Historical Development of the Law of Contracts in the DRC: A critical analysis with specific reference to the law of sale

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Abstract

The legal history of the Democratic Republic of the Congo (DRC) is closely linked to the Belgian colonization of the country. At the arrival of Belgian colonizers in the DRC, the society was ruled by unwritten customary laws, differing from one region to another. Belgian authorities then substituted those customary laws with the civil law they inherited from France during the Napoleonic era in order to meet one of the requirements of the 1885 Berlin Conference, providing adequate legislation for the Congo. They also enacted some acts dealing with commercial matters, such as business requirements, which were later referred to as the code of commerce. That inherited law continued to govern civil and commercial sales contracts alike for a long period after independence until quite recently. Owing to a lack of renewal, Congolese business law rules were becoming out-dated and were no longer appropriate for modern trade desires and urgently required modernization. That led to the adoption of OHADA law. The Uniform Act on General Commercial Law provisions constitute one of the bases for the Congolese commercial sales law, in addition to the non-conflicting provisions of the Congolese Code of Obligations that were not displaced. Implementing new laws

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creates sometimes transition problems. This article traces and evaluates critically the above developments. It considers some of the gaps met in Congolese sales law and the way they were filled, before demonstrating how OHADA law rules cohabit with former Congolese sales law rules not revoked.
Key-words: Congolese sales law, legal history, civilian legal system, gap-filling, comparative law.

Résumé

L'évolution historique du droit Congolais est intimement liée à l'arrivée du pouvoir colonial belge au Congo. A l'arrivée des Belges au Congo, la société était régie par une multitude des coutumes, différentes d'une zone à une autre. Ainsi, en vue de se conformer à une des exigences des Etats signataires de l'Acte de Berlin de 1885, celle d'instaurer de façon urgente au Congo une législation suffisante, la Belgique a vite remplacé la plupart des coutumes congolaises par des règles du Code civil français, qu'elle avait elle-même hérité pendant l'époque napoléonienne. Elle a également édicté un certain nombre des textes régissant des matières commerciales, comme celles définissant les exigences commerciales, qui ont plus tard été coordonnés sous forme de Code de commerce. Le droit tel qu'hérité de la colonisation a, jusqu'il n'y a pas longtemps, continué à régir à la fois les ventes civiles et celles commerciales. Avec l'évolution du temps, ces règles lacunaires et archaïques étaient devenues incapables de répondre aux exigences contemporaines du monde des affaires. D'où, le gouvernement avait décidé d'adhérer à l'OHADA dans le but d'assainir le climat des affaires en RDC. Ce sont les dispositions de l'Acte Uniforme portant Droit commercial général qui régissent actuellement au Congo les ventes commerciales, en plus des dispositions du Code des Obligations non contraires au Droit

OHADA. L'adoption d'un nouveau droit pose de fois un problème de transition. Ainsi, le présent article retrace et évalue de manière critique l'évolution historique ci-haut. Il dégage certaines des lacunes du droit congolais et essaie d'apprécier la manière dont ces lacunes étaient comblées. Il démontre enfin comment les nouvelles dispositions de droit OHADA coexistent avec les anciennes règles congolaises restées en vigueur.

Mots-clés: Droit congolais de la vente, histoire du Droit, système juridique, comblement des lacunes, droit comparé.

Introduction

The historical development of the Congolese written contracts law, in general, and its law of sales, in particular, can be traced back to Belgian law which originated from the French civil code and brought to the Democratic Republic of the Congo ("DRC") during the colonial period. Many years after independence, the DRC has continued to apply legislation inherited from the colonial authority,[1] although that law had long been adapted in its mother country. Because of such a lack of modernization, Congolese contracts law rules became out-dated, insufficient, and irrelevant[2]with respect to modern international sales contract requirements, and they needed to be improved.

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[1] The great preoccupations of all Congolese governments, since independence, have been those of organising the state. See JH. CRABB, *The Legal System of Congo-Kinshasa*, Charlottesville, The Michie Company Law Publishers, 1970 at 87; KEBA MBAYE, 'Le Destin du Code Civil en Afrique', in D. FAIRGRIEVE, *The Influence of the French Civil Code on the Common Law and Beyond*, London, BICL, 2007, at 442 454.

[2] L. VANDERSTRAETE, 'Business Law of the Republic Democratic of the Congo: The Impact of the Democratic Republic of the Congo's Future Accession to the OHADA', LLM Paper Ghent University 2006-2007, available at: http://www.ohada.com/doctrine/ohadata/D-07-26.html (last accessed 2-4-2020); R. MASAMBA MAKELA, 'L'Adhésion de la RDC à l'OHADA', in *Le Droit et la*

The first step in the reform process was accomplished on 12 September 2012 with the entry into force of the law under the Organisation for the Harmonisation of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires – "OHADA") treaty in the DRC. Since then, the basic principles provided by the OHADA Uniform Act on General Commercial Law, "the OHADA Commercial Act", have constituted one of the bases of the Congolese law of sales and its business law in particular.

However, as the integration of OHADA law in the DRC is recent, there is a need to assess critically the impact it has had on the historical Congolese sales law. So, the first problem of this article is to disclose some of the Congolese sales law gaps before OHADA law ratification, and value the way they were filled. The second one consists of assessing by what means OHADA law rules deals with remaining Congolese sales law provisions not displaced by the OHADA law.

This article does not intend to provide a comprehensive study of the historical development of the Congolese legal system. It rather attempts to explain how the fact that both civil and commercial sales contracts were regulated by the same rules, in a virtually un-amended form, bred many lacunas that needed removal. That's why the importance of the adoption of OHADA law is also assessed in this historical account.

This paper contains six Sections. Section one provides a background to the Congolese contracts law where the French civil code is discussed as the Congolese contracts law forefather. Section two traces the manner in which the Napoleonic Civil Code was received in Belgium before being transplanted into the

Transition en République Démocratique du Congo, Revue de la Faculté de Droit, No. 4, 2004, at 347.

Congolese legal system. Section three discusses the way contracts law as inherited from Belgium stayed alive in the DRC despite the independence, while Section four deals with the salient characteristics of the Congolese contracts law compared to French and Belgian laws, its weaknesses and gap-fillings. Section five focuses on the interaction between OHADA law provisions and early Congolese non-repealed sales law rules. The concluding section puts emphasis on the problem raised by the introduction of new laws in any legal system.

1. Background to the Congolese Contracts Law: the French Civil Code, an Ancestor for Congolese Law

Comprehensive investigations into the development of the Congolese contracts law, in general, and particularly its sales law, are largely wanting.[3] That is unfortunate because one has to search in a number of different places to reconstitute the salient elements of Congolese legal history. What is evident, however, is that, before the coming of the colonial power in the DRC, the country was largely ruled by customary rules. This situation was similarly common to other African countries; none had written known laws.[4] When the earlier Belgian settlers conquered the country, they soon substituted local customary rules considered at that time as underdeveloped, unsuitable and contrary to the needs of public policy.[5] They enforced the Napoleonic Civil Code, enacted in 1804 and which Belgium inherited from France.

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[3] MUKADI BONYI, Preface to KALONGO MBIKAYI, *Droit Civil*, T1 *Les Obligations*, Kinshasa, CRDJ, 2009, at 7.

[4] E. LAMY, 'Le problème d'intégration du Droit Congolais: son origine, son évolution, son avenir', in *RJC*, 1969, Special No., at135 139.

[5] Ibid.

Historically, the French Civil Code is a product of a long evolution which began during the twelfth century with the movement towards the reduction into the writing of substantive customary law. Such a process had largely been completed by the end of the sixteenth century.[6] Reforms to this legal system were basically introduced by royal ordinances during the seventeenth and eighteenth centuries.

Although there had been different attempts to construct a comprehensive code, the monarchy had been unable to provide France with a uniform code of law. The French Revolution of 1789 played a decisive part in overcoming the previous obstacles in the legal domain. When Napoleon Bonaparte came to power in 1799, he wanted the new order to be legitimised by the creation of a unified legal system. He, therefore, made it a priority to draw up the civil code which entered into force on 21 March 1804 as the *Code Civil des Français*. That code later became popularly known as the *Code Napoleon*[7] owing to Napoleon's active role in the drafting process and his involvement in the civil code implementation. The merit of the Civil Code consists of the unification of the civil law for all the territories comprising the French empire.[8]

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6 For a comprehensive discussion upon the history of French law, see among others, P. VIOLLET, *Histoire du Droit Civil Français,* 3rd ed, Paris, S V, 1966, at 1; C. SERUZIER, *Historical Summary of the French Codes with French and Foreign Bibliographical Annotations Concerning the General Principles of the Codes Followed by a Dissertation on Codification,* Littleton, Fred B. Rothman &Co, 1979, at 1; C. DADOMO & S.FARRAN, *The French Legal System*, 2nd, London, S & M , 1996, at 1 ; A. WEST et al, *The French Legal System,* 2nd ed, London, Butterworths, 1998, at 1.

7 The originally entitled *Code Civil des Français* was changed to *Code Napoleon* in 1807. See R. DAVID, *French Law - Its Structure, Sources, and Methodology*, Baton Rouge, LSUP, 1972, at 12; R. DAVID & H.P. De VRIES, *The French Legal System - An Introduction to Civil Law Systems,* New York, O.P., 1958, at 11 & 21.

8 G.A. BERMANN & E. PICARD (eds), *Introduction to French Law*, The Netherlands, KLI, 2008, at25.

The content and structure of the French civil code was divided into three main Books.[9] Book III, which is the most extensive and also the most important for our purposes, considers contracts as one of the ways to obtain property in addition to the law of successions, matrimonial property, gifts and wills, and the law of torts. Sales contracts, in particular, are regulated by Articles 1582 to 1701 of the Code. As a whole, provisions governing contracts are based on the Republic's principle of liberty, a principle according to which people were allowed the freedom to make any contract, subject only to the needs of public policy.[10] From this development, it is clear that one of the most notable events in legal history occurred when the French civil code came into force. At that time, the French civil code was considered to be "the first great modern codification of the law";[11] and it has become, two centuries later, "the oldest surviving post-Enlightenment code."[12] This reputation justified its influence beyond the French territory and its adoption as a model for civil law in other parts of Europe, especially in the Netherlands and Belgium.

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[9] The First Book deals with persons (articles 7 to 515); the Second Book regulates property and different types of ownership (articles 515 to 710); while the Third Book deals with different modes of acquiring property (articles 711 to 2281).

[10] See article 6 Civil code wherein, "Statutes relating to public policy and morals should not be derogated from by private agreements."

[11] B. SCHWARTZ (ed), *TheCode Napoleon and the Common-Law Wold*, New York, NYUP, 1956, at vii; K. ZWEIGERT & H. KOTZ, *An Introduction to Comparative Law*, 2nd ed, Oxford, Clarendon Press, 1992, at 90, who describe the French civil code as "the leading code of the Romanistic family."

[12] J. CARTWRIGHT et al.(eds), *Reforming the French Law of Obligations – Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription,* Oxford, Hart Publishing, 2009, at 4.

2. Reception of the napoleonic civil code in Belgium and its export to the Congo

Before examining the process of the introduction of the French Civil Code in the DRC, let us look at the means by which it was received and preserved in Belgium.

2.1 Preservation of the Napoleonic Civil Code in Belgium

Belgium became politically independent from the United Kingdom of the Netherlands in 1830.[13] Before its independence, Belgium was part of the territory known as the "Low Countries" that comprised the current Benelux countries.[14] Concerning its legal history, the country followed the pattern of the rest of Western Europe previous to the Napoleonic period. Its law was primarily customary at the beginning.[15] In the 1795 revolution, France annexed the Southern Netherlands, i.e. today's Belgium.[16] As a result of that event, all French revolutionary legislation was disseminated into the annexed departments as was the 1804 Napoleonic codification a short time after.[17]

After the French withdrawal from Belgium, the great powers of Europe convened in Vienna to redraw the map of the old continent. At the end of the conference, Belgium and the

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[13] H. BOCKEN & W. De BONDT (eds), *Introduction to Belgian Law*, The Hague, KLI, 2001, at 1.

[14] See R.C. Van CAENEGEM (ed), *Legal History: A European Perspective*, London, THP, 1991, at 148-163.

[15] A. WATSON, *The Evolution of Law*, Hopkins, THP, 1985, at 66.

[16] J.H. CRABB, *The Constitution of Belgium and the Belgian Civil Code*, Littleton, FBR & Co, 1982, at 11.

[17] See D. HEIRBAUT & M.E. STORME, "The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?", available at: https://lirias.kuleuven.be/bitstream/ 123456789/250351/1/heirbautstorme.pdf (last accessed 2-4-2020).

Netherlands were merged under William I into the United Kingdom of the Netherlands.[18] Immediately after his inauguration, King William I expressed the desire to have his own Dutch codes. Although a civil code was adopted in 1831, this code was not applicable in Belgium (Southern Netherlands).[19]

As for the Netherlands, Article 139 of the 1830 Belgian Constitution called for a speedy amendment to the existing French codifications. Unfortunately the country limited itself to a "pious wish" and Belgium is still waiting for its fulfilment more than two centuries later.[20] As Heirbaut and Storme have stated, the failure of Belgium to write a new civil code has been analysed as the most conspicuous feebleness of Belgian private law.[21] Regarding its contracts law, for instance, Belgian contracts law forms, as it is the case in France, a part of the third Book of the civil code governing the different ways of acquiring property. That law is ruled by Articles 1101 to 1369 which have remained almost unchanged although it has been adapted by case law.[22]

To sum up this, apart from some improvements made here and there, the commonalty of French and Belgian law is evident. Many Belgian contractual law provisions remain identical in text to their French civil code equivalents. They bear the same article

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[18] A. WIJFFELS, "Les Contrats dans le Code Civil de 1830. Contribution à l'Histoire de la Réception du Code Civil des Français en Belgique sous le Régime du Royaume des Pays-Bas Unis", in P. WERY (ed), *Le Droit des Obligations Contractuelles et Le Bicentenaire du Code Civil*, Brussels, La Charte, 2004, at 21 & 32.

[19] D. HEIRBAUT & M.E. STORME, *op. cit.* at 3; D. FAIRGRIEVE, *The Influence of the French Civil Code on the Common Law and Beyond*, London, BICL, 2007, at 158.

[20] P. LECOCQ, "Le Code Napoléon, Un Modèle Conservé", in D. FAIRGRIEVE, *op. cit.,* at 229; M. FONTAINE, "Le Code Civil Napoléon et les Obligations Contractuelles: De Centenaire en Centenaire et Perspectives", in ANDENAS et *al* (eds), *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems*, London, BICL, 2007, at 393; M. FONTAINE, "Les Obligations Contractuelles: 1804-1904-2004 et l'Avenir … ?", in P. WERY (ed), *op. cit.,* at 10.; H. BOCKEN & W. De BONDT (eds), *op. cit.,* at 222.

[21] D. HEIRBAUT & M.E. STORME, *op. cit.,* at 5.

[22] For illustrations, see ANDENAS et *allii* (eds), *op. cit.,* at 383

numbering as well. Furthermore, the Belgian civil code still has several legal clauses which duplicate provisions of the ancient French law. Belgium has remained even more faithful to the original Code Napoleon than has France.

From what has been said so far, it appears that it is the contract law Belgium acquired from France during the Napoleonic era that was brought to the DRC through colonization.

2.2 Export of the Napoleonic Civil Code in the DRC

A backdrop to Congolese civil law

When the Belgians conquered the Congo, they did not find a non-ruled country. The country was divided into different indigenous ethnic groups, each of them with its own rules, tribunals, and legal authorities.[23] At their arrival, Belgian colonisers found a diversity of unwritten customary laws in the Congo as existed in all other African countries.[24] Congolese official legal organisation started from as early as 1885 after the Berlin conference followed by the effective occupation of the Congolese territory by Belgian.

The Berlin Conference imposed on Leopold II some requirements amongst which the establishment, as soon as possible, of a very efficient judicial organisation and adequate legislation for the Congo.[25] As far as the judicial organisation was concerned, two Acts were immediately enacted: the Decree organising justice in criminal matters, on 7 January 1886; and the

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[23] A. SOHIER, *Traité Elémentaire de Droit Coutumier du Congo-Belge*, 2nd ed, Brussels, Fernand Larcier, 1954, at 9.

[24] See R.B. SEIDMAN, *Research in African Law and the Processes of Change*, Occasional Paper No. 3, Los Angeles, ASCUC, 1967, at 8.

[25] KALONGO MBIKAYI, *op. cit.*, at 14.

Ordinance regulating jurisdiction and procedure of civil and commercial courts, on 14 May 1886.[26]

With regard to contracts and commercial legislative issues, however, the King was uncertain about whether it would be better to transpose Belgian laws into the Congo or to adopt new regulations. In the French colonies, for instance, the Code Napoleon was made directly applicable. Without following such a French option, Leopold II decided to enact new laws adapted to the Congolese situation. To achieve this, he appointed a drafting civil code commission composed of experienced Belgian lawyers. That commission later came to be known as the "Superior Council".[27]

Meanwhile, the Congolese General Administrator enacted a "provisional civil code" by Ordinance of 14 May 1886.[28] As stipulated by its Preamble, the principles applicable to judicial decisions ordinance aimed "to determine, temporarily, rules to be followed in civil and commercial matters until special rules are promulgated."[29] Its first article specified that all matters not specifically regulated in Congolese law had to be resolved in

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[26] See Ordinance of 14 May 1886 approved by Decree of 12 November 1886, *BO*, 187, as revoked by the 1960 Procedure Civil Code, *MC*, 1960, at 961.

[27] See Decree of 16 April 1889, *BO*, 161, completed by the Decree of 21 March 1893, *BO*, 245.

[28] Principles Applicable to Judicial Decisions General Administrator of the Congo Ordinance of 14 May 1886; approved by Decree of 12 November 1886, *BO*, 188 & 189.

[29] Despite its apparent provisional character, this Ordinance continues to be intensively invoked by the Supreme Court. See CSJ, 8 July 2009, RC 2378, *BA* 2004-2009, TII, at 216; CSJ, 18 August 2006, RC 1965, *BA*, 2004-2009, TI, at 304; CSJ, 1 October 2005, RA 729, *BA*, 2004-2009, TI, at 141; CSJ, 15 September 2004, RP 2297, *BA*, 2004-2009, TI, at 46; CSJ, 24 May 2002, RC 2438, *BA*, 2000-2003, at 143; CSJ, 10 March 2001, RC 2003, *BA*, 2000-2003, at 69; CSJ, 29 December 1993, RC 014/TSR, *BA*, 1990-1999, at 97. Furthermore, this Supreme Court's view is supported by a number of scholars who believe that that regulation has never been revoked. See, among others, B. NKATA, *De la Violation des Principes Généraux du Droit, Moyen de Cassation*, Kinshasa, CEDI, 2004, at 45; M. MELI, "L'Ordonance de l'Administrateur Général du Congo du 14 mai 1886 est-elle encore d'application?", in *Revue Les Analyses Juridiques*, 2007-2008, at 13-14.

conformity with local customs, general principles of law, and equity.

Congolese contracts law drafting process

When it came to the drafting process of the Congolese civil code, and contracts law, it was obvious that the Superior Council had Belgian law as a principal source of inspiration. But, because the Council intended to produce an original law for the country, it refused to transpose Belgian law into the Congo. According to *Verstraete,* the Council created "experimental legislation".[30] Such bearing is consistent with Mancuso's argument according to which,

> (…) although African legal systems resemble the legal systems of their respective settler countries, it cannot be deduced that legal rules in African countries are merely copies of the laws of their mother countries. There are some important differences between them.[31]

In the Congo, particularly, the drafting commission took cognisance of the freshest civil codes of the time among which the Australian Torrens Act of 2 July 1858 and the Italian Civil Code[32]. It compared them with both the Belgian 1884 Laurent's draft and the works of the 1889 Belgian reform civil code commission. As a result of this, the commission produced a new law adapted to the needs of the Congo at that time; although it was mainly inspired by Belgian law and of course those newer codes.

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[30] See VERSTRAETE in A. SOHIER (ed), *Droit Civil du Congo-Belge*, Tome I, *Les Personnes et la Famille*, Brussels, Maison Ferdinand Larcier, 1954-1956, at 13.

[31] S. MANCUSO, "The Harmonization of Commercial Law in Africa: the project related to telecommunications in the OHADA harmonization process", in *Journal of International Trade Law and Policy*, 2006, 5(2), at 57.

[32] For illustrations and comment, see V. DEVAUX, "Les Lacunes de la Loi dans le Droit de l'Ancien Congo-Belge", *RJC,* 1966, (42), at 200.

Forced by the need to secure free trade in the Congo basin as required in Berlin, the Council gave priority to the Law of contracts. On 30 July 1888, it enacted the Book relating to Contracts Obligations,[33] prior to those of Persons and Property adopted in 1895[34] and 1912[35] respectively. The Congolese civil law, as in many other civil law countries, is divided into three areas, the Law of Persons, the Property Law, and the Law of Obligations, mostly the law of contracts. Compared to its parent countries, however, the three traditional Books of the Congolese civil code were enacted at different times, like in France and Belgium, but out of order for the DRC.

As far as the 1888 Code of Obligations is concerned, its field of application consisted in regulating "the validity, effects, extinction, and the proof of obligations in general."[36] With such a goal, that Code purports to lay down general principles applicable to all kinds of contracts. The Code also contains particular rules for certain special contracts such as the contract of sale. Sales contracts are particularly regulated by the third Title of that Code which covers Articles 263 to 364, an average of 102 sections. These provisions deal with both civil and commercial contracts[37], as verified in the following section.

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[33] Contracts or Agreements Obligations Decree of 30 July 1888, *BO*, at 109.

[34] Civil Code of Persons Decree of 4 May 1895, *BO*, at 138, as revoked by the Family Code, Act No. 87-010 of 1 August 1987, *Official Gazette*, Special No., as amended by Act No. 16/008 of 15 July 2016.

[35] Decree of 31 July 1912 relating to things and the different modifications of the property, *BO*, 1912, at 386, as revoked by the Land Act No. 73-021 of 21 July 1973 as amended by Act No. 80-008 of 18 July 1980, *Official Gazette*, Special No. 1980 reedited on 1 December 2004.

[36] General rules relating to contracts are provided for by the first Title relating to contracts or conventional obligations in general (articles 1 to 245); chapter VII of the third Title dealing with the transfer of claims (articles 352 to 358); and by the twelfth Title regulating prescriptions (articles 613 to 659).

[37] For similar case in other African countries before OHADA law enactment, see M. FONTAINE, "The Preliminary Draft OHADA Uniform Act on Contract Law: An overview", in *Uniform Law Review*, 2008, 1/2, at 210.

3. Congolese Contracts Law during and after the Colonial Period

This section discusses the constituent elements of the contracts and sales law before and after independence. It maintains that elements of the Napoleonic civil code are still evident in Congolese law, which have also determined the status of the DRC's membership in the civil law family.

3.1 Congolese Contracts Law through Belgian Settlement

When Belgium annexed the Congo in 1908,[38] a problem arose about the application of the legislation of the mother country in the colony. Fortunately, the Belgian Constitution had already rejected all attempts at legislative unification in its colonies through the first sentence of Article 1§4, which stated that colonies had to be governed by particular laws. This rule was scrupulously followed by the Congolese "Colonial Charter" of 18 October 1908[39], which Article 1 specified: "The Belgian Congo has a personality distinct from Belgium. It is ruled by particular laws."

By stating that the Belgian Congo was ruled by specific statutes, the Colonial Charter logically meant that laws concerning Belgium could not have any direct effect in the colony.[40] Therefore,

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[38] Following the annexation, the previous "Superior Council" was replaced by a new institution named as the "Colonial Council" assigned to examine decree proposals prepared by Colonies Departments, other than civil law statutes, particularly the law of contract, which were kept intact.

[39] *BO,* 1908, at 65.

[40] It was stated that: "Si, en cas d'interprétation douteuse des lois congolaises, on peut s'en rapporter au texte des lois belges sur la matière, *cette faculté ne peut ni ne doit s'étendre jusqu'à permettre l'application des lois belges au Congo*. » ("Although in the case of doubtful interpretation of Congolese regulations, one may consult the corresponding text of Belgian law; this cannot and must not be understood as meaning the extension of the application of Belgian statutes in the Congo.)" See Trib App Boma, 5 March 1912, *JDC,* 1913, at 240; CG App Boma, 30 April 1912, *JDC,* 1914-1919, at 1.

they had to be especially signed into law for the colony. In one decision, dated 3 June 1935, the Belgian Supreme Court evoked the fact that the Belgian Congo and Belgium were subject to distinct and independent rules, although those rules emanated from the same sovereignty, i.e. the King. It then ruled that metropolitan statutes should be invoked in the colony only if they are expressly required by a colonial regulation.[41]

Despite its legal independence, nevertheless, the Belgian Congo was subject to Belgian sovereignty. It could, therefore, not be considered as a foreign country with regard to Belgian law,[42] particularly "the fundamental norms of its civil (contracts, and sales) law."[43] In conformity with this principle, the Congo had to share the civil law legal system legacy with its metropolis.

One may consider that rules regulating sales contracts should be augmented by what is referred to as the "Code of Commerce", particularly the Commercial Engagements Evidence Decree of 2 August 1913.[44] This so-called 'code' has, however, never been formally enacted as a self-governing code; rather, it consists of loose-standing acts dealing with different commercial matters such as checks,[45] bankruptcy,[46] and commercial companies.[47]

These Acts were enacted at widely separated dates and were grouped under the Code of Commerce heading for convenience by editors of the Congolese codes[48]. Although the Commercial Engagements Evidence Decree lists the purchase of goods among

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41 Cass B, 3 June 1935, *RJCB*, 1935, at 201.

42 Cass B, 31 May 1928, *JC*, 1928, at 33, and *RJCB* 1928, at 257.

43 Civ Brux, 20 June 1957, *RJCB*, 1958, at 115.

44 See the Evidence of Merchants and Commercial Engagements Decree of 2 August 1913, *BO*, at 775.

45 Decree of 10 December 1951, *BO*, 1952, at 342.

46 Decree of 27 July 1934, *BO*, at 796.

47 Decree of the Sovereign King of 27 February 1887, *BO*, at 24.

48 See O. LOUWERS & C. KUCK, *Codes et Lois du Congo Belge*, Brussels, Maison Ferdinand Larcier, 1929, at1 ; P. PIRON & J. DEVOS, *Codes et Lois du Congo Belge, Tome I, Matières Civiles, Commerciales et Pénales*, 8th ed, Brussels, Maison Ferdinand Larcier, 1960, at 98.

commercial transactions, the commercial code does not effectively regulate important aspects of sales contracts. It seems therefore beyond the scope of this Article.

From the foresaid discussion, most, if not all, of the Congolese codes were inspired by Belgian law and the Napoleonic civil code itself. One commentator states in this regard that if the law of persons and the law of property may have moved some distance away from the Napoleonic code, such is not the case with the law of contracts and obligations,[49] and analogically the law of sales. This is summarised nicely by Crabb as follows:

> Although the law of Belgium as such never extended to the Congo, the form and techniques of the Congolese written law have naturally reflected those of the Belgian legal system. Since the Belgian system is largely based on the French legal system, the Congolese legal system in its written law component is aligned with the nations that follow the Napoleonic French legal tradition.[50]

Similarly, the fact that the Belgian Congo was ruled by particular laws did not necessarily entail the disappearance of different laws inherited from the colonial power at independence. Those statutes, including sales law, remained in force until the country became independent in 1960.

3.2 The Congolese Law of Contracts after Independence

It is usually accepted that a successor regime maintains in force the body of law it has inherited or changes it immediately. Regarding the law of contracts and sales, the Congolese Government adopted the first option following the days of independence. The Code of Obligations which is mainly dedicated to contracts rules including

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[49] JH. CRABB, *Legal system, op. cit.,* at 83.
[50] Ibid.

sales ones remained unchanged even after decolonisation. Of course, the reform of the law of obligations was envisaged from time to time. In 1976, for instance, Parliament proposed the creation of a commission that would consider the question of reform and the unification of Congolese law.[51] This commission had the task, among other things, of observing legal changes registered since independence, and verifying whether there was any need to revise some civil code provisions in order to adapt them to the economic context of the time.

As an answer to Parliament's suggestion, a reform commission was appointed by Act No. 76-017 of 15 June 1976.[52] The commission was led for a long period by Kalongo Mbikayi. That commission became later known as the Permanent Commission for the Reform of Congolese Law. Unfortunately, the results of its work have never been published; the Code of Obligations, as inherited from the Belgian authorities, and its sales contracts rules have remained in force up the end of 2012, particularly for commercial sales contracts. This situation leaves one asking whether that law has some of its own features.

4. Characteristics of the Congolese contracts law and gap-filling

This section summarises some of the Congolese contracts and sales law feebleness in comparison with metropolitan laws and considers the way those lacunas were crowded.

[51] See KALONGO MBIKAYI, *op. cit.,* at 16.
[52] Ibid.

4.1 Selected Congolese Contracts and Sales Law Gaps

As was noted earlier, from the beginning Belgium treated the Congo as a distinct jurisdictional entity. In legislating for this country, Belgium avoided reproducing massive parts of its laws, even if the Belgian law of contracts and sales naturally inspired the Congolese one. Notwithstanding that influence, the Congolese sales law was different from the law of the colonising country in certain aspects. One example of this is the difference between article 325 of the Code of Obligations and article 1648 of the Belgian Civil Code dealing with actions in defects. The first provision provides the buyer with a *60-day* period limit to start proceedings, whereas the second requires a ''brief delay'' only.[53] Further to the time limit itself, another difference relates to the meaning of the two provisions. According to Congolese case law, the Belgian law "brief delay" is supposed to run from the discovery of the defect, while under Congolese law it was presumed that the defect should be discovered within 60 days and the claim sued in the same timeframe.[54]

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[53] According to article 1648 Belgian Civil Code: "Any action resulting from redhibitory vices must be brought by the buyer within a *brief delay*, according to the nature of the defects and the usages of the place where the sale was made."

[54] Drawn from Elis, 7 April 1917, *RJCB,* 1917, at 28, confirmed in Elis, 21 March 1942, *RJCB,* 1942, at 124, whereby: "Si le législateur Congolais s'est inspiré de la législation métropolitaine, il y a lieu de noter qu'il existe des différences essentielles dans les textes et que l'article 325 du Code des Obligations implique une interprétation différente de celle de l'article 1648 du code civil belge livre III. En effet, le bref délai qu'assigne ce dernier article, suivant la nature des vices rédhibitoires et l'usage du lieu où la vente a été faite, ne court qu'à partir du moment où le vice rédhibitoire a été découvert; le texte congolais par contre, suppose que le vice doit être découvert dans les 60 jours et l'action intentée dans ce délai. " Translated as : "Even if Congolese law is inspired by Belgian legislation, there are some important differences in the texts. In this regard, article 325 Code of Obligations implies an interpretation different from that of article 1648 Belgian Civil Code. The brief delay provided for by article 1648, depending on the nature of the redhibitory defect and usages of the place where the contract was made, runs from the day of discovery of the defect, whereas the Congolese law provision assumes that the defect must be discovered in the 60 days

Of course, there is a close similarity between the Congolese law of contracts and Belgian law, and, accordingly, the French law of contracts too. Many articles are common to these three legal systems. Nevertheless, there are some articles which are identical in Belgian and French laws, but do not exist in Congolese law; other provisions are merely formulated differently. One illustration is article 1107 al. 2 of the Belgian and French civil codes which is differently worded compared with its Congolese equivalent, article 7 al. 2 Code of Obligations. Both provisions contain the principle that, in addition to general rules governing all kind of contracts, particular rules for classical contracts, such as the contract of sale, are established under the headings relating to each of them.[55]

With regard to commercial transactions, article 1107 al. 2 specifies, in contrast to article 7 of the Congolese Code of Obligations, that commercial contracts are governed by "particular rules established by laws relating to commerce". By so ruling, French and Belgian laws distinguish civil sales contracts from commercial ones. Under those legal systems, commercial sales contracts will be governed by additional or derogatory rules of the commercial code, unless the civil code provides to the contrary.

Concerning the Congolese legal system, some commentators have tried to refer commercial sales in Congo to the commercial

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and the claim sued within the same period.")See also KATUALA KABA KASHALA, *Code Civil Zaïrois Annoté,* Première partie, *Des Contrats ou des Obligations Conventionnelles*, Kinshasa, Batena Ntambua, 1995, at 189.

[55] According to article 1107 al. 1 French Civil Code, and article 7 al. 1 Code of Obligations , "Contracts, whether they have a specific designation or not, are subject to general rules, which are the subject matter of (the Civil Code or Code of Obligations Title III relating to contracts and conventional obligations in general)." Concerning the second paragraph, however, article 7 al.2 Code of Obligations appears to be incomplete compared with its equivalent article 1107 al. 2 French Civil Code. As stated by the latter provision, "Particular rules for certain contracts are laid down under the Titles relating to each of them; and 'the particular rules for commercial transactions are laid down by the legislation that relates to commerce'." article 7 al. 2 Code of Obligations lacks the last phrase determining the legal regime of commercial contracts.

code, mainly the 1913 Trade Evidence Decree[56]. It is obvious that the 1913 Decree counts sales of goods contracts among commercial transactions. That regulation, however, deals with merchant requirements and the proof of commercial transactions rather than by the conclusion of contract, the rights and the obligations of parties to a contract. Therefore, given that at that time there was no specific provisions related to commercial contracts, Masamba writes that "Congolese commercial contract law has to take refuge behind civil law."[57] More specifically, in the DRC, concepts such as those of "commercial sales contracts" were not regulated, except when borrowed from civil law provisions.

Article 1341 of the Belgian and French civil codes relating to oral evidence, likewise, has a different wording from the corresponding article 217 of the Code of Obligations.[58] Both provisions concede that legal acts of the value of more than a particular sum of money[59] legally determined must be made in writing, viz. by private writing or notary's stamped and signed document, except for commercial transactions. Compared with its equivalent parent civil codes' provisions, article 217 al. 2 of the Code of Obligations appears clearer than article 1341 al. 2 of the Belgian and French civil codes.[60] In the same way, contrary to France and Belgium, the Code of Obligations did not initially

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[56] See P. PIRON & DAVOS, *op. cit.,* at 99 and 231.

[57] R. MASAMBA MAKELA, *op. cit.,* at 22 and 53.

[58] According to article 1341 French Civil Code and article 217 Code of Obligations: 'An instrument before notaries or under private signature must be executed in all matters exceeding a sum or value (fixed by decree), even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value.' All of which without prejudice to what is prescribed in the statutes relating to commerce. (For French and Belgian codes).

[59] Cf three hundred seventy-five Euros for Belgium; eight hundred Euros for France; and two thousand Congolese Francs for the DRC.

[60] As stated by article 217 al. 2 Code of Obligations, "Nevertheless, commercial contracts should in any case be proved by witness where the Court will believe to admit it."

regulate some important matters such as those of wills, gifts, and matrimonial regimes.[61] Happily, all of these legal topics are now dealt with by the 1987 Family Code.

From the above background, it would be wrong to pretend that the Congolese law of obligations, in general, and its contracts and sales law, in particular, is not different from the one of the colonising country. The Code of Obligations is "incomplete" when compared with the Third Book's Civil Code of Belgium. The fact that the Code of Obligations did not regulate a number of matters has left numerous gaps in the Congolese law of contracts.

4.2 Congolese Contracts and Sales Law Gap-filling

Theoretically gaps met in the law of contracts had to be filled in accordance with the Principles applicable to judicial decisions ordinance of 14 May 1886. According to that Ordinance, all matters not specifically regulated had to be resolved in conformity with local customs, general principles of law, and equity.

It is clear from the ruling above that the colonial legislator did not allow courts to apply Belgian law provisions directly to fill the gaps in Congolese law. Instead, it required them to refer to customary laws, general principles of law, and equity. As Devaux has argued, when the law referred courts to these legal sources, it indirectly resolved matters for which no other provision had been made.[62] The author specifies that, the direction shown by one or the other of these sources "takes a legislative value that helps in filling the gaps."[63] Though the lawmaker lists three different kinds of

[61] The same situation was also observed with regard to the Belgian and French civil codes' action in rescission of agreements (articles 1305 to 1314) which have been omitted from the Code of Obligations.

[62] V. DEVAUX, *op. cit.*, at 198.

[63] Ibid.

sources, however, the 1886 Ordinance has often been interpreted in practice as referring mainly to general principles of law;[64] i.e., a set of unwritten rules which apply in the absence of regulation.

When courts are, therefore, faced with one issue for which there appears to be no applicable law, or for which the law is poorly conceived, they may use the general principles of law to enable them to reach a decision. That is to say that, while quoting the "general principles of law", the 1886 Ordinance aimed to allow courts necessarily to refer to a determined positive law in the case of silence of Congolese law. A problem emerged, however, in relation to the choice of that appropriate law in practice. The fact that Congolese civil and contract law was inspired by Belgian law led judges to prefer it.

General Administrators Van Eetvelde and Janssen, in a report dated 16 July 1891 to Leopold II, recognised that Congolese civil law was inspired by Belgian law, although it had been adapted to the special needs of the country.[65] They concluded that, for matters not regulated under Congolese law, courts would refer to the general principles of Belgian law and to local customs.[66] According to the understanding of this report, courts should adopt the dominant principles of Belgian law to enable them resolve any unregulated issue.[67]

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[64] B. NKATA, *op. cit.*, at 21; M. MELI, *op. cit.*, at 42. See also, CSJ, 8 July 2009, RC 2378, *BA* 2004-2009, TII, at 216; CSJ, 18 August 2006, RC 1965, *BA*, 2004-2009, TI, at 304; CSJ, 1 October 2005, RA 729, *BA*, 2004-2009, TI, at 141; CSJ, 15 September 2004, RP 2297, *BA*, 2004-2009, TI, at 46; CSJ, 24 May 2002, RC 2438, *BA*, 2000-2003, at 143; CSJ, 10 March 2001, RC 2003, *BA*, 2000-2003, at 69; CSJ, 29 December 1993, RC 014/TSR, *BA*, 1990-1999, at 97.

[65] Report of 16 July 1891, *BO*, 1891, at 165.

[66] Report of 16 July 1891, *BO*, 1891, at 165.

[67] See Leo, Arbitral Award, 11 December 1931, *JC*, 1936, at 23. But, NKATA at 13, according to whom, the 1886 Decree did not specifically indicate Belgian law as the legal system of reference for Congolese courts. It rather referred them to general principles applicable universally everywhere where the rule of law reigns. This is a broadly statement which should be taken with reservations.

Advising Congolese courts to turn to "Belgian general principles of law" did not, however, imply that they could apply a specific Belgian legislative provision.[68] It rather entailed the application of the legal principle of which that text was the expression. Such an option was justified, according to Sohier, by the fact that Belgian texts constituted the source of the corresponding Congolese ones.[69] One illustrative case is the decision of the former Leopoldville Court of Appeal dealing with sales by correspondence or by middlemen.[70] In this case, the court found that it is logical to presume the will of contracting parties whilst referring to the usages generally admitted in Belgian trade,[71] without necessarily applying the provisions of its Civil Code, Book Three. In accordance with those usages, for sales concluded by mailing, the contract was formed from the time the acceptance reached the person making the offer, but not when the letter was placed in the hands of the post office.[72] Likewise, Belgian decisions in contractual matters were not binding on Congolese courts. Thus, when those cases are quoted in this paper, they are not being

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[68] Boma, 5 March 1912, *JC*, 1913, at 240; CG App Boma, 30 April 1912, *JC*, 1914-1919, at 1.

[69] A. SOHIER, *Droit de Procédure du Congo-Belge*, 2nd ed, Brussels, Maison Ferdinand Larcier, 1956, at 13.

[70] Léo, 28 October 1941, *RJCB*, 1942, at 68, wherein :
"A défaut d'usages locaux suffisamment établis, il est logique de recourir, pour présumer la volonté des parties litigantes, à l'usage le plus généralement admis dans le commerce belge. D'après la jurisprudence métropolitaine la plus abondante, la plus récente et la plus autorisée, il n'y a vente accomplie, réalisée, lorsque la transaction se fait par représentant, voyageur de commerce ou agent de ventes, qu'après confirmation de la commande par le patron du dudit représentant, voyageur ou agent de ventes commerciales. "
Translated as: "In the absence of local practices sufficiently established, it is logical to assume the willingness of litigants, by consulting usages admitted generally in the Belgian trade. According to the most abundant, recent and official metropolitan case law, when the transaction is made by representative or by middleman, the formation of the contract is fulfilled after confirmation of the order by the manager."

[71] Léo, 28 October 1941, *RJCB*, 1942, at 68, §1.

[72] Ibid, §2.

referred to as being authoritative, but as having an illustrative value. In other words, when those cases are cited, it is submitted that the principles underlying the decisions are common to both Belgian and Congolese legal systems.

Congolese law has developed, however, so that currently one has first to look at proper Congolese legislation and case law before seeking elsewhere. It is only when these main sources are silent on a subject that general principles of law should intervene to resolve the matter. That is the reason why, owing to the absence of particular rules dealing with commercial sales contracts, resort to civil law rules has been valuable.

The Code of Obligations, as enacted in 1888, might well appear to be unsuited to the needs of a modern society, many aspects of social and economic life having changed since the early twenty-first century. A number of Congolese provisions had become out-dated.[73] For example, article 8 dealing with requirements for the validity of contracts, states that all contracts are based on an agreement.[74] Unfortunately, the provision does not provide the content of contractual agreements. Yet, article 8 is the only broad provision of the Civil Code defining the requirements for a valid contract. Its other provisions dealing with essential conditions required for the enforceability of the contract are, instead, concerned with defects to consent.[75] Thus, in the field of application of that Code, the process of concluding a contract was developed as matter of fact. Furthermore, the Code of obligations

[73] R. MASAMBA MAKELA, *op. cit.,* at 347; M. TSHIBENDE, "Le Processus d'adhésion de la République Démocratique du Congo à l'OHADA - Une adhésion sans atermoiements funestes, mais sans précipitation inconsiderée", *Revue Congolaise de Droit et des Affaires,* Special ed., No. 2, 2011, at 71.

[74] Article 8 provides four conditions for the validity of any contract: the consent, capacity, an object, and the cause.

[75] See Articles 9 to 18 of the Code of Obligations. Article 9, for instance, denies to consent given by mistake or extorted by duress or fraud the quality of valid consent.

does not deal with electronic contract because drafted in a period when modern methods of communication were not yet known.

Numerous legislative modifications to the Code of Obligations have, therefore, been necessary in order to move towards legal modernity and security. To achieve this objective, the DRC ratified OHADA law bringing, among other things, its sales law into line with that of its neighbours, rather than embarking on an effort of its own.

5. Adoption of OHADA law in the DRC

OHADA law innovations for the DRC are discussed here, and its dealings with ancient Congolese sales law rules considered.

5.1 The Benefits of the OHADA Commercial Act for Congolese Sales Law

Commercial patterns have substantially influenced African history and the interaction of Africans with foreigner business persons. Recognised as one of the continents empowered with vast potential resources, Africa would naturally attract foreign investors. Its legal systems, nonetheless, did not favour that; most African countries suffered from out-dated or incomplete legal systems,[76] which also varied from one country to another.[77] The problem of this diversity of laws was likely to give rise to uncertainty which in turn discouraged investment. Apropos of this, there is unanimity that a

[76] See M. FONTAINE, "Explanatory Note to the Preliminary Draft OHADA Uniform Act on Contract Law", in *Uniform Law Review*, 2008, 1/2, at 633; D.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", in *Revue de Droit Uniforme,* 2008, 1-2, at 339.

[77] B. MARTOR et *al., Business Law in Africa: OHADA and the Harmonization Process,* London, Eversheds, 2002, at1.

strong investment cannot be achieved without a secure legal and commercial environment.[78] That is why, in the interests of a greater cooperation among African states, fourteen countries from West and Central Africa decided to harmonise their legal systems in the area of business law. To this end, they adopted in Port-Louis (Mauritius) the Treaty creating OHADA on 17 October 1993.

The purpose of OHADA consists, *inter alia*, in providing member states with a harmonised set of business laws by elaborating and adopting simple and modern common rules adapted to African economies.[79] Those modern rules are laid down in Uniform Acts.[80] So far ten Uniform Acts have been enacted under OHADA's sponsorship, among which the General Commercial Law Act.[81]

Before the adoption of this Act, however, there were no specific provisions dealing, for example, with commercial sales in the African Franc Region. The only rules applicable in this regard were the provisions of Title VI of Book III of the Napoleonic civil code, i.e. articles 1582 to 1701 regulating sales contracts. Commercial sales were, in other words, ruled at that time by the same rules as civil or consumer sales like in the RDC. It is clear that the application of civil law rules to commercial transactions was generally inappropriate for a developing economy. For that reason, the OHADA Permanent Secretariat notes that, "As most major international trading countries have (…) acceded to the Vienna Convention, it was essential to introduce in the positive law

78 Ibid.
79 Article 1 of the OHADA Treaty.
80 OHADA Treaty, articles 5 & 6.
81 Uniform Act on General Commercial Law adopted on 17 April 1997, as revised on 15 December 2010.

of the Contracting States to the Treaty a law that is as close as possible to the provisions applicable now in most of the States."[82]

From the initial five Books, the current version of the Commercial Act contains eight main Books, the Book VIII of which deals with commercial sales.[83] According to its articles 1 and 234, this Act applies to contracts of sale of goods between businessmen on condition that the parties have their place of business in one of the OHADA member states or when conflict-of-law rules lead to the application of the law of one OHADA country.

Following from these provisions, it is clear that the eighth Book is vital in matters regarding domestic sales and international sales contracts alike. Its provisions govern both national and international sales transactions; they are up-to-date with regard to contemporary commercial law requirements.[84] In addition, Book VIII provides the definition of concepts such as those of "offer and acceptance", viz. rules relating to the formation of contracts.[85] It also determines the obligations of each party[86], and the remedies for breach of contract.[87] This Act also modernises the rules governing the effects of contractual agreements, namely the rules relating to the transfer of ownership and the transfer of loss in the goods bought.[88]

In brief, the OHADA Commercial Act is in line with contemporary commercial law requirements. It balances the rights and obligations of sellers and buyers. Such are some of the key

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[82] See Secretariat of the OHADA comments, available online at: http://perso.mediaserv.net/fatboy/cd_ohada/pres/pres.02.en.html (last accessed 6-4-2020).

[83] Articles 234 to 302.

[84] A.P. SANTOS & J.Y. TOE, *Ohada – Droit Commercial General*, Bruxelles, Bruylant, 2002, at at 361-362.

[85] Uniform Commercial Act, articles 241-249.

[86] Articles 250-274.

[87] Articles 281-293.

[88] Uniform Commercial Act, articles 275-280.

features which justified the adoption of the OHADA Treaty by the DRC.

5.2 The Interaction between OHADA Law and Congolese Sales Law

A brief overview of the OHADA Treaty reveals that its adoption is a sign of the abandonment of sovereignty for signatory countries. Confirmation of this is article 10 ruling according to which, Uniform Acts are directly applicable in, and binding on all member states, notwithstanding any conflicting provisions in existing or future national laws. Such supremacy has been confirmed in one of the OHADA Common Court of Justice and Arbitration (CCJA)[89] Advisory Opinions, dated 30 April 2001. The CCJA ruled that "the effect of Article 10 of the Treaty is to abrogate and prohibit any national statute or regulatory provision which has the same purpose as the Uniform Acts and which conflicts with them."[90] Scholars are unanimous in their views that, in so ruling, the CCJA has clearly confirmed the *supra-nationality* of OHADA Uniform Acts.[91] Simply, the meaning of article 10 is to repeal national laws in matters governed by the Uniform Acts.

As far as Congolese sales law provisions are concerned, OHADA law does not completely exclude them from the field of commercial transactions. In effect, article 327 al. 1 of the Commercial Act refers commercial sales contracts to the general

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[89] The CCJA is the Supreme Court for all OHADA member countries in matters regulated by OHADA law

[90] CCJA Advisory Opinion No. 1/2001/EP of 30 April 2001, Juriscope, 2005, available at: http://www.ohada.com/jurisprudence/ohadata/J-02-04.html (last accessed 6-4-2020).

[91] See P. DIEDHIOU, "La Portée de l'article 10 du Traité de l'OHADA", in C. CHAPPUIS, D. FOEX & TG KADNER (eds), *L'Harminisation Internationale du Droit*, Genève, Helbing Lichtenhahn, 2007, at 265.

rules of the law of contract and sale, unless these rules are contrary to its spirit. In addition, Article 1 al. 3 of the Commercial Act provides that "(…) any tradesman or company remains subject to all laws non-conflicting with that Uniform Act, applicable in the state where its place of business or head office is located."

It may be observed that the meaning of Article 327 al. 1 above is similar to that of article 7 of the Code of Obligations which determines the Code's field of application. In conformity with the latter provision, contracts are regulated, firstly, by the contract law general principles, secondly, by specific rules relating to the given contract, and, thirdly, by the rules of the law of commerce for commercial transactions.

From what has been explained so far, the Code of Obligations general rules remain applicable to commercial sales contracts provided they are not in conflict with the provisions of the OHADA Commercial Act. In other words, OHADA law combines both special rules of the law of sale with the common principles established by the civil code providing that the Uniform Act is silent on the issue.[92] To exemplify this, as the Commercial Uniform Act does not provide a definition for the concept "sale", article 263 of the Code of Obligations intervenes to fill that gap.[93] Likewise, the requirements for the validity of contract as provided by article 8 of the Code of Obligations govern commercial sales as well.

More specifically, from the coming into effect of OHADA Uniform Acts in the DRC, provisions of the civil code are not

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[92] See CCJA, 31 May 2007, Case No. 24/2007, *Wague Bocar v Socimat-ci, in Receuil de Jurisprudence,* No. 9 January-June 2007, at 53, available at : http://www.ohada.com/jurisprudence/ohadata/J-08-225.html; Supreme Court Cote d'Ivoire, 6 February 2003, Case No. 57, *JC El Achkar Hadife v A Nawfla,* available at : http://www.ohada.com/jurisprudence/ohadata/J-03-233.html(both last accessed 6-04-2013).

[93] For application, see Commercial Tribunal of Kinshasa/Gombe, 28 February 2012, RCE 2183, *Kabala Katumba v SOCIMEX* (unreported decision).

revoked, but rather complemented by the newer Commercial Act rules. Legal concepts, such as “commercial contracts law” and “commercial sales contracts” which were known earlier in a civil law context, are, at the moment, regulated by specific provisions, namely articles 234 to 302 of the Commercial Act. It is these provisions which currently form the main legal source for commercial sales contracts including international sale of goods agreements. But, because OHADA law is still recent in the DRC, it is early to assess its impact of courts.

Conclusion

The DRC belongs to the civil law legal system family. Its law of contracts is closely linked to the French Napoleonic code brought into the country under the Belgian settlement influence. During the colonial period and about a half century after independence, both civil and commercial contracts were ruled by these civil law rules. Despites the existence of a commercial code implemented in Congo, this failed short to adapt the contracts to the necessity of the development of business and commercial transactions.

Thus, before the implementation of OHADA law in the DRC, most of the legal concepts defined in the first legal system in a commercial context, were organised by the Code of Obligations in a civil law environment. Congolese commercial contract law was, in short, concealed behind civil law in which the earlier lawmaker had failed to make specific provisions for commercial sales contracts. Such a situation was not likely to ensure legal security and certainty. Furthermore, Congolese law was no longer in a position to properly support the country’s economic development.

These reasons guided the government to adopt the OHADA Treaty. Following its entry into effect in the DRC, from September

2012, under current Congolese contracts law, commercial sales contracts are ruled primarily by the OHADA Commercial Act complemented by non-conflicting principles of the Code of Obligations. These provisions form the actual basis of Congolese sales law and its fundamental principles.

The history of the development of these laws needs to play an important role in providing the backdrop against which this investigation and interpretation must take place. The introduction of a substantial body of new law always leads into a period of uncertainty while the impact of the new law and its interaction with the existing law is established. It is hoped that this exposition of the historical evolution of the Congolese contract law will be able to shed some light on this process.

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