

## The Harmonisation of Contract Law within OHADA

### General Report on the Ouagadougou Colloquium – 15-17 November 2007

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1. The Colloquium on the harmonisation of contract law within OHADA held in Ouagadougou (Burkina Faso) provided an opportunity to take a closer look at some of the more technical aspects of contract law. For example, with regard to the substance of the contract, concepts such as *cause*, which is a feature of roman-germanic law, and consideration, which belongs to the common law, as well as principles such as good faith and freedom of contract, formed the subject of several communications and fuelled the debates. As to the form of the contract, a number of communications and some of the debates threw the spotlight on important issues such as the role of material formalism – to protect consent – and proof, as well as the formation of electronic contracts and issues of evidence pertaining thereto. Besides these strictly contractual aspects, the Colloquium also broached some fundamental subjects relating to the harmonisation process itself, looking, in particular, at the way in which OHADA was tackling the harmonisation of business law in the region. The delimitation of the law to be harmonised and the legal bases of the harmonised law were two such fundamental questions – fundamental in that they raised legal policy issues – which involved the participants in lively, exciting and at times passionate debate. This report will examine the subject matter discussed by the Colloquium from the perspective of these two fundamental issues.

2. The drafters of the OHADA Constitutive Act set out to achieve the twin goals of providing legal and judicial security by setting up a “simple, modern and adapted business law to enable an easier access to economic

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Report presented (in French) at the Colloquium on “The Harmonisation of Contract Law within OHADA”, held in Ouagadougou (Burkina Faso) from 15 to 17 November 2007, to discuss in particular the preliminary draft *OHADA Uniform Act on contract law* (2005) prepared by UNIDROIT at the request of OHADA. This text, as well as the Explanatory Note thereto drafted by Professor Marcel FONTAINE, may be accessed on the UNIDROIT Internet website (<<http://www.unidroit.org>>) and are reproduced in this issue. The English version of this report was translated by the Editors.

activities" (Treaty Preamble, para 5). From a normative point of view, this goal is pursued by means of Uniform Acts; from the institutional standpoint, uniformity of business law is sought through the uniform interpretation of the Acts by the Common Court of Justice and Arbitration (CCJA). Article 1 of the OHADA Treaty defines the object of the law to be harmonised, stipulating that this is confined to business law. Since this is an area of the law that has neither a fixed content nor precise boundaries, the question arises of how to determine the substantive demarcation of the law to be harmonised. Moreover, OHADA, as we know, is an open organisation: the Treaty Preamble refers to the member States' determination to contribute "to progress towards African Unity" (Treaty Preamble, para 1). Article 53 is more explicit and presents the OHADA Constitutive Act as a Treaty "open to membership of any member State of the OAU that is not a signatory to the Treaty" and even "to any non member State of the OAU invited to accede by agreement of all the States Parties" (Treaty, Article 53). Clearly, the delimitation issue also has a geographical dimension.

3. Determining the geographical scope of an Organisation whose primary objective is to produce common rules and to ensure their common interpretation is bound to raise problems in terms of the legal framework and the legal bases of the harmonised law. Comparative law has identified the existence of legal "families" or, as the great French comparatist René David put it, of "*grands systèmes de droit*" (major legal systems). It is obvious that a legal unification process involving a single legal system is less complicated than one involving different legal systems.

#### **I. – THE SUBSTANTIVE DELIMITATION OF HARMONISATION**

4. As pointed out above, the scope of the Uniform Acts is confined to business law. This is defined by Article 2 of the Treaty, which supplies a set of rules relating to "company law, the definition and classification of legal persons engaged in trade, the recovery of debts, securities and means of enforcement, bankruptcy, receiverships, arbitration, employment law, accounting law, sales law and transport law ...". However, the list is not exhaustive since the article furthermore provides that "any other matter" may be deemed business law if the OHADA Council of Ministers unanimously so decide. Business law is, after all, as mentioned earlier, an area of the law with a variable content and no fixed boundaries. It seeks to address all the rules of law relating to commercial enterprises and to the production and circulation of economic wealth. By this token, it may encompass, besides commercial

law in the usual sense, the law governing certain specialised commercial professions, financial services, criminal business law, fiscal law, labour law (some of it at any rate) and accounting law. Lately, voices have been heard proposing also to include industrial and commercial property law, non-commercial company law, the law governing new information and communication technologies, competition and consumer law, the law governing certain special contracts, as well as specific aspects of private international law. There can be no doubt that the Uniform Acts, if they are to achieve their goal of unification, simplification and modernisation of business law, will need to cover if not all, then certainly most of the legal rules applicable to enterprises and economic activity.

5. The Ouagadougou meeting having been called to discuss the harmonisation of contract law within OHADA, contract law naturally formed the central core of the debates. Two interlinked sub-issues arose: should contract law be part of the business law to be harmonised and, if so, should the harmonisation extend to all contracts, including non-commercial (civil) contracts?

6. The first question may be approached from a “positivist” or “legalist” angle. Article 2 of the Treaty gives the OHADA Council of Minister the prerogative of defining, in an empirical fashion, the business law that is to be harmonised. The Council of Ministers decided to include contract law (and more recently, during its session at Niamey on 26 and 27 July 2007, the law of evidence which will be merged with contract law). As a consequence, contract law is regarded as properly belonging to business law in OHADA terms, as one participant, speaking in his capacity as representative of the OHADA Permanent Secretariat, confirmed.<sup>1</sup>

7. However, a scholarly Colloquium must subject such a pithy, formal and above all, strictly legalistic statement to more careful scrutiny. The issue of legitimacy also arises, which, in this instance, implies that the statement must be scientifically sound. The problem is that the Treaty provides absolutely no guidance as to exactly what business law is to be harmonised. Article 2 simply lists the subject matter, apparently handing the OHADA Council of Ministers a blank cheque and laying down only one procedural requirement (the unanimity procedure) and making no stipulations as to substance.

<sup>1</sup> Cf. the communication presented by Idrissa KÉRÉ, “L’OHADA et l’harmonisation du droit des contrats : propos et questions préliminaires”, reproduced in this volume.

8. The classification of legal rules into different areas of the law may be undertaken according to at least two criteria. One criterion is to differentiate groups of rules according to the common sources, concepts, principles and methods of interpretation which between them make them relevant to a given area of the law and set them apart from other areas of the law. This is how the traditional classifications in civil law, commercial law, social law, tax law, administrative law, etc., were conceived. More recently, new classifications based on an entirely different criterion have emerged. Here, the rules are classified and pooled according to the economic sector of activity to which they apply. Hunting and fishing law, tourism and such fall into this new category, as indeed does business law. Business law, with its heterogeneous sources, is restricted only by the limits imposed by the presence and activity of economic operators. It has been rightly said of business law that it is "destined to encompass all the rules pertaining to business, in the economic sense, and to all the operations involved in the production and distribution of economic wealth."<sup>2</sup> It can scarcely be denied that a contract is a crucial element in the production and distribution of economic wealth. It might even be argued that a contract is the key legal act in this area. From the point of view of legitimacy – not just from a purely legalistic standpoint –, the contract must be properly integrated into business law. It was rightly pointed out in one of the communications presented at this Colloquium that company law and the law of contracts are the two touchstones of a liberal economy. Company law forms the subject of a Uniform Act; what could be more logical than that the legislator should also attend to contract law? However, opinions may differ as to the way in which the legislator should approach this task.

9. Simply establishing that a contract, because it is a key element of business law, should be the subject of legal unification is not enough. There are those who hold that commercial contract law takes its general theory from that of contracts – both commercial and non commercial – and that therefore, business law being a specialist area, it should not interfere with general contract law but rather produce uniform rules for specific commercial contracts in which OHADA has so far shown no interest – apart from commercial sale, commercial lease, brokerage, agency and the transport contract. Examples might be financial leasing, franchising, factoring, exclusive distributorships agreements, all distribution contracts, banking transactions – as to the latter, this should be done in close collaboration with the Economic and Monetary Union of West Africa

<sup>2</sup> D. BA, "Le problème de la compatibilité entre l'UEMOA et l'OHADA", in : *La libéralisation de l'économie dans le cadre de l'intégration régionale : le cas de l'UEMOA*, Actes du Colloque de Ouagadougou, 16-17 décembre 1999, Publications du CEEI, n° 3 (2001).

(UEMOA) and the Economic and Monetary Community of Central Africa (CEMAC). However, one look at the new trends in the law of obligations should be ample to show how risky such an approach would be. A special contract law not rooted in the general law of contract would be difficult to establish.<sup>3</sup> There are just so many special texts – for example, in French contract law – that they might well end up emptying the general law of contract of its substance. No single system would survive, we would be left with a plethora of sundry texts, scattered and at times inconsistent among themselves and vis-à-vis the general theory of contract. The question indeed is whether the regulation of specific contracts should be left to the legislator – even to the uniform legislator. Would it not be wiser to leave such regulation in the creative and pioneering hands of contract practice, operating within the general framework of the general theory of contract? To take the example of arbitration, which is “philosophically” close to contract law, both being based on the freedom and autonomy of the parties, contemporary legislation – and the OHADA Uniform Act on arbitration is an eloquent example – has placed almost all matters pertaining to procedure and the conduct of arbitral proceedings squarely in the hands of the parties – particularly arbitrators and the rules of permanent arbitration centres. However, this freedom is solidly rooted in principles of procedural law: equality of the parties in the proceedings, *principe du contradictoire* (the right to be heard in an adversarial process). Contract law might do worse than follow this example: sound, plain and precise general principles and rules, with the content of specific contracts taking its cue from contract practice. This would satisfy Portalis’ wise maxim that the law must lay down general principles and rules and avoid detailed regulation – a point so eloquently made during this Colloquium.

10. Assuming that a commercial contract, being an act of business law, is best served by a general theory rather than by rules tailored to each different type of contract, the case for a Uniform Act on commercial contract law has been made. However, this does not settle the question of whether such a general theory might also apply to non commercial contracts. Whenever this question has arisen in drafting earlier Uniform Acts, the drafters have chosen to include the relevant non commercial relations as well. Thus, for example, the Uniform Act on arbitration law which applies “to any arbitration when the seat of the Arbitral Tribunal is in one of the Member States.”<sup>4</sup> The same solution

<sup>3</sup> Cf. the communication presented by Eleanor CASHIN RITAINE, “Nouvelles tendances en matière de droit des obligations: quel droit s’applique ?”, reproduced in this volume.

<sup>4</sup> Art. 1 of the Uniform Act of 11 March 1999 on arbitration.

was adopted for the law on securities, the provisions of the relevant Uniform Act applying both to commercial and non commercial securities.<sup>5</sup> Should the general theory of contracts be any different? This amounts to asking whether what is useful and reasonable for a commercial contract is likewise useful and reasonable for a non commercial contract. In comparing the UNIDROIT Principles (designed for *international* commercial contracts, but this need not prevent them from being extended to all contracts) with the general theory of contracts in French law (as enshrined in the French Civil Code, which means that it applies to all contracts), we find that nothing, in the UNIDROIT Principles, particularly conflicts with the current French general theory of contracts.<sup>6</sup> Indeed, several of the States that have begun to modernise their civil and commercial obligations law have taken the original, purely commercial, character of the UNIDROIT Principles further. The laws of obligations of the Russian Federation and Latvia are two examples, and one of the communications presented at this Colloquium was entirely devoted to another such country, China.<sup>7</sup> Other countries have taken the same approach in respect of arbitration law. Several States have incorporated the bulk of the provisions of the UNCITRAL model law on international commercial arbitration, not confining themselves to international arbitration but extending these provisions to all types of arbitration, both commercial and non commercial, domestic or pertaining to private international law. French international arbitration law forms the principal source of inspiration for OHADA's arbitration law which applies to commercial, non commercial and domestic arbitration as well as to disputes pertaining to private international law. Moreover, in drafting a new law, be it uniform or otherwise, the underlying assumption is likely to be that the new legal regime will improve on the old. Unless a good reason can be given to reduce the scope of application of the new legislation, it makes sense to give it as wide a scope as possible. In our case, this implies, as indeed has been suggested, that non commercial contracts should be given the benefit of the innovations proposed by the Uniform Act on contract law.<sup>8</sup> Then there is the question: how

<sup>5</sup> Art. 1 of the Uniform Act of 17 April 1997 organizing securities.

<sup>6</sup> Cf. the communication presented by Jean-Michel JACQUET, "Le droit français des contrats et les Principes d'UNIDROIT", reproduced in this volume.

<sup>7</sup> Cf. the communication presented by ZHANG Shaohui, "L'influence des Principes d'UNIDROIT dans la réforme du droit chinois des obligations", reproduced in this volume.

<sup>8</sup> Cf. the communication presented by Dorothé C. SOSSA, "Le champ d'application de l'avant-projet d'Acte uniforme OHADA sur le droit des contrats: contrats en général / contrats commerciaux / contrats de consommation", reproduced in this volume.

workable is the law? To limit the scope of the Act to commercial contracts alone would render the law of contractual obligations unduly complex. Two separate legal regimes for contractual obligations would exist side by side – one for non commercial contractual obligations governed by the Civil Code, the other for commercial contractual obligations governed by a Uniform Act - , with a third special regime in the offing for consumer contracts. This is one of the reasons why the author of the preliminary draft would prefer to see the Uniform Act extended to both commercial and non commercial contracts.<sup>9</sup>

11. The waters are, however, muddied in OHADA law by considerations of an institutional, or rather a jurisdictional, character involving the competence of the CCJA. It has been rightly pointed out that to extend the Uniform Act to non commercial contracts would cause the CCJA to become inundated with cases as national Courts of Cassation were stripped of much or even most of their prerogative. This would probably be so if it were true that most of the litigation in the national courts involved non commercial contractual relations,<sup>10</sup> and our options would then be two: either simply not to extend the future Uniform Act to non commercial contractual obligations, or to examine the CCJA itself to determine whether, and if so how, it impedes a reasonable, useful and comprehensive harmonisation of commercial and non commercial contract law, making the law of contractual obligations even more complex without good cause. Of course, this is not for the Colloquium to decide, although the matter was raised in the very first communication, dealing with current problems in the harmonisation of business law.<sup>11</sup> Does it really make sense to preserve the current prerogatives of the CCJA at all costs? For my part, and speaking from a strictly personal standpoint not argued during this Colloquium, it is high time that, for various reasons, the CCJA be turned into a court having jurisdiction to give preliminary rules on questions of interpretation of Community law – along the lines of the Court of Justice of the European Communities in Luxembourg. In this way, the national courts and the CCJA would complement rather than conflict with one another.<sup>12</sup>

<sup>9</sup> Cf. the communication presented by Marcel FONTAINE, “L’avant-projet d’Acte uniforme OHADA sur le droit des contrats : vue d’ensemble”, reproduced in this volume.

<sup>10</sup> Cf. SOSSA, *supra* note 8.

<sup>11</sup> Cf. the communication presented by Jean Yado TOÉ, “La problématique actuelle de l’harmonisation du droit des affaires par l’OHADA”, reproduced in this volume.

<sup>12</sup> P. MEYER, “La sécurité juridique et judiciaire dans l’espace OHADA” (Communication to the Colloquium organised by the Nigerian Bar on “Legal and judicial security within UEMOA”, Niamey, 21-22 March 2006), *Recueil Penant* (2006), 151-175.

## II. THE LEGAL BASES FOR HARMONISATION

12. The OHADA Permanent Secretariat asked the expert entrusted with preparing the preliminary draft Uniform Act to choose the UNIDROIT Principles of International Commercial Contracts as his source of inspiration or as his model in drafting the preliminary draft. In other words, the UNIDROIT Principles were to be the principal legal basis for the new contract law. The author of the draft duly complied, and he has explained why he only diverged from the UNIDROIT Principles where absolutely unavoidable. The main reason he gave for “sticking to” the Principles was his concern that the future Act should benefit as much as possible from the scholarly discussions around the Principles and their application by the courts and arbitral tribunals. However, wherever necessary, the author filled any gaps left by the Principles with a view to producing a complete law of obligations (e.g., in respect of conditions, plurality).

13. Any legal regulation involving private relationships must reconcile two types of interest : the interest of private persons (co-contractors in the area under discussion), and the general or public interest. The interest of private persons is served in the preliminary draft Uniform Act by the principle of contractual freedom (and its logical corollary : the supplemental character of contract law) which has consequences for the conclusion of the contract, for its content and for its performance. This does not differ all that much from the French Civil Code, except in that the principle of contractual freedom is explicitly spelled out in the preliminary draft Uniform Act, whereas Article 6 of the Civil Code refers to it only implicitly. The general interest requires that contractual freedom be watched over by the *ordre public*, mandatory rules and grounds of absolute nullity. Again, the preliminary draft Uniform Act complies with the basic tenets of private law legislation. Its references to the *ordre public*, to good moral standards and to the binding provisions of the law (Article 3/1), if handled prudently and wisely by the courts, are key tools in overseeing the contract.

14. More specifically, the UNIDROIT Principles, from a substantive point of view, are characterised by:

1. adherence to the basic principles of contract law (contractual freedom, good faith, emphasis on the agreement of the parties),
2. openness to contractual practices and usages (hardship, force majeure, merger clauses),
3. protection of the contract (rules to deal with non-performance or defects of the contract with a view to saving the contract),

4. protection of the weaker party (gross disparity, reduction of excessive penalty clauses, reliance on good faith),
5. incorporation of recent advances in contract law (duty to co-operate, ban on inconsistent behaviour).

These key elements, which form the substance of the UNIDROIT Principles, were discussed by the various workshops held during the second part of the Colloquium.<sup>13</sup>

15. In terms of their structure and form, the UNIDROIT Principles constitute a body of soft law the importance of which for the current sources of the law of obligations was highlighted in one of the communications presented at the Colloquium.<sup>14</sup> However, there is evidence that one of the purposes of soft law is to help create hard law, among other things through its influence on domestic or international legislative drafting. Several examples were given: the influence of the UNIDROIT Principles on the recent Dutch codification of the law of obligations, on the reform of the Chinese law of obligations, on the United Nations Convention on international commercial sale. Soft law may also be seen to influence State law through contract practice. An analysis of some of the arbitral case law of the Court of Arbitration of the International Chamber of Commerce (ICC) dealing with contract law clearly evidences that the UNIDROIT Principles have crept into the sources of the law,<sup>15</sup> always assuming – with Hans Kelsen – that contracts are a source of law on a par with the law itself.

16. Over and beyond these considerations, it is fair to raise the question of whether it was appropriate to have chosen the UNIDROIT Principles as the main source of inspiration for the new uniform contract law in Africa. It must

<sup>13</sup> Cf. the communications presented by Kalongo MBIKAYI, “La confirmation des principes de bonne foi et de loyauté dans l’avant-projet d’Acte uniforme OHADA sur le droit des contrats”; Sibidi Emmanuel DARANKOUM, “La protection du contrat dans l’avant-projet d’Acte uniforme OHADA sur le droit des contrats: conclusion, exécution et remèdes en cas d’inexécution”; Christine CHAPPUIS, “Le renoncement à la cause et à la “consideration” dans l’avant-projet d’Acte uniforme OHADA sur le droit des contrats”; Etienne MONTERO, “L’avant-projet d’acte uniforme OHADA sur le droit des contrats: L’adéquation aux contrats électroniques”; Jacqueline LOHOUES OBLE, “L’autonomie des parties: le caractère supplétif des dispositions de l’avant-projet d’Acte uniforme l’OHADA sur le droit des contrats”; SOSSA, *supra* note 8; Félix ONANA ETOUNDI, “Formalisme et preuve des obligations contractuelles dans l’avant-projet d’Acte uniforme OHADA sur le droit des contrats”, reproduced in this volume.

<sup>14</sup> Cf. CASHIN RITAINE, *supra* note 3.

<sup>15</sup> Cf. the communication presented by Emmanuel JOLIVET, “L’harmonisation du droit OHADA des contrats : l’influence des Principes d’UNIDROIT en matière de pratique contractuelle et d’arbitrage”, reproduced in this volume.

be said that some of the many reactions to this question have been less than positive.

17. This is not the place to discuss some of the more isolated criticisms, some of which may well turn out to be well-founded but which were not discussed in any detail by the Colloquium. Some specific points were made, such as the lack of definition of the subject/purpose (*objet* in French law). No-one will need reminding, however, that the legislator is not supposed to take the place of legal doctrine. The legislator's task is to prescribe rules of conduct, not to supply legal definitions. That is the proper domain of legal scholarship and the case law. The drafters of the French Civil Code were perfectly aware of this when they omitted to define the subject. It was left to legal scholars to specify what was meant by *objet* in the Civil Code, whether it referred to the contract, to obligations or to individual performance. The draft was also criticised for being incomplete. One communication pointed out, however, that the draft numbered 244 articles, far more than the provisions on obligations in the substantive law of Mali and Senegal.<sup>16</sup>

18. The appropriateness of a law may be judged according to various criteria. In other words, different points of view may come into play in judging whether or not the choices made by a law are well-advised or not.

19. One of the criteria which was often quoted at this Colloquium was the objective of universality, designed to transcend legal differences and legal nationalism. In the latest edition of OHADA's "Green Code", Professor DAVID raised this question in connection with the possibility of OHADA opening up to States that do not belong to the French legal tradition.<sup>17</sup> A case in point would be the anglophone States belonging to the common law family. Several communications stressed that the UNIDROIT Principles and the preliminary draft Uniform Act drawn from them properly derive neither from the civil law nor from the common law. One communication hailed the draft as a way of overcoming the legal boundaries handed down from colonial days and of thus forming the basis for a degree of universality.<sup>18</sup> In this sense, Africa might become a model for other integration projects. What started out as an African regional experiment might thus become a model of universality. However, the

<sup>16</sup> Cf. SOSSA, *supra* note 8.

<sup>17</sup> Jacques DAVID, *Avant Propos, OHADA, Traité et actes uniformes commentés et annotés*, Juriscope (2008), 2<sup>ème</sup> éd., 11.

<sup>18</sup> Cf. DARANKOUM, *supra* note 13; also, the communication presented by S.K. DATE-BAH, "The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer", reproduced in this volume.

quest for universality is unlikely to be plain sailing. Indeed, such a quest involves jettisoning certain concepts, customs, mind-sets. In law, as in many other areas, anything new, anything less familiar, anything somewhat foreign inspires fear.

20. From the point of view of civil law, another communication on French contract law and the UNIDROIT Principles was reassuring,<sup>19</sup> the latter being there portrayed as being in no way at odds with the former. In some areas, such as the formation of the contract, the Principles may be viewed as constituting a considerable degree of codification of case law practice. This would help to clarify the French law on contract formation. Of course, there are many points on which the UNIDROIT Principles diverge from French “legal” law (provisions on hardship, emphasis on curing non-performance in preference to early termination of the contract). The use of the words “legal” law is deliberate, since it must be borne in mind that French contract law, in that its provisions are generally supplemental to the general law of obligations, already incorporates this type of solution. From a civil law point of view, therefore, the Principles represent evolution rather than a break, still less a revolution. After all, it would make little sense to hinder positive progress in contract law merely because one was disinclined – often more on sentimental than rational grounds – to let go certain concepts – the much-debated notion of *cause* springing to mind.

21. Another criterion by which to judge the appropriateness of a law is to see how practical it is, how simple, how easy to use. It has been rightly pointed out that if we compare the French Civil Code and the UNIDROIT Principles, we find that the latter are much more than mere “principles”. The UNIDROIT Principles are drafted in easy-to-read language without unnecessary jargon, and go into considerable detail. The French civil law of obligations can often only be understood by referring to the vast body of case law. I would challenge anyone in this learned gathering to describe the French law on contract formation simply by reference to the actual provisions of the Civil Code. That is not to say, of course, that the UNIDROIT Principles need no interpretation. The comments accompanying the Principles attest to this.

22. Yet another criterion by which to judge the law’s appropriateness is the ability of new legislation to accommodate new practices. One of the communications presented at the Colloquium looked at the UNIDROIT Principles from the point of view of its treatment of new methods of contract formation using electronic technology. There can be no doubt that the dematerialisation of contracts in the wake of technological progress has

<sup>19</sup> Cf. JACQUET, *supra* note 6.

implications both for the form of the contract and in terms of evidence. The results of this analysis show that the general rules of contract law contained in the Principles do not hinder the development of electronic commerce. Some provisions may have to be re-phrased, for example those determining when notice becomes effective.<sup>20</sup>

23. The UNIDROIT Principles are relatively young. They lack the experience that comes with years of integration in a national legal system. In this sense, they are a challenge to the future. We can draw no definitive conclusions, being launched upon a process the outcome of which is as yet to be determined, and assuming that the preliminary draft Uniform Act is adopted, we shall have to see what will be its medium and long term implications. I can only conclude on a question mark. But what is a question mark but the outward sign of a secret expectation, a secret hope?



<sup>20</sup> Cf. MONTERO, *supra* note 13.