “*legal culture*”. Often, people are unaware of the existence of legal rules or at any rate have only a hazy idea of what they are. When a problem or a dispute arises, most people will eschew the law and the courts and will seek instead other means of redress or resign themselves to their fate. The incompetence, to a greater or lesser degree, of many magistrates is another facet of this phenomenon.

Poor legal culture is, in fact, and 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?

The solution, it would seem, lies not in the provision of a simplified version of contract law relying on a very few, but readily understandable, legal rules. The OHADA member States need a proper legal (infra)structure capable of attracting investors and enabling them to hold their own in international trade.

¹² Cf. S.K. DATE-BAH, “Communication sur le droit des obligations civiles”, *Revue sénégalaise de droit* (1977), 80.

Moreover, the problem is not confined to the specific area of contract law alone. It arises generally, and indeed applies to the Uniform Acts already in existence, the practical implementation of which is not seldom quite problematic.

The remedy, then, would appear to consist in pursuing and indeed, stepping up the initiatives already taken to inform and train. A case in point, and a good example, is the *Ecole Régionale Supérieure de la Magistrature* set up by OHADA. Only in this way, gradually, and by dint of considerable effort, can the problems related to poor legal culture and incompetence even begin to be solved.

What is certain is that a major information campaign will need to be launched after the Uniform Act on contracts is adopted. This work will undoubtedly be facilitated by the plentiful commentaries to which the chosen model, the UNIDROIT *Principles*, have already given rise.

VI. – SOME IMPORTANT QUESTIONS

In drafting the future Act, a number of important questions arise. Four of these stand out in particular. Will the future Uniform Act establish a special law for commercial contracts, or a “common” law applicable to all contracts, both commercial and otherwise? Given the high illiteracy rate, should the contract law be formalistic in approach or not? Are not some of the innovations introduced by the Uniform Act and inspired by the UNIDROIT *Principles* likely to create problems in adjusting to them? And how should the draft deal with matters not covered by the UNIDROIT *Principles*?

We shall now take a closer look at these issues without, however, venturing any predictions as to the solutions that will be adopted in the end.

A. A special law for commercial contracts or a “common” law for all contracts ?

Should the Uniform Act on contract law apply only to commercial contracts or should it be extended to apply to contracts in general and therefore include private, non-commercial contracts (“*contrats civils*”) as well?

The first reply that springs to mind is that the future Act should govern commercial contracts only. After all, OHADA’s avowed aim is to harmonise *business law*. The model chosen, the UNIDROIT *Principles*, deals exclusively with international *commercial* contracts. However, this would perhaps be over-hasty.

First of all, we need to understand the question itself. We are dealing here with a general regimen for contracts, that is to say, with common rules on formation, performance, non-performance, interpretation and so on, not with the fate of particular contracts. Specific regimens will anyhow continue to exist for certain, essentially *non-commercial*, contracts such as the marriage contract, as well as for certain *commercial* contracts such as brokerage and commission contracts. The question here, however, is whether the OHADA countries will, in the future, have a single, *common* contract law applicable to all commercial and non-commercial transactions, or whether the new law will apply only to commercial contracts, leaving other contracts to the respective domestic laws.

Several considerations argue in favour of a single regimen.

First of all, there are precedents for the extension of the scope of application of the OHADA Uniform Acts to non-commercial transactions, e.g. as regards arbitration, securities, and recovery procedures.

Then, to have two different contract laws would be asking for problems when deciding which governed what. A case in point are the so-called “mixed” contracts between retailers and consumers. The debate on the commercial nature of contracts seems somewhat out of date. Codes or laws that cover the full panoply of commercial and non-commercial obligations already exist in several countries, such as Italy and Switzerland, but also in Senegal and Mali. Also, there is no general theory of commercial contracts; the only general theory of contracts is that currently incorporated in the Civil Code (at least where most of the civil law countries are concerned), and this serves as a common core for private law as a whole. Unification would ensure that the benefits of modernisation brought by the Uniform Act would not pass non-commercial contracts by.

To limit the new Act to commercial contracts would, moreover, put the OHADA countries in a rather curious position. It would allow the current contract law to continue governing non-commercial contracts and lead to the co-existence of two separate, fully-fledged contract laws that differed substantially. There is, in fact, no historical precedent for such a situation.¹³ Nearly everywhere, and at all times, a single, general contract law has prevailed, applicable to both commercial and non-commercial contracts, with appropriate adjustments to deal with specific issues (for example, in matters of evidence).

Most of those questioned during the rapporteur’s preparatory missions favoured a single contract law. Still, the issue remains a delicate one, not least because the solution eventually adopted will affect the extent to which national jurisdictions must defer to the Joint Court of Justice and Arbitration.

B. The question of formalism

Given the high illiteracy rate, should the contract law be formalistic or non-formalistic in approach?

As mentioned earlier, illiteracy is a widespread problem in the OHADA countries, albeit to varying degrees. In most of the countries concerned, the majority of the adult population can neither read nor write. How and to what extent should this affect the drafting of a contract law capable of addressing African realities? The 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 notifications.

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.”

Does widespread illiteracy in the OHADA countries automatically point to minimal formalism as the obvious solution? Or should we, on the contrary, accept that illiterates deserve special protection when contracting obligations, and that such protection must perforce derive from requirements of form?

Opinions differ widely on this key issue.

On the one hand, Africa has a strong “oral tradition”. Not a few of the most prosperous businessmen in the sub-region are illiterate. Some of those questioned, particularly business people, argued in favour of minimal formalism. Illiteracy, they say, is an African reality; the law

¹³ Except perhaps when some of the European Socialist countries had separate Codes for international commercial contracts; Czechoslovakia even had three such Codes existing side by side: a Civil Code, an Economic Code (for contracts falling under the Central Planning regime) and a Code of International Commerce.

must therefore be kept as simple as possible. In contractual matters, no specific requirements as to form should apply, whatever the amounts involved.

At the other end of the scale, a minority advocated an absolutely general requirement of evidence in writing. This view is held in particular among notaries, who largely favour a high degree of formalism (in regard to which they stress the counselling role that would devolve on them).

Between these two extremes, most of the views expressed were in favour of some degree of formalism in contract law as regards evidence.

What would be the characteristics of such protective formalism in a setting of widespread illiteracy?

Examples may be found in several provisions currently in force, such as Article 20 of the Senegalese law on commercial and non-commercial obligations, which requires two witnesses to confirm, in writing, the identity and presence of the contracting party and to vouch that the party in question is acquainted with the nature and effects of the contract. However, it would appear that such a system works none too well in practice: the parties concerned are loath to resort to this formality which is seen as betraying a lack of trust vis-à-vis the other party to the contract and moreover does not prevent later disputes to arise in bad faith. Cost is another inhibiting factor, as are some of the practical difficulties of involving third parties.

The solution ultimately adopted will depend, in part, on the decision as to the scope of application of the future Uniform Act on contracts. It would, for example, be quite feasible to retain a degree of formalism in non-commercial contracts while having no, or less stringent, formal requirements for commercial contracts. An Act that covered both commercial and non-commercial contracts could provide different rules for each category in this respect. However, it should be borne in mind that there is no reason why any provision incorporated in the Uniform Act on contracts should preclude the provision of specific rules for certain, special types of contract such as real estate sales, certain types of company, and consumer contracts.

The Uniform Act on contracts need not, in fact, take position in the matter. OHADA is currently envisaging the drafting of another Uniform Act on evidence. Were this to materialise, the former would simply refer to the latter in matters of evidence.

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

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. It is therefore legitimate to wonder whether problems might not arise in adjusting to some of these changes.

The situation is not, of course, a new one: it has already arisen in the different sectors regarding which uniform acts have been adopted. However, contract law lies at the core of legal culture and changes in the way of thinking about it may touch sensitive chords.

During his preparatory missions, the rapporteur tested reactions by means of a series of questions pertaining to some of the positions held by the UNIDROIT *Principles*, either in respect of its guiding principles or on specific points. As a rule, reactions were favourable, which augurs well enough for the reception of the new texts. Some issues, however, deserve special attention.

(1) Good faith – Protection of the weaker party

Opinions were positive on many points, such as, for example, the strong emphasis in the

UNIDROIT *Principles* on good faith (Article 1.7) and some of the consequences thereof: duty to co-operate (Article 5.1.3), mitigation of harm (Article 7.4.8), liability for negotiating in bad faith (Article 2.1.15, as well as the provisions dealing with abuse by the dominant party, such as "gross disparity" (Article 3.10), exemption clauses (Article 7.1.6) and "agreed payment for non-performance" (Article 7.4.13).

(2) *Change in circumstances*

The possibility of re-negotiating the contract in the event of a change in circumstances (UNIDROIT *Principles*, Article 6.2.1 to 6.2.3) was generally well-received, whereas some of the legal systems in the OHADA countries, which take their cue from French law, do not accept the notion of hardship. However, several references were made to the devaluation of the CFA franc, which has left a bitter legacy. Re-negotiation of contract in the event of changed circumstances would anyway square with the realities of African life, and a provision to this effect would be especially useful in the climate of instability that characterises Africa. It is also important to remember that there are plenty of safeguards in the regimen instituted by the UNIDROIT *Principles* to protect against abuse.

(3) *Termination for non-performance*

Although a majority also declared themselves in favour of the solution adopted by the UNIDROIT *Principles*, opinions were divided concerning the method of termination of bilateral contracts for fundamental non-performance. The regimen introduced by the French *Code Civil* in many of the OHADA countries requires a court order for termination. The UNIDROIT *Principles*, on the other hand, provide that "*The right of a party to terminate the contract is exercised by notice to the other party*" (Article 7.3.2).

A minority of those who expressed an opinion would prefer to preserve the judicial character of termination. This, they argue, would stand in the way of abuse, of arbitrary, unilateral termination by the stronger party.

The majority, however, favoured termination by simple notification. This was seen as the best way of ensuring speed, simplifying procedures and relieving pressure on the courts. Termination by leave of the court may indeed prevent abuse, but a major drawback is that it can delay the solution of what may be a dire contractual crisis by months or even years, when in fact the aggrieved party often has an urgent need to obtain release from the contract in order to find another partner.

It should be stressed that in comparative law, unilateral termination, with *ex post facto* control by the courts, is the solution most commonly adopted, particularly in German, Swiss and Portuguese law and in the common law countries, as well as by a major international instrument, the *United Nations Convention on Contracts for the International Sale of Goods* (Articles 49 and 64). Belgian law, in its most recent case law upheld by scholarly doctrine, now recognises the validity of termination by unilateral declaration in some circumstances, notwithstanding Article 1184 of the Civil Code which is still in force in Belgium.¹⁴ France now appears to be taking the same road.¹⁵ In practice, anyway, the same result is obtained by means

¹⁴ Cf. S. STIJNS / D. VAN GERVEN / P. WERY, "Chronique de jurisprudence – Les obligations: les sources (1985-1995)", *Journal des Tribunaux* (Bruxelles), 1996, 740-742.

¹⁵ 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* (Brussels / Paris), 2001, 451-512.

of express termination clauses.

(4) "Cause" and "consideration"

An issue that probably triggered the most reactions was one which, in practice, is likely to have fewer consequences than others once a Uniform Act on contracts inspired by the UNIDROIT Principles is in force.

The *Principles* refer neither to the concept of "cause" (familiar to some civil law systems) nor to that of "consideration" (typical of the common law systems). This "overlooking" of the concept of "cause" came as a surprise to many of those adhering to the French legal tradition, who could not conceive of a contract law that did not make provision for such a fundamental concept. Yet the reaction of the common lawyers that the rapporteur met in Cameroon was much the same regarding "consideration" – they seemed quite unable to imagine a contract that did not include this notion.

Looking at these two reactions, we get a good inkling of the kind of difficulties with which the drafters of the UNIDROIT *Principles* had to contend. The concept of "cause" is a key element of the contract in some roman-germanic legal systems (such as France, Spain and Portugal), but not in all: it plays no such role in Germany;¹⁶ and is quite unknown in the common law countries. As to "consideration", this is a typically common law concept unknown in the roman-germanic systems. Clearly, no universal, harmonised contract law can include either of these concepts, since they are too closely linked to specific legal systems. The problem is mirrored at OHADA level: neither of these concepts is common to all countries in the region.

However essential the concept of "cause" and "consideration" may appear to the systems that apply them,¹⁷ it is nevertheless perfectly feasible to construct a viable contract law that includes neither. Such is the case, for example, of Germany, and indeed, of the UNIDROIT *Principles*.

That is not to say that the solutions which French law and common law associate with the notions of "cause" and "consideration", respectively, are discarded; they are achieved by other means. In French law, for example, the notion of "cause" is used among others to invalidate contracts with an unlawful cause. The same result may be more easily attained by including a provision invalidating any contract that is not in keeping with mandatory law, with the *ordre public* or with good moral standards (or some such similar formula) – no need to refer to "cause" of the contract.

D. Matters not covered by the UNIDROIT *Principles*

The first edition of the UNIDROIT *Principles*, published in 1994, dealt with the main chapters of contract law: formation, validity, interpretation, content, performance, non-performance. The second edition, published in 2004, includes some new areas, in particular agency, assignment of rights, obligations and contracts, set-off, and limitation periods. The draft Uniform OHADA Act will incorporate all of these innovations.

Nevertheless, a careful scrutiny will reveal a number of gaps in the UNIDROIT *Principles*. While these will no doubt eventually be filled by another edition of the *Principles*, remedies

¹⁶ Cf. K. ZWIGERT / H. KÖTZ, *An Introduction to Comparative Law*, ed. 1977, II, 69; German law only refers to the concept of cause with regard to enrichment "without cause". Cf. also H. KÖTZ / A. FLESSNER, *European Contract Law*, Oxford (1997), I, 54: "The concept is quite unknown elsewhere in Europe ...".

¹⁷ We do know, however, that the concept of "cause" excites scholarly criticism in the countries that apply it, while the concept of "consideration" is likewise often queried in the common law countries.

must be found to serve the OHADA draft in the meantime.

New provisions will thus be proposed in several areas such as illegality, general provisions on avoidance, certain aspects of performance (loss of benefit of time for performance, performance to the detriment of an attaching creditor, performance by a third party), conditional, joint and several and alternative obligations, protection of creditors and third parties, or confusion of obligations.

These new texts will be drafted drawing on other recent codifications: first of all, the *Principles of European Contract Law* (which have already filled a certain number of gaps), the new Civil Code of the Netherlands (*Nieuwe Burgerlijke Wetboek*) and the 1991 Civil Code of Quebec, which is drafted in a clear and concise fashion eminently suited to its integration into the UNIDROIT *Principles*.

The drafting process of the Uniform Act on contracts is well underway. It looks set to be completed by the end of 2004, when UNIDROIT will submit the text to the OHADA Permanent Secretariat, which in turn will set in motion the consultation and adoption procedure described *supra*. Upon completion of that procedure, seventeen African countries will have at their disposal a uniform contact law broadly reflecting the UNIDROIT *Principles*. There can be no doubt that this achievement will prove to be a landmark in the legal harmonisation movement worldwide.

