

Modern contract law: The key to economic development in West Africa?

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Abstract

It has been said that inter-African trade is the key to economic development in that part of the world. The organization for the harmonization of business law in Africa (OHADA) has already enacted 10 "Unified Acts" (UA's) that attempt to facilitate commercial transactions across national borders, however many believe they have yet to address the needs of informal businesses. The term "informal" can be defined using the International Labour Organisation's definition as "un-registered businesses". In 2004 OHADA approved the development of the UA on contract law as a method to modernize outdated national laws and join the ranks of the 10 other UAs. *The impact of the proposed UA will be the alignment of conflicting norms between the informal sector and national legislation.* However, its impact is still unknown as it has yet to be adopted. It is for that reason that a comparison of hypothetical results and obstacles could elucidate the effectiveness of the proposed UA in the informal sector. After interpreting African customary norms, the proposed UA and analysis of doctrine, it is evident that the UA has potential, however it is far from being ready for implementation. Further research must be conducted in order to qualify which norms should be incorporated, which norms to expel, and how to properly communicate and implement the UA to ensure its long-term success.

References:

Darankoum 2008, DB - OHADA 2013, Deschamps 2013, Dickerson 2011, Dickerson 2011b, Fafchamps 2004, Fontaine 2004, Fontaine 2008, Fontaine 2013, Mancuso 2011, Preliminary draft of UA on contracts

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1: Introduction

- OHADA stands for the organization for the harmonization of business law in Africa.
- The informal sector (unregistered businesses) accounts for 38% of Sub-Saharan Africa's GDP and is an important sector historically overlooked by OHADA.
- The proposed UA has yet to be adopted 11 years after its initial draft.

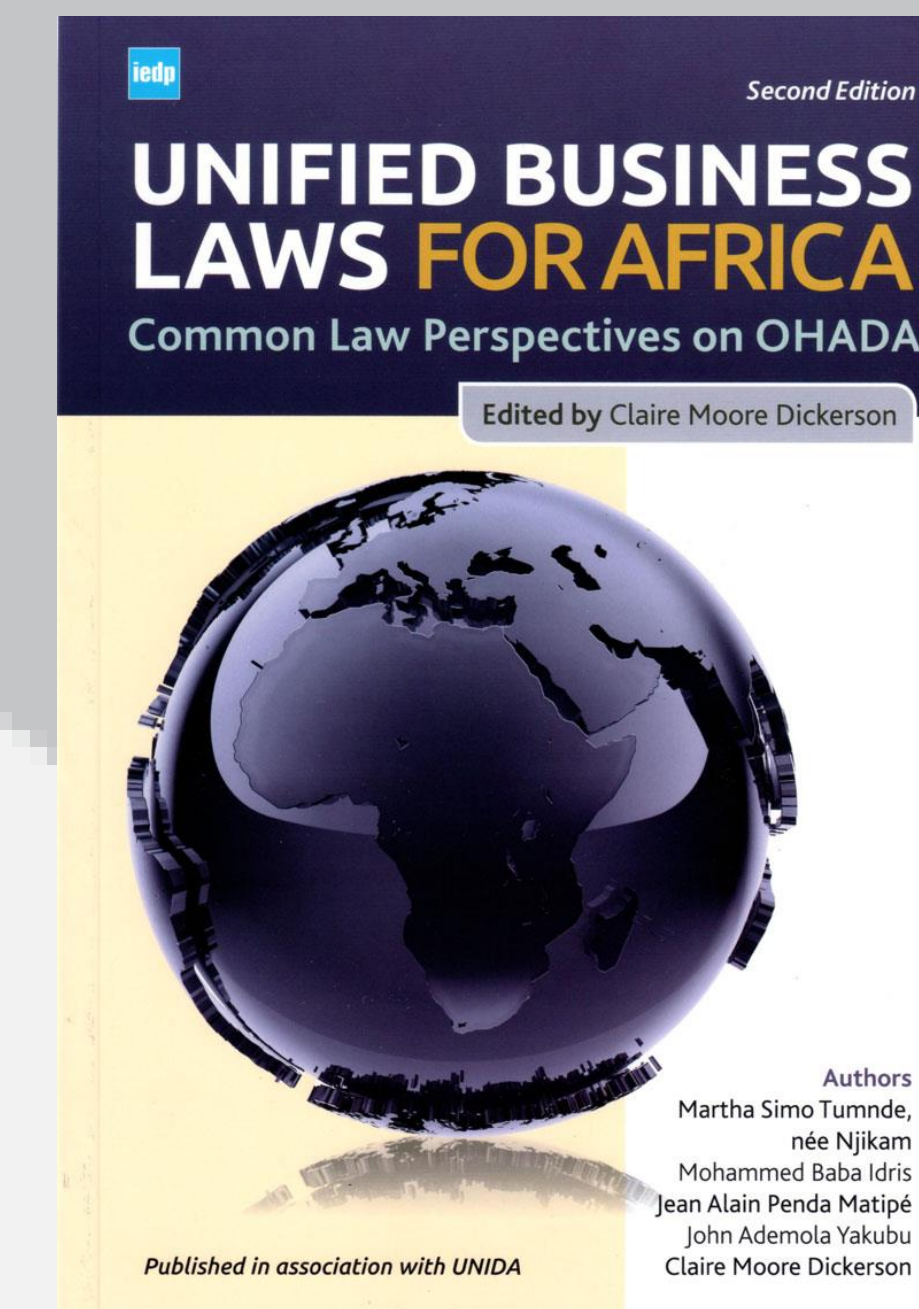
"... If simple, norm-conforming and if communicated effectively, formal law can increase predictability in the informal sector"

-Claire Dickerson



2: Methodology

- OHADA legislation and explanatory notes
- Legal doctrine
- Social sciences doctrine



3: Results

Potential Impact

Normative content closely aligned with informal practices

- Contract formed when offer meets acceptance
- "Favor contractus" concept: allows valid contract despite missing elements
- Formalization of fraud, threat and gross disparity: protection of the weaker party, i.e. the disadvantaged
- Solutions for failure to execute: Agreed payment for non-performance
- Formalization of principle of "good faith" (trust-based contracting relationships)
- No requirement for contract form
- Proof of contract via witnesses

Capacity of norms to encourage survival of contracts

- Emphasis on intention of parties to contract could encourage survival of contracts despite missing elements
- Evidentiary rules tailored to illiterate African majority

Obstacles

Implementation of norms

- Ineffective information diffusion
- Language barrier across French, Portuguese, Spanish and English-speaking countries in OHADA
- General lack of legal culture: Tendency of informal businesses to turn to police or threats of violence/coercion instead of legal institutions
- Prevalent illiteracy
- High court/arbitration costs and limited access to justice

Lack of adaptation of norms to needs of informal businesses

- "Favor contractus" may not be simple enough for informal sector, creating unpredictability
- Different concept of time in Africa; no statute of limitations and no interest period
- The UA provides for too much flexibility which is destabilizing and unpredictable – countering the goal of the UA