# OHADA's Proposed Uniform Act on Contract Law

## Formal Law for the Informal Sector

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A great deal of effort and a great deal of erudition have gone into the preparation of the OHADA Uniform Act on Contract Law (preliminary draft) [hereinafter draft Uniform Act on Contract Law].[1] An important but simple observation is that by far the greater part of the economies in OHADA's current and prospective member-countries is located in the informal sector. This reality inevitably will have an impact on the implementation of the proposed uniform act currently under discussion. To be sure, the uniform act, if adopted, will affect agreements in the formal sector. The focus here, however, is the informal sector, for which the draft uniform act is already remarkably suited, given its broad and clear fundamental principles, and its respect for local norms.

The comments below nevertheless suggest a few instances where the draft could be tweaked to enhance its predictability in the informal sector, and thus its ability to encourage capital- and market-expanding promises of future performance.

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1 The participants at this conference need no introduction to OHADA. The following sources may be helpful to Anglophones seeking basic information about this uniform system of business laws, which includes both statutes ("uniform acts") and institutions, and is effective in 16 West and Central African countries (with a 17th having signed and ratified the constitutive treaty). Books: C.M. Dickerson (Ed.), *Unified Business Laws for Africa: Common Law Perspectives on OHADA,* 2009; Mator *et al.*, *Business Law in Africa: OHADA and the Harmonization Process*, 2nd edn, 2007; M. Baba Idris (Ed.), *Harmonization of Business Law in Africa: The Law, Issues, Problems & Prospects,* 2007. Websites, all of which have English-language content, including unofficial translations of the principal OHADA documents: <www.ohada.com>, which also contains scholarly articles; and <www.juriscope.org>, which provides English-language commentary for three of the uniform acts. Also useful is OHADA's official website, <www.ohada.org>; however, as of this writing (8 November 2011), it describes its English-language portion as still under construction.

OHADA's legislature, the Council of Ministers, adopted at its meeting (13-15 December 2010) revisions to two of its eight existing statutes, namely the Uniform Act on the General Commercial Law ("Acte Uniforme relatif au Droit Commercial Général", originally adopted 17 April 1997, 1 JO OHADA 1 (1 October 1997), available at <www.ohada.com>, hereinafter sometimes "UAGCL") and the Uniform Act on Secured Interests (the official French title is "Acte Uniforme portant Organisation des Sûretés," originally adopted 17 April 1997, 3 JO OHADA 1 (1 October 1997), available at <www.ohada.com>), and adopted a new Uniform Act on Cooperatives. The acronym "OHADA" stands for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", sometimes translated as "Organization for the Harmonization in Africa of Business Laws".

## A. The Realities of OHADA's Territory

### *I. Informal Sector*

While there are numerous definitions of the informal sector, one frequently used is: the part of the economy not documented for purposes of the official count of GDP.[2] Important is the point that the transactions within this sector are essential: they provide basic sustenance and more. They are in the main legitimate activities; often the actors even satisfy their tax obligations. For example, given the current tax regime in Cameroon and the methods of collection deployed by the different levels of government, the actors who are deepest in the informal sector, especially if engaged in the smallest transactions within organized markets, are in fact likely to be paying all relevant taxes. What sets those actors apart is the very high level of "débrouillardise" – of doing whatever is necessary to feed themselves and their extended families. It is a supremely practical attitude that sets the tone for law's potential role deep in the informal sector.

The informal sector is very significant in this part of the world not only to those who owe their survival to it, but also because of its size. A few figures merit emphasis. While the United Nations Development Programme's estimate for the informal sector's presence in the world-wide economy is 30% of GDP,[3] the percentage is much higher for Sub-Saharan Africa – and was so even before the current financial crisis. In 2002, an economist estimated for the World Bank that the informal sector occupied between 40% and 60% of the local economies,[4] and the International Labour Organization reported that, depending on the country, the informal sector employed between 43% and 93% of all non-agricultural workers.[5] This last finding suggests that the informal sector is just as important to urbanizing economies as it is to the rural areas.

Of course, by pretending that there is an identifiable informal sector I am inevitably simplifying reality. The boundaries of this sector are notoriously flexible and even porous. Many people operate in both the formal and informal sectors simultaneously, often even at different points in the same transaction. Thus, the refer-

2 F. Schneider, 'Size and Measurement of the Informal Economy in 110 Countries Around the World', July 2002, available at <http://rru.worldbank.org/Documents/PapersLinks/informal_economy.pdf>.

3 'U.N. Development Programme & Communication on Legal Empowerment of the Poor', Vol. I: Report of the Commission on Legal Empowerment of the Poor 15 (2008) (cited as: '*UNDP Report v.1*'), available at <www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf>.

4 *See e.g.* Schneider, *supra* note 2, p. 5.

5 International Labour Organisation (ILO), 'Women and Men in the Informal Economy: A Statistical Picture' 19 (2002), available at <www.wiego.org/publications/women%20and%20men%20in%20the%20informal%20economy.pdf>. Up to 72% of nonagricultural employment in sub-Saharan Africa is in the informal economy. *See also* International Labour Conference, Geneva, 3 June 2002, Report of the Committee on the Informal Economy, 19 June 2002, ILC90-PR25-292-En.Doc, 25/16–25/19, available at <www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf> (listing various asserted characteristics of the informal economy and defining the informal economy).

ence to the informal sector as some kind of monolithic reality concededly is hyperbole to facilitate discussion.

*II. The Example of Cameroon*

Pragmatism both permits and limits the style of business done within the informal sector. A pilot study in various markets in Douala and in the Anglophone region of Cameroon, conducted during the fall of 2010 with Dr. Yenshu Emmanuel Vubo of the University of Buea, indicates that transactions between retail sellers and consumers are most often for cash, as are, within the study, all the transactions between the retail sellers and their suppliers.[6] Given that the transactions are for cash on the barrelhead, there is no future aspect to the relationship except for those rare occasions when the retail seller condescends to extend credit, and except for whatever legally enforceable expectations the buyer may have as to quality – the latter expectations being typically protected by inspection.[7]

This limited inclusion of future obligations is both a cause and a reflection of the cash-based nature of the deals. In other words, both suppliers and retail sellers within the informal sector are reluctant to extend credit even to broaden their markets. In addition to the negative impact on sales, the inability of even established retail sellers to have trade payables means that these market participants are not using their commercial relationships with suppliers to leverage capital. The failure to use buy-sell relationships to expand markets and capital is a reality different from the typical business experience in the global North, and is a direct consequence of parties' lack of confidence in contractual promises of future performance.

The question is, to what extent is the draft Uniform Act on Contract Law likely to increase informal-sector confidence in such promises.

## B. Draft Uniform Act on Contract Law, and the Informal Sector

Our fundamental interest in contracts, then, is due to their enhancement of predictability – their conversion of unquantifiable uncertainty into quantifiable risk.[8] Business people are used to dealing with risk. After having taken it into account, they can determine whether to accept the other party's promise into the future, instead of systematically rejecting all such potentially capital-expanding and market-enhancing promises.

6 *See* C.M. Dickerson, 'Promises of Future Performance and Informal-Sector Transfers of Personal Property: The Example of Anglophone Cameroon', *Acta Juridica* (forthcoming 2011) (cited as: '*Future Performance*').

7 *Id.*

8 For a discussion relevant to development *see generally* M. Trebilcock & J. Leng, 'The Role of Formal Contract Law and Enforcement in Economic Development', 92 *Va. L. Rev*. 2006, p. 1517.

While formal law is designed to apply to the formal sector, if simple and norm-conforming, and if communicated effectively, it can also increase predictability in the informal sector. We will examine these assertions and consider whether the draft Uniform Act on Contract Law satisfies these criteria: is it simple and norm-conforming, and can it be communicated effectively?

*I. Pragmatism of the Proposed Uniform Act As Formal Law*

In order to support future promises in the informal sector, the core concept is simplicity. In his explanatory notes, the rapporteur for the draft OHADA Uniform Act on Contract Law has explicitly referred to the realities in which OHADA operates.[9] He catalogues (1) deficiencies in the region's overall judicial systems, which he characterizes as unreliable; (2) the overwhelming complexity of juridical regimes that include traditional notions as well as those from the global North; and (3) obstacles, not of a legal nature, to implementation of Northern law, including the host countries' relatively high illiteracy rates.

If a formal law is to reassure a contracting party that the other will perform future promises, the threshold requirements are that the parties know when the contract law applies, when and whether a contract has been formed, and what are the exact terms of any binding obligation. More succinctly, at issue are: scope, formation and interpretation.

*II. Scope, Including Avoidance of Conflict*

A formal law that seeks to enhance predictability within the informal sector must be intelligible to its audience. That is why simplicity has to be a fundamental principle. Overlap with other laws of equal authority, especially if the terms are not identical, is to be avoided as it contributes to complexity and to unpredictability of outcome. On the other hand, all promises that a non-lawyer businessperson would expect to be binding should be so. Thus, as we shall see, the registration requirement of the Uniform Act on General Commercial Law, or at least its potential weakening of unregistered market-actors' contractual rights, needs to

9 M. Fontaine, 'OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft paras. 13-18 (September 2004)' (cited as: *Explanation*), available at <www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf.>. The French version is available at <www.unidriot.org/french/legalcooperation/OHADA%20note-f.pdf>.

be entirely removed.[10] A contractual promise should be binding, without traps for the unwary. Similarly, most gratuitous contracts should default to enforceable.

*1. Registration as Impediment*

The rapporteur has carefully set out some of the areas of conflict between the proposed general Uniform Act on Contract Law and existing OHADA uniform acts – of which OHADA then had eight in effect and now has nine.[11] He focuses notably on the Uniform Act on General Commercial Law to the extent that it relates to sales contracts between *commerçants* (commercial economic operators).[12]

The proposed Uniform Act on Contract Law will seek to operate effectively whatever the Northern legal tradition of the venue, thus removing at least one area of potential conflict that currently exists in, for example, the Anglophone regions of Cameroon between the common law of contracts and the Uniform Act on General Commercial Law.[13] In the draft uniform act's broadest application – which is the rapporteur's preferred outcome[14] – the new contract law would apply to any

10 The UAGCL, as it was revised pursuant to the decision of OHADA's supranational legislature, the Council of Ministers on December 2010, adds an entirely new subcategory of *commerçant,* namely the *entreprenant* who is an individual and, being on a smaller scale, is subjected to a simplified registration requirement. Nevertheless, a filing requirement persists. Revised Art. 30 UAGCL defines the *entreprenant* as having, for two consecutive years, sales at or below the levels specified for other purposes in Art. 13 Uniform Act on Accounting ("Acte Uniforme portant Organisation et Harmonisation des Comptabilités des Entreprises"), adopted 22 February 2000, 10 JO OHADA 1 (20 November 2000), available at <www.ohada.com>). These annual sales levels are 30 million Francs CFA for businesses selling goods, 20 million Francs CFA for artisans, 10 million Francs CFA for service businesses. On 8 November 2011, 10 million Francs CFA will buy roughly EUR 15,000 or USD 21,000. While revised Art. 30(6) UAGCL excuses the *entreprenant* from the full registration requirement imposed on a *commerçant,* the former still has to file a declaration with the official registry pursuant to the revised act's Arts. 62-65.

11 *See generally* <www.ohada.com>, <www.juriscope.org> and (only in French) <www.ohada.org> for the texts of the nine uniform acts existing as of 8 November 2011; the most recent addition is the Uniform Act on Coorperatives. *See also supra* note 1.

12 Fontaine, *Explanation*, *supra* note 9, Part E, pp. 26-31 (referring especially to Arts. 202-205 UAGCL, collected under the title "Champ d'application", that is, scope; in the 2010 revisions to the UAGCL, Arts. 234-236 describe the "Champ d'application"); *see also* Fontaine, *Explanation, supra* note 9, paras. 63-64, pp. 28 and 29 (concerning commercial leases and agency relationships, respectively). All these issues are now extended to the new category of *entrepenant*. *See also supra* note 10. Fontaine also describes other areas of concern relating to the existing uniform acts, including in connection with the Uniform Acts on Secured Interests, on Simplified Recovery Procedures and Measures of Execution, and on Collective Proceedings (unofficial translations). *See* Fontaine, *Explanation, supra* note 9, paras. 65-67, pp. 29 and 30, respectively.

13 Fontaine, *Explanation, supra* note 9, para. 6, p. 5, para. 9, p. 7 (describing UNIDROIT Principles preparation by representatives of all major legal traditions, and the OHADA Council of Ministers' selection of these as a principal source for OHADA, as the organization seeks to remain open to new members). For the same reason, albeit to a lesser degree, the United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980, also inspired the drafting of the proposed Uniform Act on Contract Law. *See e.g.* Fontaine, *Explanation*, *supra* note 9, para. 34, p. 16 (first of two).

14 Fontaine, *Explanation*, *supra* note 9, paras. 24-26, pp. 12-14.

exchange whether or not it involves a commercial economic operator of the type defined in the Uniform Act on General Commercial Law.[15] Consequently, the proposed Uniform Act on Contract Law will control not only contracts currently formed under and governed by the General Commercial Law,[16] but also contracts with and between consumers, including family members. Additionally within the new contract law's scope as recommended by the rapporteur will be all other contracts considered to be non-commercial,[17] for example those between a practicing lawyer and a client.[18] We all know countless lawyers in OHADA's member-states who definitely have a business on the side. Simplifying the legal terrain by having one law apply regardless of the players clearly is more straightforward and better adapted to the informal sector than is the current complex of formal contract laws.

Unfortunately, the Uniform Act on Contract Law as proposed may not reach far enough. Although the new uniform act will be a general contract law and, being later in time, will supersede the General Commercial Law where they both apply, the latter will continue to fill gaps left by the former. The General Commercial Law's registration requirements, therefore, will continue. To emphasize the importance of this issue, note that in our informal-sector pilot study, all the retail sellers were commercial economic actors ostensibly required to register,[19] and almost all had failed to register.

The General Commercial Law requires commercial economic operators to register,[20] states that its provisions on contracts apply to commercial economic operators,[21] and stipulates that persons who should have but did not register cannot benefit from the "qualité de commerçant".[22] In turn, this means, arguably, that commercial economic operators who fail to file will potentially lose rights under a

15 Available at <www.ohada.com> and <www.ohada.org>.

16 Revised Arts. 234-236 UAGCL; formerly, Arts. 202-205 UAGCL.

17 Fontaine, *Explanation*, *supra* note 9, paras. 21-25, pp. 11-14.

18 Under both the former and the revised Art. 9 UAGCL, being a lawyer is explicitly considered incompatible with commercial activity.

19 Former Art. 25, now replaced by revised Art. 44 UAGCL for the *commerçant*, and chiefly revised Art. 30 UAGCL for the *entreprenant*. *See also supra* note 10, confirming that, even under the revised UAGCL, the smallest economic operators under discussion here will remain subject to some form of mandatory filings namely, the declaration as *entreprenant*. For its part and more generally, revised Art. 237 UAGCL, expressly envisages the existence of separate law covering all contracts ("droit commun des contrats") so long as the latter is not inconsistent with the UAGCL's commercial-sale provisions. As to the use of the phrase "droit commun des contrats": the English-language version of the *Explanation* translates it as law that does "apply to contracts in general." *See* Fontaine, *Explanation, supra* note 9, para. 21, p. 11.

20 Revised Arts. 30 & 44 UAGCL, relating to the *entreprenant* and *commerçant*, respectively, replacing former Art. 25 UAGCL.

21 Revised Art. 234 UAGCL, replacing former Art. 202 UAGCL.

22 With respect to commerçants: Arts. 44 and 60 UAGCL, for these purposes formerly Art. 39 UAGCL. *See also supra* note 10 concerning the UAGCL's 2010 revisions; pursuant to revised Art. 65, entreprenants who have failed to file the declaration mandated by revised Art. 62 lose access to specialized rules of evidence, statutes of limitation and leases. A fuller discussion of the revised UAGCL's effect on smaller economic operators is beyond the scope of this article.

contract that they could enter into only because of their technical status as commercial economic operators.[23] This is not only perverse but also a significant attack on simplicity; it underscores why the Uniform Act on Contract Law's scope needs to be broad enough to cover all aspects of contracts to which the informal sector's typical, unregistered commercial economic operators may become parties.

This broad scope is important especially when the contracting party is an informal-sector businessperson who fails to file through ignorance. Because intention is costly to demonstrate, the simple solution is to eliminate all consequences affecting contractual rights and obligations, whatever the reason for failure to file, with the result that the definition of commercial economic operator will no longer potentially limit contracting parties' rights to benefit from their contracts if they should have filed but did not do so.[24]

As a general matter, even outside the interface with the General Commercial Law concerning registration of commercial economic operators, the proposed Uniform Act on Contract Law's broad scope is perfectly normal, and even desirable, from the perspective of a legal professional trained in the United States. Our common law of contracts controls all transactions engaging an exchange by which the parties at least objectively intended to be bound. To be sure, statutory law is increasing. For example, sales of goods in the United States are now under the Uniform Commercial Code, but it is not truly uniform, not strictly commercial and, most important here, not a code. Even for sales of goods, the common law continues to be relevant as it fills gaps in the statute. The common law of contracts thus is the backbone of law potentially applicable to all exchanges. Along with its more civilian concepts, this draft Uniform Act on Contract Law thus does have a reach familiar to legal professionals of the common-law tradition, especially if it retains its broad scope.

23 *But see* R. Masamba, 'L'Applicabilité du droit des affaires au secteur informel (1 February 2008)', available at <www.congolegal.cd/spip.php?page=imprimer&id_article=173> (person not registered as a commercial economic operator, but who acts as such has all the burdens but none of the benefits of the status). Masamba's statement is broad, but he specifically refers to bankruptcy and to commercial leases, and adds that members of professions are not home free as they may also be subject to disciplinary action. *See id.* Presumably, anyone acting as a commercial economic operator is also obligated to respect the formal accounting rules, as another example, *See* revised Art. 13 UAGCL describing the accounting requirements for *commerçants* and revised Arts. 30 & 31 UAGCL doing so for *entreprenants*, both replacing former Art 13 UAGCL). These are serious issues as they give rise to systematic civil disobedience, and require revision of the UAGCL's definition of "commercial economic operator". A.P. Santos & J.Y. Toé, *OHADA Droit Commercial Général*, 2002, pp. 59-60 (discussing the definition of "l'acte de commerce"). In my view, given the realities on the OHADA territory, a lawyer should be allowed to be full registered commercial economic operator, and a person otherwise behaving as a commercial economic operator, but having revenues below a specified amount should be excluded from the definition entirely.

24 Replacing former Art. 39 UAGCL: revised Arts. 60 & 65 UAGCL for *commerçants* and *entreprenants*, respectively; replacing former Arts. 202-205 UAGCL: revised Arts. 234-236 UAGCL.

*2. Gratuitous Contracts*

In the area of gratuitous contracts, the rapporteur again chose to override a conflict of Western traditions by broadening the scope. This time, however, he ignored the common-law tradition, which generally does not enforce gratuitous promises, and selected instead the continental tradition.[25] With characteristic courtesy to the two major formal legal systems at issue, he assures us that local norms can prevail. Accordingly, the rapporteur has chosen to include the following language as the Uniform Act on Contract Law's Article 2/1. He asserts that although it permits the enforcement of gratuitous promises, it does not oblige a jurisdiction that, historically, has not enforced such promises to modify its legal norms:[26]

> A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.[27]

Frankly, but for the rapporteur's comments, if I were to assess de novo the express language of the provision, I would have concluded that the text does mandate the enforcement of gratuitous promises, so long as the parties have objectively expressed that intent. To be sure, what is necessary for an expression of intent to be sufficient may still be subject to local interpretation, and even that much flexibility is incompatible with the principle of uniformity. In any event, there are plenty of cases where the target of a gratuitous offer has expressed acceptance by word or deed that would appear sufficient to the purpose here, even without any reliance.[28] And despite the contrary orthodoxy, any nod toward enforcing gratuitous promises does appear consistent with Northern norms at least, given the common-law judges' extraordinary efforts to fashion bases on

25 If there has been reliance, common law does in some cases, enforce gratuitous promises. *See* § 90 Restatement (Second) of Contracts; *see also* D.G. Epstein, M. Arbuckle & K. Flanagan, 'Contract Law's Two "P.E.'s": Promissory Estoppel and the Parol Evidence Rule', 62 *Baylor L. Rev*. 2010, pp. 397 and 402-407. Under national law of an OHADA member state, a gratuitous promise that matures into a gratuitous contract (assuming "cause" and acceptance) may have to be in notarial form to be enforceable. That would be the case under French law, which has been an inspiration for many of those member states, if the gratuitous contract is, for example, a "donation". *See e.g.* Art. 931 and 932 French Civil Code, available in its original version at <www.legifrance.gouv.fr/affichCode.do;jsessionid=606EE2CC6109F14232CA52144DD2B4AB.tpdjo10v_1?idSectionTA=LEGISCTA000006150545&cidTexte=LEGITEXT000006070721&dateTexte=20110214>. On the other hand, the notarial obligation will not apply to many promises considered gratuitous by a jurist of Anglo-Saxon tradition, because either they do not ripen into gratuitous contracts under French law, or at least do not involve "donations". *See also* B. Nicholas, *The French Law of Contract*, 1992, pp. 38-45.

26 Fontaine, *Explanation*, *supra* note 9, para. 46, p. 21 and 22.

27 Art. 2(1) Draft Uniform Act on Contract Law. While this formation-language is discussed below in Part 2.a B.1 on formation, it also implicitly and inevitably contributes to defining the uniform act's scope.

28 This would have avoided the tortured reasoning of iconic common-law contracts cases such as *Hamer v. Sidway*, 124 N.Y. 538 (1891) (concerning an uncle's promise to a nephew).

which to enforce those promises,[29] and perhaps also with local norms of the OHADA territory.

For purposes of the informal sector, it does seem desirable that the Uniform Act on Contract Law adopt the broader scope that includes gratuitous contracts. Absent proof to the contrary, this broader scope appears closer to likely expectations: promises generally are serious. If we can start with the premise that gratuitous contracts are enforceable, applicable legal norms will determine whether the parties intended to form a contract.[30] The inclusion of local norms at the level of intent-interpretation does seem advisable as it will make the statute simpler to apply which, as suggested below,[31] will facilitate compliance. Further, introducing these local norms only to interpret a party's intention to be bound is more conducive to uniform application across the entire territory – an important OHADA goal – than is using local norms to determine first whether, in the particular location, a gratuitous promise is ever to be enforceable. Thus, the scope of the Uniform Act on Contract Law should expressly include gratuitous contracts, and local norms should determine only whether the promisor intended to be bound. This provides a balance that is appropriate to the informal sector as it favors predictability while respecting actual expectations.

a. Formation

Consistent with its expansive view of its own scope, and more generally with its focus on simplicity and clarity, the Uniform Act on Contract Law seeks to respect as enforceable all those promises that the parties expect to be enforceable. As the proposed law's treatment of the firm (irrevocable) offer demonstrates, this focus on norm-based outcome has a profound impact on formation. Better alignment of obligations and norms increases the likelihood of compliance and, thus, the statute can be the basis of market- and capital-enhancing predictability.

The rapporteur makes a notable effort to acknowledge, but without adopting, both the common-law and the civil-law formation-related legal traditions, as is implicit in his espousal of the Unidroit Principles of International Commercial Contracts (2004) [hereinafter Unidroit *Principles*] as a model.[32] For purposes of the informal sector, the virtue of this effort is the text's resultant simplicity. Legal professionals may be able to sort out whether enforceability of contract is deter-

29 *See* Epstein *et al.*, *supra* note 25 (discussing the use of reliance and the aggressive application of § 90 Restatement (First) of Contracts (1932)).

30 *See* discussion *infra* Part B.II.2.b (discussing interpretation).

31 *See* discussion *infra* Part B.III (concerning enforcement).

32 *See e.g.* Fontaine, *Explanation*, *supra* note 9, para. 7, p. 6, para. 9, p. 7. The UNIDROIT Principles describe themselves as principles of *international* commercial law, *see* UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2004, Rome, April 2004, available at <www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>. The OHADA draft Uniform Act on Contract Law is international as well, given OHADA's cross-border uniformity within its territory. Since informal-sector actors frequently cross borders themselves – often well beyond the OHADA territory, in fact – the relevant context for this discussion is not purely domestic.

mined by common-law "consideration", the civilian "cause", or neither, but these technical terms are meaningless to a layperson. After explaining with care the different original purposes for consideration and cause, and after demonstrating how these issues are handled elsewhere in the draft uniform act,[33] the rapporteur very pragmatically goes for the third option and selects instead the simplicity of the offer-acceptance model for formation. The draft uniform act's Article 2/1 is quoted above in the discussion of scope,[34] and, since it refers to how a contract can be "concluded", also applies to formation.

The firm (irrevocable) offer functions as a subset of contract, and the Uniform Act on Contract Law's treatment of its formation is focused on predictability. First, the firm offer illustrates handsomely the advantages of the offer-acceptance model. Second, it provides a helpful example of a simple, direct form striving to conform to existing norms. As the rapporteur acknowledges, the consideration-less formulation reverses the common-law doctrine that offers normally are revocable,[35] meaning that no contract has been formed. The rapporteur then refers to the Unidroit *Principles,* Article 2.1.4[36] which, while establishing irrevocability of offers as a default, remains solicitous of legal professionals of the Anglo-Saxon tradition.[37] The rapporteur even carefully parses the difficulties that we common-law lawyers have had in deciding whether particular language is sufficient to communicate the intent that an offer be irrevocable. This is an issue of formation as such an offer evidences the existence of a mini-contract prohibiting the offeror's withdrawal for the relevant period. The rapporteur concludes that the formal law's preferences will dominate: local legal norms will ultimately determine whether particular language or behavior will be sufficient to express the intent of irrevocability.[38]

Given the crabbed attitude to formation that we in the United States have adopted from our English colleagues, the openness on the part of the draft Uniform Act on Contract Law to local legal norms may create exactly the unpredictability that uniformity strives to avoid. The common law makes it extraordinarily difficult to find intent to make a binding offer – to the point that the parties' demonstrable expectations are frustrated. The consequence of allowing a local, formal legal norm to control substantive law will be unfortunate where, as with the rules gov-

33 *See* Fontaine, *Explanation, supra* note 9, paras. 44-50, pp. 20-23.

34 *See supra* Part B.II.1 (Scope).

35 As the rapporteur notes, Common Law typical offers are unenforceable because they typically lack consideration, a concept excised from the draft Uniform Act on Contract Law. The rapporteur also discusses gratuitous promises in the same section of his *Explanations;* here gratuitous promises are instead considered in Part B.II.1, *supra,* on scope. Fontaine, *Explanation*, *supra* note 9, para. 46, p. 21 and 22.

36 *See* Fontaine, *Explanation*, *supra* note 9, para. 46, p. 21 and 22, referring to Art. 2.1.4 UNIDROIT Principles.

37 Consider, for example, that irrevocability is clearly an exception. *See* Art. 2.1.4 UNIDROIT Principles, Comment 2.

38 Fontaine, *Explanation*, *supra* note 9, para. 46, p. 21 and 22; Art. 2.1.4 UNIDROIT Principles, Comment 2.

erning formation of a firm offer, the inherited common-law and civilian formal-law rules are so different. The consequence of allowing local, formal law to trump the uniform act in such a situation is not simple, not conducive to predictability, and not appropriate to the informal sector.

Consider, as an example, the following sentence. If you received it, would you not think that it reflects the intent to form a binding, firm offer?

> P.S.-This offer to be left over until Friday, 9 o'clock, a.m. *J.D.* [the offeror's initials](the twelfth), 12th June, 1874. (Signed) J. Dodds

The old English case, *Dickinson v. Dodds,*[39] gets it wrong. The offeror, Dodds, to all appearances had believed that his statement contained an offer and, indeed, that it probably was irrevocable.[40] He had tried to hide from Dickinson until after Friday at 9:00, in order to prevent the latter from accepting the offer before that time – at which point Dodds could safely revoke the still unaccepted offer. Although Dickinson may have had some doubts, he, similarly, acted as though he had the power to accept the offer, so long as the acceptance occurred before that same Friday at 9:00.

The case held, contrary to the parties' apparent expectations, that the offer was revocable because Dodds had received no consideration for it, and that Dodds had in fact revoked.[41] Basically, the court held that this language meant only that Dodds' offer would lapse at 9:00 on Friday unless Dodds revoked it sooner, not that Dodds was required to keep the offer open until then.

Despite being a common-law lawyer, or perhaps precisely because I am one and know the *Dickinson v. Dodds* case, I am delighted that the draft Uniform Act on Contract Law facilitates the formation of irrevocable offers,[42] although I would be happier with a full default to binding status. That would be yet more simple, straightforward, and to all appearances in basic conformity with typical expectations, as Dodds and Dickinson themselves demonstrated by their behavior. It would thus further enhance predictability.

39 2 Ch. D. 463 (1876).

40 The eminent contracts scholar from the United States, E.A. Farnsworth, agrees. E.A. Farnsworth, 'Mutuality of Obligation in Contract Law', 3 *U. Dayton L. Rev.* 1987, p. 271.

41 *See generally* J.E. Murray, Jr., 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods', *8 J.L. & Com.* 1988, p. 11 and 24 (commenting on the severity with which courts in the United States will analyze language to determine whether the intent was lapse language or a firm contract). I hope and expect that interpretation of the draft Uniform Act on Contract Law would not only find the offer to be irrevocable, but would also eschew the doctrine of indirect revocation adopted by *Dickinson v. Dodds* – another trap for the unwary.

42 Art. 2/4(2) Draft Uniform Act on Contract Law (expressly referring to Art. 2.1.4(2) UNIDROIT Principles, whose Comment 2, and Illustrations 2-4, in turn, assume the enforceability of a firm offer).

The Uniform Act on Contract Law also introduces flexibility that will be especially desirable if the new law does default to favoring formation: the quasi-assumption of an offer's irrevocability, for example, is rebuttable by the offeror's expression of intent to the contrary. Because too much flexibility is destabilizing, flexibility should be limited to issues of interpretation, and not be allowed to erode the predictability of scope or of formation. Thus, the default position should include gratuitous contracts within the proposed uniform act's scope, should presume the irrevocability of offers, and should introduce local norms only for the purpose of interpreting the parties' intent.

b. Interpretation

Assume, then, a contract that is within the uniform act's scope and that has been properly formed; if it is to be predictable, it will have to be interpreted as the parties intended. In order for formal law to protect the promises effectively, the contract's contents thus have to be clear.

In *Dickinson v. Dodds,* for example, even if the Uniform Act on Contract Law were adopted, and even if it were understood to include gratuitous contracts and to be relatively willing to find offer/acceptance, unpredictability would still lurk at the back door. What are the local norms with respect to the intent language? Did the parties intend their particular language to create a firm offer, or merely a revocable offer that lapses?

Interpretation conceptually includes any effort to determine parties' expectations at the time of contract formation. Parsing a contract's text is part of the exercise, of course, but interpretation also includes the broad spectrum of escape hatches: after the parties have seemingly entered into a valid contract, they can still be released by demonstrating fraud or threat, or gross disparity of power or knowledge, or impossibility or mistake, or illegality.[43] Even at common law, these exceptions are very narrowly drawn to avoid having them swallow the underlying contractual principle that expectations as of the moment of agreement form the contract. To broaden the applicability of the exceptions would threaten the predictability of contracts and, consequently, their ability to reduce future risk.

The exceptions exist at all, however, because these safety valves are essential if contract law is to conform to basic societal norms, which in turn is the only context in which parties would be willing to enter into contracts containing future promises. The exceptions for fraud, threat and gross disparity are, in effect, detailed, statutorily mandated interpretations of parties' intent. Just like more classic interpretation, these escape hatches determine whether the parties had the intent to create a binding contractual obligation. That is, they protect the parties' expectations as of contract formation. Impossibility and mistake address the parties' expectations as of the moment of the making of the contract, again, at the moment when they were consenting to be bound. Only the exception of illegality is primarily for the protection of the larger society, and at least the broad

43 Ch. 3, para. 1 Draft Uniform Act on Contract Law ("Grounds of Invalidity").

lines of this exception probably are sufficiently anticipated by commercial parties to avoid being a trap for the unwary.

Consequently, simplicity of formation and considerable generality of terms are essential. An encompassing understanding of scope, a reliance on offer and acceptance to effect formation, and a conception of interpretation based on contextualized intent: all these appear entirely consistent with the arrangements we saw in the markets during our pilot study.

*III. The Draft Uniform Act on Contract Law and Extra-Legal Constraints*

Even if a contract is simple, clear and predictable, we do not know how likely it is to be fully performed.[44] Thus, enforcement is a topic that is – justifiably – brought up frequently for the purpose of exposing lacunae in developing-country judicial systems.[45] If a contract is likely to be enforced, of course parties will be more willing to exchange promises of future performance, which would include the extension of credit. In turn, that would, for example, allow suppliers to accept trade payables and, consequently, would allow retail sellers to leverage their capital by that means.

The issue of performance is raised here not to trigger proposals of specific judicial reforms. Instead, my goal is to emphasize the questions to be asked, assuming both the reality of an inadequate legal culture, and the importance of social influence in the context of contracts. The probability of performance may indeed be enhanced by the effective enforcement of promises, but formal enforcement is only one method of encouraging performance.

The preliminary study already adverted to revealed that the retail sellers who remained unpaid rarely took any action against their deadbeat debtors. Even on those occasions when they did take steps to recover the amount owed, they did not go to court but, instead, went to the police or its paramilitary analogue.[46] Since there are no available records of these police actions, it is hard to assess the predictability of outcomes when the police adjudicate. Even in the unlikely event, moreover, that a transaction occurring in the informal sector ends up in a formal

44 Enforcement arguably is a form of substituted performance, burdened with its own attendant costs, including transaction costs.

45 Consider, by way of example, the World Bank's Doing Business Report on OHADA, 'The International Bank for Reconstruction and Development & The World Bank, Doing Business in 2010: Reforming through Difficult Times', 2009, pp. 55-57, available at <www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB10-FullReport.pdf> (focusing on enforcement of contracts). We in the developed world would do well to cast a gimlet eye on our own judicial regimes. *See, e.g.* D.C. Clarke, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments', 10 *Colum. J. Asian L.* 1996, p. 1 and 34 (referring to a low rate of enforcement in a developed country allegedly blessed with an effective legal system: in New Jersey in 1987, for non-small-claims, non-landlord civil cases, only 25% of the writs of execution were fully satisfied and another 7% were partially satisfied).

46 *See* Dickerson, *Future Performance, supra* note 6 (discussing disadvantages of using the police to decide disputes, including the lack of review, and the potentially corrosive nature of using police to handle non-penal matters).

court bent on rigorously applying the law, it is unclear whether the formal law will in fact recognize local norms and thus be able to reflect the intentions and expectations of the parties. There is a trade-off between the apparent extreme flexibility of the police, and the predictability of a rigid, formal legal system; the rapporteur acknowledges the balancing act, more fully discussed in Part B.I, above.[47] Perhaps local norms, which reduce predictability when they are unsystematically applied, can increase it if the relevant community's norm-based constraints are clear and robust.

Consider, for example, that when applying formal law in the uncertain environment of the informal sector, the impact of social influence is crucial. In the United States, an important part of the literature on contracts includes a discussion of the extra-legal constraints on actors, especially in the commercial realm. Seminal scholarship includes Stewart Macaulay's ground-breaking work in 1963 demonstrating that businesspeople in an iterative relationship will behave to a standard higher than the minimum required by contract law,[48] Ian Macneil's reconfiguration of contracts as relational,[49] and Lisa Bernstein's 1992 study of diamond merchants in New York.[50] From these studies we learn that informal, extra-legal social influence plays an important role in shaping the relationships that will predictably be respected. We also learn that this role remains significant even in an environment overwhelmingly controlled by formal law.

If extra-legal constraints are important in formal law's domain, they have at least as great an opportunity to contribute to predictability where formal law's implementation is weak. The *Njangi*, or tontine, is a classic example of a structure dependent on extra-legal constraints built on long-term, iterative relationships. However, the particular seller-retailers we encountered in the markets tended to report very little in the way of iterative business, either with their clients or with their suppliers. This necessarily limits the effectiveness of these constraints and is compatible with the behavior we observed, namely cash-on-the-barrelhead instead of promises of future payment. Nevertheless, formal law, even when ineffectively applied (as in the informal sector), may help create an environment that supports the expansion of markets and the leveraging of capital even where social

47 Art. 1/5 Draft Uniform Act on Contract Law (referencing expressly "the need to promote uniformity in its (the uniform act's) application", and referring to Art. 1.6 UNIDROIT Principles to the same effect).

48 S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', 28 *Am. Soc. Rev.* 1963, p. 55. The principle applies outside contract law as well, of course. *See, e.g.* R. Ellickson, 'Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County', 38 *Stan. L. Rev*. 1986, p. 623 (a seminal work discussing rights in real property).

49 *See* I.R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law', 72 *NW. U.L. Rev*. 1978, p. 854; I.R. Macneil, 'The Many Futures of Contracts', 47 *S. Cal. L. Rev*. 1974, p. 691. For an accessible discussion, *see e.g.* C.J. Goetz & R.E. Scott, 'Principles of Relational Contracts', 67 *Va. L. Rev*. 1981, p. 1089.

50 L. Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', 11 *J. Legal Stud*. 1992, p. 115 (discussing the closed, iterative world of diamond merchants).

influence is not strong, for example, among strangers. It is all about broad concepts balanced against detailed application.

OHADA law, like any other, will have the best chance of having parties respect its minimum requirements if it conforms to existing norms, especially if it cannot predictably enlist either actual legal enforcement,[51] or a close iterative relationship supportive of social influence. As the rapporteur noted, there is currently no overarching, unifying theory of contract in the informal sector.[52] Confirming that point as to law more generally, customary courts in Cameroon have limited geographic jurisdiction precisely because of recognized differences in norms in different regions; thus, only at the level of themes can there be any sense of uniformity. A law prepared to cover multiple countries must focus first on broad, simple concepts. The Uniform Act on Contract Law does so to a significant degree, although as discussed in Part B.I, above, further streamlining could adapt it yet better to the informal sector. Whatever the fundamental concepts, these must be communicated effectively, however.

Effective communication of the new text is all the more possible given the hybridity of workers as they often do operate in both the formal and the informal sectors.[53] Further, while the rapporteur is commendably forthright to highlight issues such as illiteracy,[54] the informal sector also includes very literate persons. We know that within the informal sector are persons who have their A-levels, and many who have started and even completed university. In our pilot study within markets, we found university graduates selling produce in open spaces, and selling second-hand goods from open stands.

Informal conversations with these businesspeople in Cameroon revealed more generally a wide range of knowledge: a very few did possess a broad and deep understanding of applicable formal laws, but none, whether Francophone or Anglophone, discussed applicable contract law except in the context of debt. Not one made reference, for example, to supply contracts. Not one made reference to two different regimes of contract law, namely OHADA's General Commercial Law for the relationship between the retail seller and the supplier, and, at least in the Anglophone regions, the common law of contracts modified by consumer statutes for the relationship between the retail seller and the consumer. Thus a threshold issue relating to implementation of formal contract law in the informal sector is: communication. Workers within the informal sector have to know that formal contract law exists and which version is applicable to them before they can use it.

51 I have elsewhere suggested that, at least in Cameroon and with appropriate enhancements, customary courts could be tasked with providing enforcement of informal-sector contracts. *See* Dickerson, *Future Performance, supra* note 6.

52 Fontaine, *Explanation*, supra note 9, paras. 13-16, p. 9 and 10. *See also* J.A. Penda Matipé, 'The History of the Harmonization of Laws in Africa', *in* C. Moore Dickerson (Ed.), *supra* note 1, p. 7 (describing the unsuccessful French and British attempts to codify customary law in pre-independence Cameroon).

53 *See supra* Part A.I.

54 Fontaine, *Explanation*, *supra* note 9, para. 17, p. 10.

The vignettes suggest that it would be helpful to increase the likelihood of effective social influence. The one-off vertical relationships revealed by the pilot study that Dr. Yenshu and I conducted during the fall of 2010 were not, for the most part, compatible with efforts to disseminate information let alone develop social influence. This in turn suggests that a self-help role for contract law would be to facilitate and support the formation of networks. A clear and norm–respecting contract law can itself be a virtual venue for discussion and thus ultimately for network creation. If it can be effectively publicized, the draft uniform act's language relating to good faith,[55] both in performance and, to a more limited degree, in negotiation,[56] reflects a relatively high moral tone consistent with the outcomes of virtuous iterative relationships such as the *Njangi*. Provisions invalidating contracts based on fraud, duress and the like have the same effect.[57] That is why communicating the Uniform Act on Contract Law's terms across the porous boundary that separates the formal and informal sectors is so important even before the formal law is fully implemented.

This use of contract law to bolster cooperation and networks may seem utopian. There is evidence, however, that OHADA uniform acts already are playing that role within the regional legal profession, and have garnered significant interest from business people as well.[58] An effort at communication in the informal sector is useful in its own right, and it also prepares the soil for the future transplant. Meantime, other OHADA uniform acts, notably those relating to Economic Inter-

55 Art. 1/6 Draft Uniform Act on Contract Law.

56 Art. 2/15 Draft Uniform Act on Contract Law. The availability of the good faith standard during negotiations appears quite different from the common law in the United States, except that this Art. 2/15 refers expressly to Art. 2.1.15 UNIDROIT Principles, whose Comment 2 asserts that full rights are available in the context of negotiation "[o]nly if the parties expressly agreed on a duty to negotiate in good faith". Art. 2.1.15 UNIDROIT Principles, Comment 2. *See also* § 205 Restatement (Second) of Contracts (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). Its Comment c expressly notes that bad faith in negotiation may nevertheless give rise to a cause of action, but in tort or restitution, not contract. § 205 Restatement (Second) of Contracts, Comment c. The general understanding is that, in the United States, there is no contract-law obligation of good faith in negotiations. *See, e.g.* C. F. Richmond, 'Casenote, Promissory Estoppel Only a Shield, Not a Sword?: Analysis of DeWitt v. Fleming, 828 N.E.2d 756 (Ill. App. 5th 2005)', *31 S. Ill. U. L. J.* 2007, p. 735 and 756.

57 Art. 1/6 & Chpt. 3, para. 1 Draft Uniform Act on Contract Law (good faith, and "Grounds of Invalidity", respectively).

58 C.M. Dickerson, 'Corporate Social Responsibility: Lessons from the South on Law and Business Norms', *in* D. Gold (Ed.), *Law and Economics: Toward Social Justice*, 2009, p. 131 and 145 (describing workshops organized in Anglophone Cameroon in late 2005).

est Groups and cooperatives, would act in concert with any new contract law to facilitate more directly various styles of cooperation.[59]

All this activity is only an initial move toward predictability, but even a discussion of the proposed Uniform Act on Contract Law, without considering formal enforcement procedures, is a good first step.

## C. Conclusion

When I first heard that OHADA's institutions were focusing on creating a new, general uniform act on contracts, I was deeply skeptical. Looking from the outside, my instinct was that it would be preferable for the OHADA member-states to take a deep, collective breath, and to try to consolidate their gains derived from the eight (now nine) existing uniform acts. On the other hand, a draft law of contracts offers a chance to review organizational goals. That is good. Further, I have come to appreciate that the time-lines to thorough transplantation are so long that it is important to have new laws and revisions constantly in the pipeline.

Specifically with respect to the informal sector, the proposed draft Uniform Act on Contract Law is an opportunity to communicate about law as a stabilizing influence, and the text describes broad pro-predictability concepts that are both practical and aspirational. Some tweaking could nevertheless be helpful as more is better for the big concepts: keep the scope open, and adopt the default that commercial promises are binding. Thus, both gratuitous contracts and the irrevocability of offers would presumptively be enforceable.

Local norms enhance the likelihood of compliance, but they reduce uniformity and, thus, predictability. They should be retained where they matter most in contract, namely, in the interpretation of intent, but cabined elsewhere. Once adopted (if adopted), the uniform act will take increasingly firm root; its application will become more predictable as cases begin to filter up, first through the formal sector, of course. Over time, as the transplant takes hold, the Common Court of Justice and Arbitration will be the ultimate protector of the statute's uniformity, and of its capital- and market-enhancing simplicity and predictability. Despite all the determination and thought that have already gone into this draft, the hard work begins when the uniform act becomes effective. But that is as it should be.

59 Formal OHADA law already does support at least some of these arrangements by facilitating the formation of Economic Interest Groups (EIGs). *See* paras. 869-885 Uniform Act on Commercial Companies & Economic Interest Groups (concerning EIGs) (unofficial translation). *See also* C.M. Dickerson, 'Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law', 59 *Am. J. Comp. L.* 2011, p. 179 and 211 (discussing the use of EIGs to create collectives). Further, now that the Council of Ministers has adopted the Uniform Act on Cooperatives, OHADA has yet another formal statute that offers a pro-network form.