Ensuring Harmonisation of Contract Law at Regional and Global Level : the United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL

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I. – UNIFORM TRADE LAW IN AFRICA

Commercial patterns have substantially influenced African history and, in particular, the interaction of Africans with foreigners. The development of trade relations highlighted the need for an adequate regulatory framework to ensure their predictability and stability.

It seems possible to trace uniform elements in African international trade law through the centuries. In the early days, contracts were concluded and performed instantly and therefore requested minimal regulation.[1] Common traits in customary contract and guarantee law were already present throughout the continent.[2] In particular, formal elements in the formation of the contracts and its proof seem to have been widespread and to have lasting

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1 R. FRIMPONG OPPONG, "Private International Law in Africa: the Past, Present and Future", 55 *American Journal of Comparative Law* (2007), 677, at 689.

2 On customary contract and guarantee law, especially African, see N. ROULAND, *Anthropologie juridique*, PUF, Paris (1988), paras. 160-170 (258-272 in the Italian edition), and bibliography at para 175. Argues in favour of the uniformity of customary contract law, K. M'BAYE, "L'expérience du droit uniforme dans les pays d'Afrique", in : UNIDROIT (Ed.), *International Uniform Law in Practice / Le droit uniforme international dans la pratique* [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Rome, 7-10 September 1987)], Oceana, New York (1988), 48-65.

influence until today.[3] Commercial Islamic law brought other common features to some parts of Africa, for example in the area of banking, where a legal framework had been already developed by the Xth century. The prevalence of certain Islamic schools in African sub-regions helped to further promote uniformity. European uniform trade law, the *jus mercatorum*, came to maturity around the mid-XVIth century, when European commercial interests in Africa started to grow in importance. Elements of European commercial law reached Africa through European traders. Thus, all layers of pre-colonial African commercial law contained, to varying degrees, uniform elements.

The impact of colonial law was twofold. Firstly, European powers brought to Africa the full body of their commercial law,[4] though its application, in accordance with ordinary colonial rule, was typically limited to cases when at least one of the parties was Europeans. This was in line with the economic structure of the times, which foresaw integration between colonies and their colonial power, but did not encourage trade among colonies or with European countries other than the colonial power. Nevertheless, certain commercial rules were similar across the various legal systems. This similarity could be due to the closeness of legal systems belonging to the same legal family (e.g., French, Italian, Portuguese and Spanish territories), but could also reflect the original uniformity of the various domestic provisions.[5] Secondly, at the beginning of the XXth century, international trade law saw the first attempts at unification at the global level through treaties whose application was extended to colonies.[6]

At the dawn of independence, African States extended the application of domestic commercial law to all citizens, thus replacing fragmentary customary rules. Often, those States took over international obligations. Given this framework, there was little doubt that uniform commercial law would gain wide

3 F. ONANA ETOUNDI, "Les Principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats", *Unif. L. Rev.* / *Rev. dr. unif.* (2005), n. 4, 683, at 701-702.

4 R. SACCO *et al.*, *Il diritto africano*, UTET, Torino (1995), 129.

5 Cameroon provides an example of mixed legal system where company law is largely similar both in common law and in civil law jurisdictions: G. BAMODU, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa", 38 *Journal of African Law* 2 (1994), 125 (174).

6 *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 1924 (The Hague Rules); *Convention providing a Uniform Law for Bills of Exchange and Promissory Notes*, 1930; *Convention providing a Uniform Law for Chèques*, 1931.

acceptance in Africa.[7] This was also in line with the desire to strengthen economic and political ties across the continent as advocated by the doctrine of Pan-Africanism.

Alas, high expectations in the field of African uniform law have not met with adequate results. A number of regional and sub-regional organisations, sometimes with overlapping mandates, started work with varying degrees of success. Results seemed best in certain specific fields, such as intellectual property and insurance law, but regional integration, be it generally economic or strictly legal, was not truly achieved, due to a number of reasons ranging from the desire to protect national sovereignty to the limitations stemming from economic reality.[8] A remarkable exception is OHADA, which managed to establish a major system of reform and unification of commercial law thanks, amongst other things, to the common legal tradition of its member States.[9]

Today international trade law does not seem to be a priority area of work throughout Africa due to the prevalence of other, more urgent issues, as well as a certain isolation from international legal developments and limited appreciation for the economic benefits arising from a modern commercial law framework.[10] The multiplication of organizations in charge of economic integration (including, sometimes, legal harmonization) and their insufficient coordination has created a new source of disharmony.[11] Besides, a number of technical problems hinders the success of efforts even in cases when political will and mandate are clear.[12]

7 A. ALLOTT, "The Unification of Laws in Africa", 16 *American Journal of Comparative Law* (1968), 51-87.

8 M. NDULO, "Harmonisation of Trade Laws in the African Economic Community", 42 *International and Comparative Law Quarterly* (1993), 101 (103-106).

9 OHADA had a seldom-remembered predecessor, the *Bureau africain et malgache de recherches et d'études législatives* (BAMREL), active especially in the field of company law.

10 For similar views with respect to the status of private international law in Africa, R. FRIMPONG OPPONG, Private International Law in Africa, *supra* note 1, 678-680.

11 The matter was discussed at the conference "L'harmonisation du droit sur les continents africain et européen", held in Bordeaux on 20 and 21 September 2005. The publication of its proceedings has been announced.

12 B. THOMPSON, "Legal Problems of Economic Integration in the West African Sub-Region", 2 *African Journal of International and Comparative Law / Revue africaine de droit international et comparé* (1990) 2, n. 1, 85 (86), lists: insufficient participation in international instruments; derogation from national sovereignty; conflict between constitutional and public international law; divergences in domestic laws of member States; conflict between customary and inherited Western laws; lack of regulation in key commercial areas; and insufficient conflict of laws

The limited participation of African States in international trade law instruments reflects this unfortunate situation. Taking as a benchmark the two trade law treaties with broadest participation, the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958 ("New York Convention") [13] and the *United Nations Convention on Contracts for the International Sale of Goods*, 1980 ("CISG"),[14] we find that only thirty African States are parties to the New York Convention, and only nine are parties to the CISG. The participation of African States in the legislative-making process seems also to be less than optimal, despite the prominent place formally given to African delegations.[15]

In fact, limited commercial law reform initiatives were undertaken in Africa in the last decades. Rather, focus was placed on economic plans, State ownership and central management of economic resources, due to a number of reasons ranging from the adoption of socialist ideology to the influence of "law and development" doctrines.[16] This meant stressing the administrative aspects of economic law, to the detriment of commercial rules applicable to market entrepreneurs. However, this did not erase the fundamental similarities in trade legislation across the continent.

Today the renewed interest in trade with Africa due to the importance of its resources brings back to centre stage the need for modern uniform trade legislation. This goal can be achieved effectively only by looking beyond colonial lines and traditional sources of inspiration for legal reform. In particular, in the case of West Africa, it is necessary to take stock of the fact that, while OHADA represents a most important reality, a number of regional economic powerhouses share a common law heritage that remains, to date, largely incompatible with the work of OHADA. Therefore, the desire to achieve a high level of legal integration calls for the adoption of universal uniform texts such as those prepared by UNCITRAL, UNIDROIT and other comparable organisations.

rules.

13 United Nations, *Treaty Series*, vol. 330, 38. The New York Convention had 142 States Parties as of 1 January 2008. All UNCITRAL texts are available on the UNCITRAL website (<http://www.uncitral.org>) in all the official languages of the United Nations.

14 United Nations, *Treaty Series*, vol. 1489, 3. The CISG had 70 States parties as of 1 January 2008.

15 R. DAVID / C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporains*, 10th ed., Paris, Dalloz (1992), para. 524, (p.) 471, suggest that the participation of African delegations in legislative-making meetings operates only at a formal level without ensuring that African interests are given due consideration.

16 On some fundamental features of African economies and their legal rules, see SACCO *et al*, *supra* note 4, 213.

Those texts are drafted taking into account differences in legal traditions – in particular, as far as West Africa is concerned, accommodating civil law, common law and Islamic law – and regional practices and patterns.

II. – THE DRAFT OHADA ACT ON CONTRACT LAW AND THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 1980

The analysis of the draft OHADA Act on contract law (the "draft OHADA Act") vis-à-vis the CISG provides a practical example of how universal and regional uniform trade law texts may complement each other. In particular, it is suggested that the CISG effectively addresses the issues raised by commentators during the preparation of the draft OHADA Act, thus showing the CISG's adequacy in regulating international trade. Therefore, OHADA member States should strengthen their process of economic integration by adopting the CISG in order to benefit from the CISG's application to contracts for the sale of goods concluded with commercial partners located in non-OHADA African States and in other parts of the world.

At a general level, it should be stressed that the draft OHADA Act on contract law was inspired by the *UNIDROIT Principles of International Commercial Contracts* which, in turn, build on the CISG.[17] Therefore, there is a strong lineage linking the CISG and the draft OHADA Act. Maintaining consistency between those texts will ensure uniformity at the different legislative levels and will facilitate the use of the vast amount of case law and academic works available on the CISG and on the UNIDROIT Principles in the interpretation of the draft OHADA Act.[18] This is of great importance especially on those points where the draft OHADA Act innovates significantly on existing domestic law, for instance in case of unilateral termination of the contract for non-performance.[19]

Moreover, the OHADA Uniform Act on General Commercial Law contains provisions on sale contracts which follow closely those of the CISG.[20] Therefore, keeping the draft OHADA Act in line with the CISG would also ensure consistency with the OHADA Act on general commercial law.

17 For a clear description of the relation between texts on uniform contract law, O. LANDO, "CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law", 53 *American Journal of Comparative Law* (2005), 379.

18 For similar considerations on the relation between the draft OHADA Act and the UNIDROIT Principles, 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 (577).

19 This solution has already been adopted in the CISG: FONTAINE, *supra* note 18, 582.

20 G. KENFACK DOUAJNI, "La vente commerciale OHADA", *Unif. L. Rev.* / *Rev. dr. unif.*

The authentic text of the CISG is available in the six official languages of the United Nations of which Arabic, English, French and Spanish are relevant to OHADA States. This linguistic offer has an impact beyond the availability of a multilingual text. Indeed, the CISG was drafted to carefully avoid reference to any legal notion typical of a given national system or legal family. This helps ensure the interpretation and application of that treaty in light of its international and uniform nature. Thus, use of the CISG terminology in other uniform trade law texts will further uniform interpretation of those texts, too.

A number of specific issues discussed in this Conference with respect to the draft OHADA Act seem to find adequate treatment in the CISG, as elaborated below.

The CISG is particularly flexible in accommodating the parties' needs. In fact, it respects contractual freedom, as parties are free to opt out of any or all of its provisions.

The CISG does not mandate a particular form for a contract for the international sales of goods, unless States decide to do so by lodging a declaration under Article 96 CISG. The African States which have already become a party to the CISG have, revealingly, decided not to lodge such a declaration. This seems in line with the social conditions of African countries and, in particular, with the wish to ensure that entrepreneurs with a lower level of literacy will not be unduly penalized by formal rules inserted to protect them, but eventually used against them.[21]

The CISG protects the effects of contracts in certain cases of partial performance, thus implementing the principle of *favor contractus*, which is becoming increasingly popular due to its ability to reflect economic realities.[22]

The principle of good faith is a leading interpretative principle under Article 7(1) of the CISG and impacts also the draft OHADA Act.[23] This is in line with the prominent place given to good faith in the African context,

(2003), 191, offers a comparative analysis of the CISG vis-à-vis the OHADA Act on General Commercial Law.

21 See also LANDO, *supra* note 17, 389.

22 See the contribution of E. DARANKOUM in this volume.

23 LANDO, *supra* note 17, 392, points out that "it is not possible in practice to distinguish a problem of interpretation from one of supplementation", and that therefore this provision applies not only to the interpretation of the CISG but also to that of the contract and of the behavior of the parties. See also the contribution of K. MBIKAYI in this volume.

where, in particular, it assists in addressing abuses stemming from informal transactions.[24]

The drafters of the CISG have carefully avoided any reference to the notions of *cause* and consideration, which are deeply rooted in the respective systems of origin,[25] and replaced them with provisions acting as functional equivalents.[26] This successful solution ensures effective regulation of the contract while rejecting misleading references to domestic notions.

It should be stressed that the universal nature of the CISG is fully compatible with further regional unification efforts.[27] In particular, Article 90 CISG provides that the convention should not prevail over international agreements containing provisions concerning the matters governed by the CISG, insofar as the parties have their place of business in States parties to those agreements. Moreover, Article 94 CISG indicates that States which have the same or closely related legal rules on matters governed by the CISG may not apply the CISG to contracts between parties having their place of business in those States, provided a declaration to that effect is lodged. In short, the CISG allows exclusion of those contracts which fall under a regional treaty or a regional uniform law. By doing so, the goal of fostering regional integration is achieved while at the same time preserving integration with States located outside the region. This is particularly important to provide reassurance that, under treaty law and the CISG provisions, OHADA Acts and the CISG are fully compatible and their interaction ensures maximum harmonization both at the global and at the local level.

Similar considerations apply to the texts complementary to the CISG. The Convention on the Limitation Period in Contracts for the International Sale of Goods [28] may adequately clarify a difficult but critical aspect of the law of obligations, effectively unifying a notion that varies considerably in different legal systems.

Most importantly, UNCITRAL has prepared a fully-fledged set of texts relating to electronic commerce: the *UNCITRAL Model Law on Electronic*

24 ONANA ETOUNDI, *supra* note 3, 695.

25 See the contribution of C. CHAPPUIS in this volume; FONTAINE, *supra* note 18, 583.

26 LANDO, *supra* note 17, 390-391, further discusses the point from the perspective of the binding force of the unilateral promise.

27 F. FERRARI, "Universal and Regional Sales Law: Can They Coexist?", *Unif. L. Rev. / Rev. dr. unif.* (2003), 177.

28 Concluded in 1974 and amended in 1980: United Nations, *Treaty Series*, vol. 1511, 3.

Commerce, 1996,[29] the *UNCITRAL Model Law on Electronic Signatures*, 2001,[30] and the *United Nations Convention on the Use of Electronic Communications in International Contracts*, 2005.[31] Those three texts provide a modern legislative framework for all needs relating to the use of electronic means both in domestic and in international trade. African countries are engaged in bridging the digital divide and, in this context, are constantly and vigorously expressing their interest in the adoption of legislation on electronic commerce. Adoption of UNCITRAL texts would satisfy this need in a field where uniformity at the global level is of paramount importance. Cooperation between UNCITRAL and OHADA in this field is, of course, highly desirable and could take place, for instance, by means of adopting an OHADA uniform act on electronic commerce and electronic signature based on the provisions of the relevant UNCITRAL model laws, and at the same time promoting adoption of the Electronic Communications Convention by OHADA States to ensure coordination at the global level.[32]

In light of the above, it may be concluded that, on the one hand, the successful solutions of the CISG should find further application in the draft OHADA Act, and, on the other hand, no major obstacle stands in the way of wider adoption of the CISG and of related UNCITRAL texts by OHADA member States.

III. – POLICY CONSIDERATIONS

The substantive analysis of the CISG vis-à-vis the draft OHADA Act brings us to positive conclusions on the compatibility of the two texts. However, this discussion would be incomplete without consideration of the underlying policy choices.

It is clear that the adoption of the CISG *per se* provides a number of important benefits to State parties.

At a general level, the CISG greatly facilitates international trade by providing modern, uniform rules of clear application. In fact, often parties do not choose the law applicable to the contract. In particular, small and medium enterprises are less likely to have access to qualified legal counsel during

29 With additional Article 5*bis* as adopted in 1998: United Nations Publication Sales No. E.99.V.4.

30 United Nations Publication Sales No. E.02.V.8.

31 United Nations Publication Sales No. E.07.V.2 (treaty not yet in force).

32 See the contribution of E. MONTERO in this volume.

contractual negotiations and therefore less likely to choose applicable law. In the event of a dispute, the search for applicable law may be cumbersome, especially in light of the difficulties in retrieving information on the status and application of African legislation. When parties do agree to an applicable law, this is typically to the detriment of domestic African laws due to insufficient familiarity with those African laws or to the economic strength of the non-African party.[33]

The automatic application of the CISG to contracts of sale between parties whose place of business is located in Contracting States addresses effectively the case in which a choice of law was not made. Moreover, participation in the CISG, which is well-known, uniform in origin and perceived as neutral by all parties, facilitates the choice of the CISG as applicable law in cases when the parties' place of business is not located in Contracting States.

In fostering economic development, the CISG may play an important role in providing enterprises with the legal tools necessary to take full advantage of business opportunity. The importance of the adoption of the CISG in the Chinese legal reform process is well-known.[34] That case should be carefully studied by African countries and especially by those with Socialist experience.

In fact, currently, African States may in theory benefit from various multilateral and bilateral preferential trade regimes. However, those opportunities are in practice seldom fully exploited. Lack of legal capacity may be one reason for this. International trade law reform and modernization, including through closer integration between public and private international trade law, may contribute to addressing the matter. This approach would also support the on-going process of regional integration, which is seen as key to economic development, along the lines of what has happened in other continents. In fact, the concurrent adoption of global standards by regional international organizations and their member States would greatly help to streamline their work.

West Africa knows a variety of legal traditions.[35] OHADA texts often are evidently inspired by French law, though there are exceptions, for instance in the fields of arbitration and of sale of goods. Common law West African countries perceive OHADA texts as "devised for civil lawyers".[36] Widespread

33 BAMODU, *supra* note 5, 129-130.

34 See the contribution of ZHANG S. in this volume.

35 S.B. ABAJULO, "Sources of the Law of the Economic Community of West African States (ECOWAS)", 45 *Journal of African Law* 1 (2001), 73 (78-82) ("Legal Map of West Africa").

36 S.K. DATE BAH, "The UNIDROIT Principles of International Commercial Contracts and the

adoption of the CISG would bridge differences between West African jurisdictions.[37] Although future participation in OHADA work by common law jurisdictions may broaden the inspiration of OHADA texts, at the present time the adoption of universal uniform texts, equally mindful of all legal traditions, seems the most effective solution for regional integration.[38]

The same conclusion may apply to the adoption of other universal uniform trade law texts. Therefore, it is particularly desirable that West African States would renew their efforts towards wider adoption of those texts.

Bearing in mind the regional context, it is possible to envisage a two-pronged approach to trade law reform. OHADA and the other relevant regional organizations should consider endorsing and promoting universal uniform trade law texts to establish a minimum standard for regional and global trade. Then, those organizations may work on that standard to further develop texts addressing regional needs. The work could be done in partnership with universal international organizations, thus ensuring adequate coordination of the resulting legislative texts.[39]

However, regional reform is only one part of the equation. Broader and more regular participation of West African States in the work of universal legislative bodies, both individually and through organizations like OHADA, is equally important. This is the only way to ensure future texts will adequately address regional needs, which, in turn, allows shared ownership of those texts, and ultimately fosters adoption and implementation of the resulting uniform legislation in the region.[40]

Harmonisation of the Principles of Commercial Contracts in West and Central Africa", *Unif. L. Rev. / Rev. dr. unif.* (2004), 269 (271).

37 R. SORIEUL, "Convergences entre la CNUDCI et l'OHADA", in : Ph. Fouchard (sous la direction de), *L'OHADA et les Perspectives de l'arbitrage en Afrique*, Bruylant, Brussels (2000), 43 (46-47).

38 A positive side effect of the adoption of universal uniform texts in the region would be to allay the worries of those maintaining that the French legal system and the legal systems it inspired are inherently poorly economically efficient and therefore not suitable for developing countries. For more information on this point, see the discussion of the "Law and Finance Theory" in : C. MOORE DICKERSON, "Harmonizing Business Laws in Africa: OHADA Calls the Tune", 44 *Columbia Journal of Transnational Law* (2005), 17 (30 ff.).

39 For a recent account of achievements and challenges in cooperation among international organizations active in the legal harmonization field, see J.A. ESTRELLA FARIA, Brendan Brown Lecture Series: "UNIDROIT Symposium: The Relationship between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL", 51 *Loyola Law Review* (2005), 253.

40 T. MENSAH, "Uniform Law as a Means of Technical Assistance to Developing

This is particularly welcome in UNCITRAL, given that the Commission was established with a particular view to assisting developing countries.[41] The *travaux préparatoires* of the CISG reflect the attention paid by UNCITRAL to developing countries, in particular, in the discussions relating to international usages and practices (Article 9 CISG), notice of lack of conformity of the sold goods (Articles 39 and 44 CISG), passing of risk (Article 68 CISG) and anticipatory breach (Articles 71 and 72 CISG).[42]

Renewed participation in the work of UNCITRAL is therefore necessary to ensure that regional and local practices are taken into consideration. Such participation is the starting point for the integration of universal, regional and domestic texts, so as to support African business with fair and predictable legal rules.

IV. – CONCLUSIONS

The ultimate goal of trade law reform in Africa is ambitious. It aims at improving the integration of African countries in the global economy and fostering their economic development, while respecting the specificities of the continent and addressing its needs.

Economic development in the African context does not mean only addressing the scourge of poverty. It means also contributing to peace and stability by recreating regional webs of shared interests and peaceful cooperation. Further, building an efficient and effective framework for commercial transactions promotes the rule of law at large.[43] Hence, the importance of this exercise cannot be overstated.

Countries", *Rev. dr. unif. / Unif. L. Rev.* (1973), 24 (26-28). With respect to cooperation between OHADA and UNCITRAL, SORIEUL, *supra* note 37, 48-49.

41 United Nations General Assembly, Resolution 2205 (XXI) of 17 December 1966, Establishment of the United Nations Commission on International Trade Law. See also BAMODU, *supra* note 5, 138-140; E. BERGSTEN, The Interest of Developing Countries in the Work of UNCITRAL, in : *Asian-African Legal Consultative Committee, Essays on international law*. Thirtieth anniversary commemorative volume, New Delhi (1987), 28-41.

42 L. CASTELLANI, "Il contributo dei paesi in via di sviluppo al diritto uniforme: une quantité négligeable?", *Diritto del commercio internazionale* (2001), n. 1, 103 (105-114); BERGSTEN, *supra* note 41, discusses the interaction of developing countries with UNCITRAL texts on arbitration, maritime transport and international contracts for the construction of industrial works.

43 J-Y. DE CARA, "International Trade and the Rule of Law: the Sixth John E. James Distinguished Lecture", 58 *Mercer Law Review* (2007), 1357 (1372 ff.).

Wider adoption of the CISG may be an important step in that direction. It will also facilitate the implementation of the draft OHADA Act on contract law, once this has been formally adopted.

At the same time, African regional international organizations and countries have a vested interest in participating in shaping the rules for international trade at the global level. Therefore, their increased participation in and coordination with universal legislative bodies would be particularly desirable.