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## Articles



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# The integration of informal business law in the OHADA framework. Methodological reflections

Salvatore Mancuso (*)

## Abstract

OHADA represents today a successful example of legal integration that offers a modern and reliable legal environment regarding business law in those countries that have joined it. However, such a modern integrated system of business law appears to be unsuited to the informal business sector that still represents a vital segment of the economy in most of the African countries. The paper discusses the attempts that have been made to integrate the informal business sector in the OHADA framework, trying to understand the reasons why they have been substantially unsuccessful and suggests a possible way forward to make such integration possible.

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**Keywords**
African law, informal sector, business law, OHADA, legal pluralism

## 1. A taxonomy of the informal sector

The informal sector is a fluid area that usually escapes from a stable categorization[1]. To a jurist who is always seeking for a taxonomical approach, the exercise is complicated even further, since the informal sector tends to elude formalization and to operate in a quasi-legal or, even more, extra-legal environment. A definition that captures the main characteristics of the phenomenon identifies the informal sector in the "*[…] semi-organised and unregulated activities largely undertaken by self-employed persons in the open markets, in market stalls, in undeveloped plots of street pavements within urban centres. They may or may not have licenses from local authorities for carrying out such activities*"[2].

The result of the above definition is that the informal sector includes activities usually, but not exclusively, conducted in open or temporary structures, in urban and rural areas. The size of the business is extremely small, with extremely low capital involved, without official bookkeeping, and without or with an extremely low number of employees, then such is likely to be informal or, at most, of a small scale[3].

[1] There are many definitions of the "informal sector". In its 1972 report "Employment, incomes and equality: A strategy for increasing productive employment in Kenya" at 6 the ILO defined "informal activities" as "the way of doing things, characterised by (a) ease of entry; (b) reliance on indigenous resources; (c) family ownership of enterprises; (d) small scale of operation; (e) labour-intensive and adapted technology; (f) skills acquired outside the formal school system; and (g) unregulated and competitive markets. Informal-sector activities are largely ignored, rarely supported, often regulated and sometimes actively discouraged by the government".

[2] Central Bureau of Statistics of Kenya, cited in K. Kibwana, 'Critical aspects regarding the legal regulation of the informal sector', (1989) Vol. 5, No. 2 Lesotho L. J., 357.

3 Ibid., 361.

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Therefore, the informal sector normally embraces the part of the economy not documented for purposes of the official count of GDP[4].

Although the activities performed in the informal sector are not necessarily illegal, illegal businesses and tax evasion are phenomena that are also part of the informal sector[5]. This explains why literature has recognized that the informal sector suffers from a negative public image, even if it has many positive characteristics and has a vital role in contributing to the economic growth of the continent. However, a distinction has been developed between the informal and the underground economy. The former is the one conducted legally but without the formalities requested by the official law, and the latter covers the market production of legal and illegal goods and services that are sold or bought illegally and includes the shadow economy, where legal goods and services are produced and traded under illegal conditions, and black markets[6]. Having considered the above, in this paper, then, attention will be paid to the legal businesses in the informal sector, made normally by nano-entrepreneurs or own-account workers[7].

The variable conditions for conducting the business activity, the extremely small dimensions of the activities whose consequence is the small number of workers employed in each activity when not conducted by a sole nano-entrepreneur, and the low propensity to the formalization of the informal activities have been considered the main characteristics of the informal sector[8]. However, informal sector activities require little capital to create jobs, work essentially on family savings, are a fundamental source of new jobs for the increasing labour force in Africa, and are the

4 F. Schneider, 'Size and Measurement of the Informal Economy in 110 Countries around the World', Discussion Paper Australian National Tax Centre, ANU, Canberra, Australia.

5 F. Schneider, D. H. Este, 'Shadow Economies: Size, Causes, and Consequences' (2000) 38 J. Econ. Lit.,79.

6 P. Lemieux, 'L'économie souterraine: causes, importance, options'; [2007] Montréal, Les Cahiers de Recherche de l'Institut Économique de Montréal.

7 C. M. Dickerson, 'OHADA on the Ground: Harmonizing Business Laws in Three Dimensions', (2010) 25 Tulane European & Civil L. Forum, 10, at 112 and ff.

8 S. Kwemo, *L'OHADA et le secteur informel*, (Bruxelles, Larcier, 2012).

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main business activities in town markets and small urban centres[9]. In general, the dynamism of the informal sector in creating employment and value addition is particularly strong, representing about 80 per cent of the total labour force[10], and contributing about 55 per cent of sub-Saharan Africa's GDP[11].

However, assuming the existence of an identifiable informal sector means inevitably simplifying reality. The boundaries of this sector with the formal sector are extremely flexible and even porous. Many actors of the informal sector operate also in the formal sector at the same time, often even at different levels of the same chain. Such coexistence of the formal and informal sectors at the same time can be found – for example – in the case of the West African *nana benz*, who are wholesalers and informal retailers at the same time[12]. This happens since they purchase goods from the general suppliers using standard commercial contracts, goods that are after resold to the nano-entrepreneurs in the street markets through informal contractual instruments. Since the demarcation so vague, it is often very difficult to identify which

9 Sessional Paper No. 1 of 1986, Economic Management for Renewed Growth, Nairobi, Government Printer, 54.

10 The International Labour Organization reported that, depending on the country, in sub-Saharan Africa the informal sector employed between 39% and 71% of all non-agricultural workers. International Labour Organisation (ILO), "Women and Men in the Informal Economy: a Statistical Picture", 2nd ed. (2013), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf>.

11 African Development Bank, "Recognizing Africa's Informal Sector" (27 March 2013), available at http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/recognizing-africas-informal-sector-11645/ (21 October 2016). Data about the size and the contribution of the informal economy to sub-Saharan Africa GDP are conflicting: according to a report released by the IMF, "the share of informal economic activity in Sub-Saharan Africa remains among the largest in the world, although this share has been very gradually declining, as seems to be the case globally. The SSA unweighted average share of informality reached almost 38 percent of GDP over 2010-14", see L. Medina, A. Jonelis, and M. Cangul, The Informal Economy in Sub-Saharan Africa: Size and Determinants, IMF Working Paper WP/17/156, July 2017.

12 This is an appellation used to describe businesswomen who wear typical African clothes and are likely to own Mercedes Benz cars.

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activities are in this or that sector. Thus, the reference to the informal sector as some kind of monolithic reality has to be done merely to facilitate discussion[13].

## 2. The informal sector and the law in Africa…

The informal sector tends to escape the rigidity of legal regulation, and the informal entrepreneurs very often do not look for registration according to the relevant laws as they consider that the benefits of formalizing are not large enough to compensate for the costs of formalizing: the consequence is that informal business are not productive enough to survive as formal enterprises.[14]

Legal constraints are only one of the factors affecting the decision of an entrepreneur to opt for the informal sector. A study conducted in Côte d'Ivoire reveals that the main obstacles to the formalization of informal businesses are: the administrative formalities of starting a business (21.92%), the narrowness of the market (17.03%), the ignorance of the procedures (16.48%), high taxes and social security contributions (16.21%) and high registration costs (11.05%)[15].

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13 C. M. Dickerson, 'OHADA's Proposed Uniform Act on Contract Law. Formal Law for the Informal Sector', (2011),13 Eur. J.L. Reform 462.

14 R. La Porta, A. Shleifer, 'The Unofficial Economy and Economic Development', Brookings Papers on Economic Activity, (2008), 275. According to van Elk and de Kok, the following costs of becoming and remaining formal are usually distinguished: entry costs (the time required to go through all of the required procedures to get registered and the licence or registration fees that have to be paid), formal operating costs (the costs associated with operating in the formal economy: taxes, fees and social contributions), and compliance costs (costs of complying with labour regulations, the time required to obtain property registration and apply for formal loans, inefficient contract enforcement mechanism, etc.). See K. van Elk, J. de Kok, 'Enterprise formalization: Fact or fiction?', (2014) ILO-GIZ, available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/ifp_seed/documents/publication/wcms_245359.pdf,

15 Cellule d'Analyse de Politiques Économiques du CIRES (CAPEC), Encadrement du secteur informel: source de croissance et de compétitivité de notre économie, (2018) Abidjan, available at http://agencecipme.ci/wp-content/uploads/2018/04/Rapport_CCESP_CAPEC-_14FEVRIER-2018.pdf.

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The theme is therefore whether this Western (French, in the case of OHADA) approach to business law, based on legal positivism and high technicalities, can be effectively transplanted in Africa and it is suitable to embrace its business environment in its entirety.

The African jurists who examine the law through the Western lens that they learnt at university will immediately answer affirmatively. But such an answer does not take into consideration the fact that such law is applicable to a small elite capable of understanding it, and willing and able to apply it. Western commercial law has evolved using legal concepts and technicalities that were developed by Western legal culture over time, and only a jurist trained using Western concepts can understand them, since these are not contemplated in African traditional legal culture. This also seems to be the limitation of the OHADA system of harmonized business law.

Moreover, just as there is official law and unofficial law in Africa[16], there is also – as noted above – an area of official commerce and a wider area of informal commerce, both equally important to the State economy. These two types of commerce co-exist in most African countries, and informal commerce does not comply with official legal rules, which are too complex and lacking the flexibility necessary to run an informal

[16] Reference is made here to the law the issued by the official legislative authorities and to law emanating from alternative sources and generating further normative orders that are often competing with the official state law. Scholars today distinguish between official and living (or unofficial) customary law (on this distinction see, for example, T. W. Bennett, 'Official vs 'Living' Customary Law: Dilemmas of Description and Recognition', in A. Claassens and B. Cousins (eds.), *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act*, (2008) Cape Town, JUTA, 138; C. N. Himonga, C. Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning', (2000) 117 South African Law Journal, 306, where official customary law would be the one endorsed or produced by the State through codification or restatement tools, or through precedents or jurisprudential decisions that seek to identify and apply it, while living customary law would be made up of the system of rules that people apply on a daily basis, and which does not need any official state intervention to be produced, modified and applied. Apart from the strong criticism to the definition of such kind of law as "customary", such distinction lends itself to further criticism, as when it has become "official", this law could not be still defined as "customary", since it lost all the main characteristics of such form of law (on the criticism to this dichotomy see also A. C. Diala, 'The Concept of Living Customary Law: A Critique', (2017) 49, No. 2, Journal of Legal Pluralism and Unofficial Law, 143.

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business; therefore, the informal sector has developed its own set of rules that exist outside of the official legal systems of each nation.

If the legal order in the area of business law is characterized by written rules imposed by the state, then the legal principles among informal tradesmen are characterised by the persistence of orality which remains their main means of expression[17]. Contracts of purchase or sale, transport or delivery, performance of services or mandates, in short, commercial contracts, are concluded verbally. Despite these contracts being unwritten, the parties involved easily remember all the obligations resulting from their verbal engagements, even if certain arrangements are concluded in the presence of witnesses or receipts or other simple written instruments are used to ensure the safety of the transactions[18].

Resorting to legal orality and not reducing contracts to writing favours simplicity and avoids heavy formalism: the main obligations arising from the verbal contract are simply formulated with all the parties, in easily comprehensible terms and therefore can be easily remembered by them. Ultimately, the entrepreneurs in the informal sector do not act or move in a zone of non-law or illegality. They establish business transactions according to their beliefs and carry them out because people's words are respected, so very seldom a contract obligation is not respected as trust is one of the main elements that determines the entering into a contractual agreement. Business relations between the parties are based more on mutual trust and politeness than on formal instruments derived from the official law[19]. Recourse to writing is therefore not excluded in principle from commercial relations among them, but it may be considered unnecessary.

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[17] O. Ballal, *Les usages et le droit OHADA*, (Aix-Marseille, PUAM, 2014, 57).

[18] S. Kwemo, 'L'OHADA' cit.; S. Bissaloue, 'L'informel et le droit OHADA' in A. Noel Gbaguidi, J. Djogbenou, E. Montcho Agbassa (eds.), *Les horizons du droit OHADA: Mélanges en l'honneur du Professeur Michel Filiga Sawadogo*, (2018) 487; O. Ballal, 'Les usages' cit.

[19] C. M. Dickerson, 'Bringing Formal Business Laws to Cameroon's Informal Sector: Lessons and Cautions from the Tax Law Example', (2014) 13 n. 2, Washington Univ. Global Studies L. Rev., 267, at 283.

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Most informal entrepreneurs do not meet the requisites required by the official law that would give them access to the official credit system for setting up and running their business[20]. The alternative for them is therefore to resort to different instruments of financing like the *tontine*[21], which has become one of the pillars of today's African informal economy (especially in West Africa) despite not being directly related to commercial activities and not constituting a commercial act (*acte de commerce*) according to official business law. Practice developed countless different variations from the original concept of *tontine* in Africa, but they all present some essential elements, namely a number of participants, the periodic deadlines, the rotating contributions and withdrawals. They operate in a standard way of paying fixed sums at regular intervals, and all members in turn withdraw from the payments. The pressure of the other members, whose ties may be multiple (inhabitants of the same neighbourhood, sex or age, family relations or belonging to the same ethnic group), ensures the participation of each member. Each group also has a leader or a recognized organizer of the *tontine*. As far as participation in terms of membership is concerned, there is no "ideal" size: the size varies according to the task and character of its members or group leaders, but also by gender, or also age. The group of people participating to the *tontines* do not fall under the application of the official law, as they are not based on any contract: these associations have no legal status, and in case of

[20] There is a wide literature on this subject. Some examples are: M. Lindvert, 'Financial Barriers and How to Overcome Them: The Case of Women Entrepreneurs in Tanzania', in A. Akinyoade, T. Dietz and Chibuike Uche (eds.), *Entrepreneurship in Africa*, (2017) Brill, 344; F. Gire , K. Mellet, A. Saïdali, 'Financial practices of Dakar's informal sector entrepreneurs and mobile money', available at https://hellofuture.orange.com/en/financial-practices-of-dakars-informal-sector-entrepreneurs-and-mobile-money; B. S. Morewagae, M. Seemule, H. Rempel, 'Access to Credit for Non-Formal Micro-Enterprises in Botswana', (1995) 31, n.3 ,Journal of Development Studies, 48; C. Grey-Johnson, 'The African Informal Sector at the Crossroads: Emerging Policy Options', (1992) 17 n.1 Africa Development/Afrique et Développement, 65. More in general, on the financing of small businesses, with a case study on Vietnam, see Bach Nguyen, Nguyen Puch Canh, 'Formal and informal financing decisions of small businesses',(2021) 57 Small Business Economics", 154.

[21] The word tontine identifies a phenomenon that takes place in mainly West Africa and in the French-speaking African countries in particular, where lending money is based on exchange and solidarity.

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conflict, everything is settled amicably among the members, otherwise reference is made to rules of informal law[22].

Sometimes the writing or legal orality is not exclusive to one or other of the two business sectors. It is not rare to resort to legal orality in the commercial relations between a formal and an informal businessman. The case of the West African *nana benz* is a clear example in this respect. The *nana benz* are businesswomen officially registered with the trade registrar, who respect the legal obligations imposed by membership thereof, enter into regular contracts with their suppliers, but prefer not to enter into formal contracts with their informal retailers for the sale of the goods they supply them. However, when the informal retailer is a beginner in the area of purchase and resale, a very concise written agreement might be concluded between the parties. Digital fingerprints are affixed to the bottom of the document, which mentions the expiry date, the identity of the parties, and the sum that the informal retailer must repay to the other party after the resale of the goods.

In case of late payments or instalments, interests are normally not charged as they are not conceived in the African legal culture[23]. Legally binding situations derived from time[24], such as forfeiture, prescription or interest rate are not recognized. The reason is that the traditional concept of time is different in Africa compared to the

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[22] A. Ependa, 'Typologie et aspects organisationnels des tontines dans le contexte d'une économie sociale informelle à Kinshasa', (2002), available at http://constellation.uqac.ca/2013/1/030120696T1.pdf. Tontines have been extensively studied by French authors like M. Lelart, 'L'épargne informelle en Afrique. Les tontines béninoises', (1989), 30 n. 118 Tiers-Monde, 271; A. Ependa, 'Typologie' cit.; C. Mayoukou, 'Le système des tontines en Afrique. Un système bancaire informel', (L'Harmattan 1994); A. Kane, 'Tontines, casses de solidarité et banquiers ambulants', (L'Harmattan 2010). On the different forms of rotating credit associations in Africa see S. Mancuso, 'Tontines and other Forms of Rotating Credit Associations in Africa', in P. Hellwege (ed.), *Comparative Studies in the History of Insurance Law*, (Duncker & Humblot 2018).

[23] S. Mancuso, 'OHADA law and its target population: is there room for African traditional law within the harmonisation of contract laws in Africa?', in C. Rautenbach (ed.), *In the Shade of an African Baobab: Essays in Honor of Thomas Bennett*, (JUTA 2018).

[24] M. Alliot, 'Les résistances traditionnelles au droit moderne dans les états d'Afrique francophone et à Madagascar', in C. Kuyu (ed.), *Le droit et le service public au miroir de l'anthropologie*, (Karthala 2003).

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West[25]. In Africa, time has traditionally been linked to other factors such as market cycles or crops[26]. Thus, the payment of the price of any item is considered to be verified "at the same time" of the fulfilment of the other contractual obligation, even it has been effectively made after several days or months[27].

In general, the contractual obligation does not involve exclusively the party that contracted it, but all members of its family or community that is – in its entirety – affected by the contract entered into by one of its members. Within the communities, contractual relations are based on mutual trust, while testimony or written instruments (if the parties are literate) will support the entering into a contract when the parties belong to different communities[28].

Enforcement of contractual obligations is not brought to the formal court system, but it is rather done by turning to the informal courts in the markets or reporting the event to the police. The latter does not formally enforce official law but uses its authority while acting as public order officer, judge, and mediator at the same time. The result is an *ad hoc* enforcement of the basic rule to repay obligations without following any rules of procedure, that is considered highly irregular from a formal-law perspective[29].

While the official business law is based on the formalism derived from the Western pattern, the simplicity of the above-mentioned alternative instruments clearly shows the profound gap existing between formal and informal law. Such gap is a sign of the more general difficulty to apply official law to the informal business due to the requirements, formalisms and technicalities that official law got from the Western approach to law. The result is the creation of a parallel set of rules outside of the

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[25] A. A. Da Silva, *Usos e costumes jurídicos dos Mandingas*, (1969).

[26] M. Aime, *La casa di nessuno. I mercati in Africa occidentale*, (Bollati Boringhieri 2002).

[27] J. Vanderlinden, *Coutumier, manuel et jurisprudence du droit zande*, (Éditions de l'Institut de sociologie, Université Libre de Bruxelles; 1969), A. A. Da Silva, *Usos e costumes* cit.

[28] O. Ballal, *Les usages* cit., at 46 and ff.

[29] C. M. Dickerson, *Bringing* cit., at 284.

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official system more rooted int the African legal culture, as the following example shows.

In Somalia, where a civil war has raged since 1991 causing the absence of a fully functional central government up (at least) to 2012, three phone companies engaged in fierce competition for both mobile and landline customers as well as for internet services. Since there is no need to obtain a licence, there is no state-run monopoly which prevents the emergence of new competitors, and the prices are the lowest in Africa since taxes are not collected. But what is more significant is the fact that, despite the lack for a long time of production of official law and its application by a functioning court system, bills are paid, and contracts are enforced, by relying on Somalia's traditional clan system[30].

## 3. …with particular reference to OHADA

The formal business laws do technically and officially apply over transactions within the informal sector.

In the case of OHADA, modern business laws have been enacted by giving an African flavour to the French rules on the sectors that have been harmonized. This is because those who prepared the draft Uniform Acts at the beginning were French jurists who used the model with which they were familiar, and which seemed more appropriate for the countries where the new legislation was to be introduced. Moreover, this activity has been facilitated by the Western scholars' traditional approach, based on the assumption that commercial law is one of the areas where state laws have a monopoly, since the area of commercial law is not usually covered by African traditional law.

The OHADA Treaty has created a series of institutions, namely a Council of Heads of State and of Government, a Council of Ministers (having legislative competence), a Permanent Secretariat (having executive competence), a supranational Common

[30] See more in S. Mancuso, 'Pluralismo giuridico in Somalia. Trascorsi storici e sviluppi recenti', (2014) 9 Iura Gentium 140.

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Court of Justice and Arbitration (CCJA), and a centre for training legal professionals on the OHADA system (ERSUMA)[31]. Furthermore, every member country has an OHADA national commission whose task is to comment and propose amendments – mainly from a national perspective – to the draft uniform acts. According to the Treaty, ten uniform acts that already provide substantial coverage of business transactions and relationships have been already adopted[32]. The OHADA legislative acts are named "Uniform Acts" since they become part of the internal domestic law of each of the OHADA member states automatically and without modification after having been adopted pursuant to the procedures set out in the OHADA Treaty and published in the OHADA Official Journal. Furthermore, these Uniform Acts replace any existing or future laws on the same subject in all member States[33]. The uniform acts are enforced through the national courts, up to the second instance, since the national supreme courts do not have jurisdiction on final appeals where OHADA uniform acts apply: when a case where OHADA laws shall apply shall be decided by the court of final instance, it is appealed to the CCJA, located in Abidjan,

[31] Art. 27-41 OHADA Treaty.

[32] Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique, 17 April 1997, 2 J.O. OHADA 1, revision adopted 30 January 2014, J.O. OHADA 1 (Special Edition, 4 February 2014); Acte Uniforme portant sur le Droit Commercial Général, 17 April 1997, 1 J.O. OHADA 1, revision adopted 15 December 2010, 23 J.O. OHADA 1 [hereinafter "General Commercial Law"]; Acte Uniforme portant Organisation des Sûretés, 17 April 1997, 3 J.O. OHADA 1, revision adopted 15 December 2010, 22 J.O. OHADA 1 [hereinafter "Securities Law"]; Acte Uniforme portant Organisation des Procédures Simplifées de Recouvrement et des Voies d'Exécution, 10 April 1998, 6 J.O. OHADA 1; Acte Uniforme portant Organisation des Procédures Collectives d'Apurement du Passif, 10 April 1998, 7 J.O. OHADA 1, revision adopted 10 September 2015, J.O. OHADA n. spec. 25 September 2015 1; Acte Uniforme relatif au Droit de l'Arbitrage, 11 March 1999, 8 J.O. OHADA 1, revision adopted 23 November 2017, J.O. OHADA n. spec. 15 December 2017 1; Acte Uniforme portant Organisation et Harmonisation des Compatibilités des Entreprises, 22 February 2000, 10 J.O. OHADA 1, revision adopted 26 January 2017, J.O. OHADA n. spec. 15 February 2017 1; Acte Uniforme relatif aux Contrats de Transport de Marchandises par Route, 22 March 2003, 13 J.O. OHADA 3; Acte Uniforme relatif au Droit des Sociétés Coopératives, 15 December 2010, 23 J.O. OHADA 1; Acte Uniforme relatif à la Médiation, 23 Novembre 2017, J.O. OHADA n. spec. 15 December 2017. All uniform acts can be accessed from the OHADA website www.ohada.org.

[33] Art. 10 OHADA Treaty.

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Coôte d'Ivoire[34]. To secure a uniform interpretation and application of the OHADA uniform acts in all member countries, the CCJA decides both on the interpretation and application of the OHADA uniform acts and on the merits of the case, and therefore the case is never sent back to the domestic courts for further decision.

When OHADA uniform acts are not applicable, national legislation will be applied depending on the place where the transaction took place and according to the rules of private international law if applicable.

The techniques through which OHADA uniform acts are formulated and implemented, as well the long-lasting process necessary for their updates and changes show their high level of "rigidity", and, consequently, their dissonance with the daily realities of those who operate in the informal business sector. As it has been observed, it appears "that the regime pays more attention to regulating transactions involving big businesses and multinational corporations than it does to regulating transactions involving smaller businesses or even the informal economy, which is the driving force of African economies in the region"[35].

Several examples can be made in this respect[36].

The Uniform Act on General Commercial Law regulates the commercial sale and provides a series of guarantees that the seller shall provide to the buyer about the quality of the goods[37]. Therefore, vendors in the informal markets have a series of rights against suppliers pursuant to the above-mentioned rules on warranties, as well as obligations to customers as to the quality of goods they sell under the same

[34] Art. 13-16 OHADA Treaty.

[35] C. M. Fombad, 'Some reflections on the prospects for the harmonization of international business laws in Africa: OHADA and beyond', available at https://repository.up.ac.za/handle/2263/31659, at 15 and ff., and published in (2013) 59 Africa Today n. 3, 51. See also Olga Ballal, Les usages cit., at 44.

[36] For a wider discourse on this issue see S. Kwemo, *L'OHADA* cit.

[37] These guarantees refer mainly to the conformity of the goods to the contractual agreement and from being free from third parties' rights. They are indicated in Section 3, Chapter 1, Title III of the Uniform Act on General Commercial Law, revised version (2010), Articles 255-261.

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uniform act if the customer is also a business actor, or under the rules concerning consumer protection if the buyer is a normal consumer. The practice tells us that the informal-sector entrepreneurs did not appear, both as buyers and as sellers, to make use of the rights and obligations provided by the formal law about quality; and, similarly, consumers do the same. As it has been observed, "there could be market reasons, such as the preference for lower prices, that would induce buyers to refuse the benefit of warranties. Nevertheless, buyers' consistent neglect to demand a warranty could provide further indication that they did not perceive the laws as reliable"[38].

In its original version, the Uniform Act on Company Law required the presence of a notary public in order to comply with most of the formalities required by the Act, giving exclusive powers to this professional. In most cases notaries public are present only in the capital cities and in the big towns, and it is inconceivable that a person from a village or the rural area would travel to the town simply to sign something before a notary public because a written law requires it, and when that person probably does not even know about the law. This because there are logistical challenges in Africa, and all travelling involves considerable time and money[39].

The business environment plays an important role in the development of enterprises and in particular informal production units. In the study conducted in Côte d'Ivoire, access to finance is considered a major problem for 35.58% of informal businesses[40]. Indeed, due to their extreme small size, informal businesses do not have possibility to access the formal channels to get credit when they need it, since credit institutions are unlikely to have relations with unregistered businesses;

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[38] C. M. Dickerson, *Bringing* cit., at 280.

[39] The OHADA legislator tried to find a solution to this problem by providing, in Article 10 of the new version of the Uniform Act on Company Law adopted in 2014, that the articles of association of the company are drawn up by notarial deed or by any deed offering guarantees of authenticity in the State of the registered office of the company filed with acknowledgment of writings and signatures by all the parties having the same rank of the minutes of a notary.

[40] Cellule d'Analyse de Politiques Économiques du CIRES (CAPEC), Encadrement cit.

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therefore, most informal sector businesses rely on family savings, or other sources of financing. The formal legal sector is not helping in this respect.

The OHADA Uniform Act on Securities, even in its revised version, indicates the mortgage as the only available security over immovable, but a survey on land in 16 out of the 17 OHADA member countries showed that less than 5% of the total land is registered[41], rendering therefore mortgage substantially impracticable, and pushing consequently those in need of money to find alternative sources. And this without mentioning the issues determined by the difficulty to register the community ownership of land according to a Western based land registration system where only the individual (natural or legal person) can be recognized (and registered) as the owner[42]. Situations like this make access to credit extremely difficult (if not impossible), can cause a high mortality rate in the informal businesses, and therefore informal entrepreneurs have to resort necessarily to the informal finance to get access to alternative sources of credit.

A short overview about the informal finance is worthwhile at this point[43].

The informal finance can be defined as the set of those original mechanisms that allow the circulation of money against a temporary accumulation of credits and

[41] P. Dima Ehongo, 'L'intégration juridique du droit des affaires en Afrique: les pièges d'un droit uniforme et hégémonique dans le droit de l'OHADA', in Étienne Le Roy (ed.) *Juridicités: témoignages réunis à l'occasion du quarantième anniversaire du LAJP* (Karthala, 137, 2006). This survey does not include Democratic Republic of Congo that was not yet a member State at that time: it is very likely that if DRC is included in the survey, the percentage indicated in the tex twill be much lower.

[42] In this respect is worth mentioning the step forward made by the Loi n 21- 2018 du 13 juin 2018 fixant les regles d'occupation et d'acquisition des terres et terrains adopted in the Republic of Congo, where in its Title II (Articles 7-16) the recognition of the traditional land ownership as undivided land ownership is regulated.

[43] Literature on the informal financial sector is extremely vast and includes studies ranging from legal to economic and sociological studies. A few authors will be cited in the following footnotes in order to provide a short overview of the subject.

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debts[44]. Therefore, the informal finance includes all those unofficial mechanisms that enable temporary circulation of credits and debts[45].

The notion of informal finance makes then reference to the informal ways of financing, including those of borrowing, loan or building up of savings, which take place out of the official circuits[46]. It represents an operational approach to the phenomenon, while the notion of informal financial sector as including all the unofficial institutions granting loans to those left out by the formal financial sector, represents a more institutional approach to the same phenomenon[47]. Informal finance becomes therefore a broad concept that encompasses that wide range of financial activities and services that take place beyond the scope of a country's formalized financial institutions and are not subject to the financial sector regulations. Informal finance is common in both urban and rural contexts and normally relies on personal relationships and socioeconomic proximity. In contrast to formal finance, most informal providers focus on one service rather than offering a bundle of services.

The existence and role played by informal financial systems, especially in developing economies, is generally recognized. Informal financial institutions are considered those playing a complementary role to the formal financial system by servicing the lower end of the market. With informal financial institutions reference is made to loans from moneylenders, landlords, and families who base the financial transaction on business or personal relationships, as well as loans from institutions such as credit cooperatives, savings and credit associations that provide financial intermediation between savers and borrowers, but do not rely on the state to enforce contractual legal obligations. They consist of small, unsecured, short-term loans

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[44] M. Lelart, *Les circuits parallèles de financement: l'état de la question*, G. Henault, R. M'Rabet, 'Communication avec Actes aux Journées Scientifiques du Réseau Entrepreneuriat de l'UREF', (1990), Financement de l'entrepreneuriat et mobilisation de l'épargne 45.

[45] C. Mayoukou, 'Le système des tontines en Afrique. Un système bancaire informel', (1994) L'Harmattan, 21.

[46] M. El Abdaimi, *La finance informelle au Maroc*, (UREF/AUPELF 1991).

[47] C. Mayoukou, *Le système* cit., 22 and ff.

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restricted to rural areas, agricultural contracts, households, individuals, or small entrepreneurial ventures; they rely on relationships and reputation and can more efficiently monitor and enforce repayment than commercial banks and other formal financial institutions[48].

The informal financial system had a remarkable development in Africa. This is caused by the concurrence of different factors, namely the rigidity of the formal banking system, its inability to adapt itself to the population's needs. The official financial system is unable to make suitable financing channels adapted to the African reality available to the informal sector and – more in general – to most of the people. Actors in the informal sector rarely have collateral acceptable to banks: their creditworthiness resides in their human capital, which is difficult for formal intermediaries to consider. Often the cost to formal institutions of opening branches in villages and small towns is not justified by the business that can be generated. The informal financial system is in these cases the only accessible option, as it plays a supplementary role to that of the formal financial system.

Informal financial arrangements reduce transaction costs and risk using instruments not available to formal institutions. Those running informal financial activities can operate out of their own homes or on the street, maintain only the simplest accounts, and mix finance with other business. Freedom from control by the official financial authorities allows informal finance greater flexibility. However, such freedom also does not allow the use of many of the legal remedies available to formal intermediaries. Differently from formal legal mechanisms, informal finance relies on the knowledge of one another and on local sanctions to reduce the risk of lending. Social standing, personal reputation and the ability to obtain future financial services are often at stake in the market for informal financial services, and these sanctions showed to be effective.

All the above are the reasons why many times African savings do not adopt the forms normally used in the Western world, but rather follow mainly informal

[48] M. Ayyagari, A. Demirguc-Kunt, V. Maksimovic, 'Formal versus Informal Finance: Evidence from China', (2010) 23 (8), Rev. Financ. Stud. 3048-3097, 3048.

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channels. In this respect, *tontines* can perhaps be considered as the most representative example, definitely the most known and researched[49].

Going back to the OHADA, the discussion made above on the functioning mechanisms of the informal sector show how OHADA, the formal law, inevitably loses its centrality in the legal scenario. The existence of this gap between the official and the unofficial law has now been acknowledged, and it is significant that it is the official law that tends to be adapted to the informal reality.

The OHADA legislator introduced in the new version of the Uniform Act on General Commercial Law the "*entreprenant*", which should cope with the need to simplify the formalities required for micro and small enterprises that they cannot afford to register in the *Registre du Commerce et du Crédit Mobilier* (RCCM), particularly in rural and semi-rural areas, and through this process of "formalization", facilitate their access to formal credit and social benefits: in a nutshell, it should facilitate the official law to approach informal commerce, and in particular the entrepreneurs of the informal sector to fall within the borders of the application of the law[50]. To facilitate this process, this innovation of the OHADA legislator provides a reduced legal and accounting regime for this new legal subject. Therefore, the status of the

[49] The informality that governs the practice of tontines could clearly lead to mismanagement of the system if it is not properly run. In this respect, the rules of the OHADA Uniform Act on Cooperatives – maybe with the necessary adaptations – could be of help and represent a further meeting point between formal and informal rules.

[50] See art 30 of the revised OHADA Uniform Act on General Commercial Law. On the entreprenant see D. B. Ongono Bikoe, *L'entreprenant en droit OHADA*, (Université Panthéon-Sorbonne – Paris I, 2020, available at https://tel.archives-ouvertes.fr/tel-02943078/document); Sylvain Sorel Kuate Tameghe, entry 'Entreprenant', in P.-G. Pougoué (dir.), *Encyclopédie du droit OHADA*, (2011); J. Issa-Sayegh, 'L'entreprenant, un nouvel acteur économique en droit OHADA: ambiguïtés et ambivalence', (2012) 5 nº 878, Penant,; P.-G. Pougoué, 'L'entreprenant OHADA', (2013); S. Mancuso, 'Analyse historique et comparée de la figure de l'entreprenant en droit OHADA', in J. Diffo Tchunkam (eds.), *L'OHADA au service de l'économie et de l'entreprise*, (2014), 178; D. Tricot, 'Statut du commerçant et de l'entreprenant', (2011), n. 201, Revue Droit et Patrimoine, 67; A. Foko, 'La consécration d'un nouveau statut professionnel dans l'espace OHADA: le cas de l'entreprenant',(2010) Cahiers juridiques et politiques – Revue de la faculté des sciences juridiques et politiques, Université de Ngaoundéré, 55; M. Gonomy, 'Le statut de l'entreprenant dans l'AUDCG révisé : entre le passé et l'avenir',(2014), n.4, Revue de l'ERSUMA – Droit des Affaires, 204.

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*entreprenant* has been introduced with the aim of allowing entrepreneurs in the informal sector to emerge from their state of legal marginality and develop their activities in a legally and socially regulated environment, with simple and effective tax measures. Migration from the informal to the formal sector should be gradual and accompanied by measures at national level[51].

But the introduction of the *entreprenant* presents problems of systematization, as well as of interpretation, of this variation to the ordinary status of the entrepreneur. The attempt to provide a solution to a problem that is mainly African, together with the absence of the same institute or of a similar experience in terms of objectives in French commercial law and the peculiarities of how informal trade is practised in Africa, has produced a discipline that presents many obscurities[52]. Moreover, only a few member countries adopted the national operational measures to enforce the OHADA principles.

The revised version of the Uniform Act on Bankruptcy Law, in line with the introduction of the *entreprenant*, has subsequently extended the rules concerning bankruptcy to the small enterprises by providing specific regulations in this respect[53].

The revised version of the Uniform Act on Company Law has reduced the number of cases where the intervention of a notary public is requested for the validity of acts concerning companies. It has also revised the regulation of the *de facto* partnership and simplified the rules about the creation and the functioning of the limited liability company with a single shareholder (*société unipersonnelle*) to offer a wider range of opportunities to African people willing to join for a business endeavour and to provide solutions better tailored to the peculiarities of doing business in the African context[54].

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[51] Art. 30, par. 7, AUDCG.

[52] J. Issa-Sayegh, *L'entreprenant* cit.

[53] See Title II, Chapter II, Section 4 of the Uniform Act of Bankruptcy, revised version (2015), Articles 24 to 24-5.

[54] See more on this in S. Kwemo, *L'OHADA* cit.

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In practical terms, however, the impact of these changes on the informal commerce has been minimal up to now: very few informal entrepreneurs decided to become *entreprenant*, and the other new rules introduced have been scarcely applied[55].

OHADA's attempt to find a solution for the issues of informal commerce is surely praiseworthy, but the unavoidable vagueness of the rules provided clearly shows how difficult it is for the law to deal with the flexible and "slippery" institutions of the informal sector.

## 4. A different way forward

The discussion made above shows that all attempts made to bring formal law near the informal sector follow the same path: to make to formal law those changes deemed necessary to facilitate the migration of the informal businesses to the formal sector. In other words, up to now the discussion has been on how to adapt formal law to match the needs of the informal sector, that is bringing formal law to the informal sector.

As previously seen, the results obtained are not encouraging. The introduction of the Western pattern determined the implementation of a strongly positivist system in the OHADA region, which is antithetic to the flexibility of the African pattern. The OHADA system possibly answers the needs arising from globalization and promotion of foreign investments, but it is definitely far from the daily legal needs of the ordinary people. Paradoxically, OHADA law is more easily accessible to people (that most likely do not have the necessary skills to understand it) than the rules governing the informal sectors of the different member countries (more familiar to

[55] A. Aly Mbaye, S. S. Golub, and F. Gueye (eds.), *Formal and Informal Enterprises in Francophone Africa: Moving Toward a Vibrant Private Sector*, (IDRC 2020); S. Bissaloue, *L'informel* cit.; P. Winship, 'Law and Development in West and Central Africa (OHADA)', (2015), SMU Dedman School of Law Legal Studies Research Paper No. 272 available at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1197&context=law_faculty. See also The World Bank/IFC, "An Impact Assessment of OHADA Reforms", (2018), available at https://documents1.worldbank.org/curated/en/591171552538874508/pdf/135279-12-3-2019-18-19-19-EnglishOHADAICImpactFinalReport.pdf.

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the ordinary people). In such a positivist context, it is not surprising that informal rules struggle to find in the official law the place they have in the daily life of people, that we do not find any reference to them in the OHADA jurisprudence, and that very seldom scholars consider them when discussing about OHADA laws and their application[56].

Then, taking into consideration the scarce results achieved, it is maybe necessary to consider a different perspective and investigate on how to integrate the informal normative order regulating the informal sector into the official law.

This kind of approach necessarily requires a reconsideration of the entire discourse of legal pluralism in Africa.

The concept of legal pluralism has been admirably described by Jacques Vanderlinden as "…une situation dans laquelle un individu se trouve au carrefour de plusieurs ordres juridiques et oriente par son choix la solution à donner à un conflit éventuel tant du point de vue du for compétent que du droit applicable. […] Quel que soit le choix qu'il fasse, il risque d'entrer en conflit avec l'un, voire plusieurs, des réseaux dont il aura refusé de reconnaître le prescrit"[57], determines a conflictual relationship between the different normative orders that come into competition, in which one – the official law – tries to affirm its predominant role, and the others – the unofficial or informal laws – continuously challenge it. In any case, the different regulatory orders are in competition with each other, and, following such definition of legal pluralism by Jacques Vanderlinden, one normative order tends to exclude the other.

What, then, could the next step be?

The next step could (and should) be the one in which the conflictual relationship is replaced by a collaborative relationship between the various legal orders so that they can complete each other or at least not compete with each other.

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56 O. Ballal, *Les usages* cit., at 81.

57 J. Vanderlinden, 'Villes africaines et pluralisme juridique', (1998) 42 Journal of Legal Pluralism and Unofficial Law, 245.

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We are already aware of the impossibility of forcedly eliminating the African legal tradition: it is too strong and too rooted in the people, even those who live in cities and apply Western life models. Is it therefore possible to hypothesize a cooperation between these normative orders? It could be objected that collaboration is not actually possible, because the application of a legal order necessarily excludes the application of others. But this is not necessarily true, and many examples could be made in this direction[58].

Collaboration can be based on a hierarchical relationship (of supremacy) or equality. The first is the model based on the primacy of the source of Western derivation. Experience tells us that this last approach does not pay, and that equal dignity must be recognized for different normative orders. On the other hand, it is claimed that at least one *grundnorm* is necessary to dictate the basic rules of this cohabitation. But again, it can be objected that the very idea of the *grundnorm* is also of Western derivation and alien to the African legal culture more suited to a circumstantial and not to a predetermined approach.

And then? Make the *grundnorm* permeated with the local legal culture along with the principles of the European model? Coexistence to dictate the rules of coexistence?

The hypothesis is not strange. In the Somaliland constitution, the Senate (called in the constitution *House of Guurti*, or *Goolaha Guurtida* in Somali) is nothing but the institutionalization of the council of elders at the constitutional level. The *House of Guurti* deals with the resolution of inter-clan conflicts through a constant connection with local elders, leaving the elders the task of resolving the dispute every time the Lower Chamber is unable to do so, always having mediation and peacekeeping as primary goals. It therefore constitutes a sort of representation of the elders in the capital city. It also performs a central role of mediation between the government and the parliament: it reviews all the laws (with the exception of the financial ones) approved by the parliament and can block the enactment or request changes whenever the laws are considered contrary to the culture or interests of the

58 See more in S. Mancuso, 'Pluralismo e ordini normativi in Africa. Dal conflitto alla collaborazione', in M. Graziadei, M. Serio (eds.), *Regolare la complessità. Giornate di studio in onore di Antonio Gambaro*, (Giappichelli 2017).

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population; it also has legislative competence on religious, cultural and security issues[59].

Moving to the OHADA level, a preliminary – but fundamental – choice needs to be made clear: if the OHADA system has been created to regulate only transactions involving big businesses and multinational corporations, or (as it appears from the way the system is conceived) if the system is has been conceived to offer to all people living and operating in the member countries a more modern and effective system of business law.

If the latter is the correct direction, then the African legal culture cannot be ignored and the principles of informal law governing the informal sector shall necessarily be part of the system governing business transactions together with those imported through the use of the Western pattern.

I already proposed this approach when discussing the way forward for the possible harmonization of contract law in the OHADA system[60]. The methodological approach proposed there intends to conduct research to verify the existence of common principles in traditional contract law within the OHADA region, a sort of "common core of African informal contract law", that could inspire the OHADA legislator in his work on harmonization of contract laws. Then the research could also be expanded to all relevant aspects of informal rules governing business law in the OHADA context.

The main objection to an approach like the present one is perhaps the wide legal diversity existing in the OHADA region in the ambit of the informal sector. Nevertheless, despite the diversity of the African continent and of its legal facets, we must take into account the general and clear resemblances existing among the different African legal cultures as revealed by the authors who conducted analytical

59 S. Mancuso, 'Short Notes on the Legal Pluralism(s) in Somaliland', in S. P. Donlan, Lukas Heckendorn Urscheler (eds.), *Concepts of Law*, (Ashgate, 2014, 237)

60 S. Mancuso, 'Le droit OHADA vers sa population. Y-a-t' il une place pour les droits originellement africains dans le processus d'harmonisation du droit des contrats en Afrique?', in *Les pratiques contractuelles d'affaires et les processus d'harmonisation dans les espaces régionaux*, (conference proceedings), (2012) Porto Novo, ERSUMA.

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field studies across the continent, since they present always and everywhere the same essential characteristics[61].

Inserting principles derived from the rules governing the informal sector is not against the OHADA law. Other than Article 177 of the AUDCG that opens to the validity of usages normally practiced in agency relations, Article 239 of the same AUDCG expressly provides – with reference to the commercial sale – that the parties to a contract are bound by the usages to which they consented and by the practices established in their commercial relations, as well as by the professional usages largely known and regularly observed in the same commercial sector that they know or should have known, unless differently agreed. Moreover, according the following Article 240 there is no formal requirement to enter into a commercial sale contract that can be written or oral and that can be proved by any means.

The need to take into account African specificities was also a concern raised during the preparation and discussion of the first preliminary draft of the Uniform Act on Contract Law, drafted by Marcel Fontaine[62]. He inserted a principle almost identical to those of the AUDCG mentioned above in Article 1/8 of the draft Uniform Act, by providing that the parties to a contract are bound by the usages to which they consented and by the practices established between them, as well as by the usages largely known and regularly observed by the parties in contracts of the same kind, unless their application is unreasonable. There, one of the guiding principles in drafting the uniform act was to take into account the unique African features of contract law and he raised the issue if these unique African features should refer to traditional contract law. However, he observed that "[w]hile there still exist native rules that govern local contractual relationships, these are certainly not widely

61 T. Olawale Elias, *The Nature of African Customary Law*, (Manchester University Press 1956).

62 The discussion of the draft proposal has reached its higher academic level during the Colloquium held in Ougadougou on 15-17 November 2007. The presentations were published in 2008 in the Uniform Law Review vol. XIII, n.1/2. On the need to take into consideration African realities, see also G. Kenfack Douajni, 'La coordination de l'avant-projet d'Acte uniforme sur le droit des contrats avec les autres Actes uniformes de l'OHADA', (2008) 13 (1/2) Revue de droit uniforme/Uniform Law Review, 367.

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known"[63], and "[i]t is nevertheless important to take into account the African specificities in order to make the necessary adaptations. Everyone has evidently agreed. However, my interlocutors have experienced many difficulties in identifying the specific characteristics of contract law, which would be common to the region, if not the generally high degree of illiteracy"[64].

This kind of openings are the best vehicle to facilitate the insertion of informal rules into the system if there is the willingness to do so. This would definitely help to cope with the issue of illiteracy still largely present in sub-Saharan Africa, while the possibility to merge the application of formal and informal rules could help the actors of the informal sector in having a better knowledge of the formal rules too and to feel more confidence in the system governing their activities.

Finding the common principles of informal business law in the OHADA region (and maybe beyond, if we take into consideration the possible future enlargement of OHADA membership) would also be in line with the basic requirements indicated in the above-mentioned Articles of the AUDCG for the validity of the usages to be complied with. Indeed, the usages (or the informal practices) must be "largely known" and "regularly observed"[65]: it is evident how legal principles deriving from informal commercial activities which are common and shared by the informal entrepreneurs across the OHADA region can easily comply with the requirements of large knowledge and regular observation mentioned above.

These introductory methodological remarks need to touch upon the issue of dispute resolution in order to be complete.

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63 M. Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts', (2004) 9 (3), Revue de droit uniforme/Uniform Law Review, 573, at 578.

64 M. Fontaine, 'L'avant-projet d'acte uniforme OHADA sur le droit des contrats: vue d'ensemble', (2008) 13 (1/2) Revue de droit uniforme/Uniform Law Review, 204. The adaptations to which Marcel Fontaine refers are to the UNIDROIT principles of international commercial contracts, on which the first draft Uniform Act on Contract Law was based.

65 See Articles 177 and 239 par. 2 AUDCG. For a wide description of these two requisites see O. Ballal, *Les usages* cit., at 133 and ff.

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As briefly seen above, disputes in the informal sector may not be settled by the official State courts but the contractual parties may prefer to resort to the informal courts, often belonging to the same informal realities, otherwise they report the issue to the police.

The recently approved Uniform Act on Mediation could help in this respect. The Uniform Act defines mediation as "[…] any process, whatever the name, in which the parties request a third party to assist them in reaching an amicable settlement of a dispute, a conflicting relationship or a disagreement […] arising from a legal, contractual or other relationship or linked to such relationship, involving natural or legal persons, including public entities or the State". Mediation can be implemented by the parties (conventional mediation), at the request or invitation of a state court (judicial mediation), an arbitral tribunal or a competent public entity[66]. There are no procedural requirements to conduct the mediation, and if there is no specific requirement by the parties, the mediator conducts the mediation as he deems appropriate[67]. If, at the end of the mediation, the parties conclude a written agreement settling their dispute, this agreement is binding for them; such agreement resulting from the mediation can be enforced using the official judicial channels[68].

Looking at these basic principles we can surely affirm that the settlement of disputes arising from the informal courts can be incorporated into the formal system using the mediation channel, as they match the fundamental requirements to have a mediation as indicated above. We have already observed how the "informal sanctions" (enlarged liability at familial or community level, distrust, ostracism from the business community) already represent a strong deterrent to the non -fulfilment of the contractual obligations or the decisions of the informal courts, but the possibility to insert these latter in the official system using the mediation channel will also offer the official enforcement measures as further remedy: this would also be a way to help actors of the informal sector to approach the legal instruments offered by the formal channel.

66 Art. 1 AUM.

67 Art. 7 AUM.

68 Art. 16 AUM.

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Being a public authority (a public entity, according to Art. 1 AUM), the police – if requested for an intervention – could even act as a mediator to the extent that the basic requirements of the Uniform Act are respected (it shouldn't be difficult as the police is supposed to know the law…); otherwise it should encourage the parties to resort to a mediation where the mediator can even be an elder, the chief of the market or the informal court in the market, as the term "mediator" indicates any third party solicited to mediate a dispute, no matter what is the name or occupation of the third party in the State Party concerned[69].

To conclude, there are several aspects that could be explored in order to approximate OHADA and the rules governing the informal sector, provided that there is the intention to change how such approximation shall be done. A key step in this direction is to acknowledge the existence of legal pluralism in the African legal reality and to reconsider it: this means that insisting on the exclusive monopoly of the State in the law-making process would not lead to any result and that it is necessary to admit that these different normative orders shall be considered not anymore competing but cooperating to create a system that is more easily manageable and usable by the people.

69 Art. 1 (b) AUM.