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Research Paper

Good faith in the future OHADA contract law

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ABSTRACT
Initially designed by Professor FONTAINE of the international institute for the unification of private law, UNILAWat the request of the OHADA Council of Ministers at its meeting in Brazzaville in February 2002, the future OHADA contract law goes beyond its framework. 'preliminary draft uniform act relating thereto to integrate a more comprehensive document. This is the preliminary draft uniform text on general law of obligations in the OHADA area. Officially submitted to the Permanent Secretariat in November 2015 by Professors Joseph ISSA-SAYEGH, Paul Gérard POUGOUE and Filiga Michel SAWADOGO of the "Fondation pour le Droit Continental", this text which does not purify the contractual rules inherited from the colonial legislator until then. applicable, marks some progress with regard to traditional law of obligations.
A polysemic concept not defined by the said preliminary draft, the UNILAWprinciples and the Civil Code, good faith now radiates into the contract and is recognized as having a place during the pre-contractual period, at the time of birth, execution and execution. termination of the contract. Anything that justifies the construction of this study around a duality that allows us to address, on the one hand, good faith as a standard generating obligations in the future OHADA contract law and, on the other hand, good faith as a behavioral norm generating obligations whose violation is variously sanctioned in the future OHADA contract law.
KEY WORDS*: Good faith, OHADA contract law, UNILAW Principles, General law of obligations, explicit obligations, implicit obligations, guiding principles.*
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I. INTRODUCTION

Good faith permeates almost all areas of law. "Alligator which lives indifferently on land and in water"[1], it is present in criminal law, administrative law, family law, property law or contract law[2] and the works devoted to her are multitude[3]. Not defined by the civil code, OHADA projects and UNILAW principles[4], the

[1]LOUSSOUARN Yvon, "Synthesis report", in WORKS OF THE ASSOCIATION HENRI CAPITANT, La bon faith, Paris, Litec, 1994, p. 9 cited by LOIR (R), The foundations of the requirement of good faith in French contract law, DEA thesis, 2001-2002, Doctoral school n ° 74, Lille 2, p.4.
[2]LOIR Romain, The foundations of the requirement of good faith in French contract law, memoir op. cit. p.4.
[3]KALONGO MBIKAYI, "The confirmation of the principles of good faith and loyalty in the preliminary draft OHADA uniform act on contract law", Rev. dr. unif. 2008, ARTHAUD Claude, On good faith and its effects in civil matters, Paris, A. Parent, 1874; BRETON André, "Civil effects of good faith", [1926] Revue critique 86; DESGORCES Richard, The Good Faith in Contract Law, Current Role and Prospects, th. Paris II, 1992; GORPHE François, The principle of good faith, Paris, Dalloz, 1928; JAUBERT Joseph, Civil effects of good faith, Paris, A. Pédone, 1899; LYON-CAEN Gérard, "On the evolution of the notion of good faith" (1946) 44 Rev. trim. dr. civ. 75; MILLET Jules-Joseph-Edmond, On Error and Good Faith in Roman Law and the French Place, Paris, Lahure, 1871; PICOD Yves, The duty of loyalty in the execution of the contract, t. 208, Paris, LGDJ, 1989; VOLANSKY AL Alexandre, Essay for an express definition of law based on the idea of good faith, Paris, Bookshop of ancient and modern jurisprudence, 1929; VOUIN Robert, Good faith: Current concept and role in French private law, Paris, LGDJ, 1939.
[4]UNILAW is an intergovernmental body, which since 1926 has been involved in the preparation of international texts (conventions, uniform laws, principles of community law, etc.) relating to international trade law and

notion of good faith seems to be a sea serpent[5]and the majority of authors recognize that it presents several facets, the most visible of which refer to an opposition between "subjective good faith" and objective good faith". The Vocabulary Capitant highlights this duality and defines good faith as being on the one hand an "erroneous belief in the existence of a regular legal situation" and on the other hand, as "loyal behavior (or to all less normal) than required, in particular the performance of an obligation; attitude of integrity and honesty. "[6] The doctrine suggests to consider that in contractual matters, the assessment of good faith is done in concreto, by referring to a norm objectively developed in the particular context, local or international, which gave birth to the contractual relationship"[7]. Even though certain Uniform Acts[8]occasionally apprehend the contractual matter, the look at the contract via the Organization for the Harmonization of Business Law in Africa (OHADA) is not at first glance interesting. Because, among the OHADA Uniform Acts, we are still awaiting the adoption of the preliminary draft of the OHADA Uniform Act on contract law[9]. This uniform act is part of a work of harmonization already well underway and which is continuing in accordance with the projects adopted by the Council of Ministers.[10]who, at its meeting in Brazzaville in February 2002 asked the Permanent Secretariat to contact UNILAW(the international institute for the unification of private law); institute which gave a favorable response to the request of the Council of Ministers by proposing that Professor Emeritus Marcel Fontaine bring his expertise to the preparation of a preliminary project with funding from the Swiss Government[11]. Inspired by the UNILAWPrinciples relating to international trade contracts, the preliminary draft OHADA Uniform Act on contract law judiciously adopted the principle of good faith as the basis for the creation and especially the execution of contracts.[12]. Thus, unlike the civil code inherited from colonization which limits good faith to the execution of contracts[13], the text of Professor Fontaine[14] extends it to all contractual phases while prohibiting the exclusion of this obligation or the limitation of its scope by the parties[15] so to speak that the requirement of good faith is of public order[16]. Handed over to the Permanent Secretariat in September 2004 and communicated, at the beginning of 2005, both to the National Commissions for examination and to the Court of Justice for opinion[17], the text of 213 articles did not win the conviction and the assent of the OHADA national commissions who did

uniform private law in general. Based in Rome, Italy, UNILAWacts on the mandate of its 61 member states (the five continents are represented with different levels of development as well as the main legal traditions) and also in collaboration with non-member states, regional and universal NGOs as well as national institutions which are notably university and professional.

[5]The proposal for a common European sales law is one of the few texts to attempt a definition of good faith. According to article 2 of this text, "good faith and loyalty" should be understood to mean "behavior characterized by honesty, frankness and consideration of the interests of the other party to the transaction or relationship. in question ".

[6]CORNU Gérard, dir., Vocabulaire Juridique, Association Henri Capitant, 5th ed., Paris, PUF, 1996 at p.105; See also: CREPEAU Paul-André, dir., Dictionary of private law and bilingual lexicons, 2nd ed., Cowansville, Yvon Blais, 1991 at p. 63. quoted by LEFEBVRE Brigitte, "Good faith: protean concept", RDUS, 1996, p.324.

[7]ETOUNDI ONANA Félix, "The principles of UNILAWand the legal security of commercial transactions in the preliminary draft OHADA uniform act on contract law", Rev. dr. unif. 2005-4, p. 695

[8] The Uniform Act relating to general commercial law and the Uniform Act relating to contracts for the carriage of goods by road.

[9]MESTRE Jacques, "Regards contractuels sur l'OHADA", Proceedings of the Symposium on Securing Business Investments in French-speaking Africa: OHADA LAW, organized by the Center for Economic Law of the Paul-Cézanne University of Aix-en- Provence on March 20, 2009, Revue LAMY, DROIT CIVI, n ° 67, January 2010, p. 72

[10] Executive and legislative body of the organization composed of the ministers of justice and finance of the States Parties responsible for the adoption of the Uniform Acts.

[11] Department of Development and Cooperation.

[12]KALONGO MBIKAYI, op cit., P. 225

[13] Article 1134 paragraph 3

[14]See the author's report "The preliminary draft OHADA Uniform Act on contract law: Overview", presented at the Symposium on the harmonization of OHADA contract law, held in Ouagadougou (Burkina Faso) from November 15 to 17, 2007 having as its object the discussion of the preliminary draft OHADA Uniform Act on contract law (2005), Rev. dr. unif. 2008, p. 203.

[15]See article 1/6 of the draft which in fact provides that: "1. The parties are required to comply with the requirements of good faith. "2. They cannot exclude this obligation or limit its scope".

[16]NGOUMTSA ANOU Gérard, "The obligation of good faith in OHADA law: analysis based on commercial sales". L'Obligation, Studies offered to Professor Paul-Gérard Pougoué, L'Harmattan, 2015, p. 615

[17]BILE KANGAH Junior Emile, Reflection on the future harmonization of contract law in the OHADA area, master's thesis, UCAO / UUA, 2007, p.4

not hesitate to voice their opposition[18]. These oppositions are already perceptible from the pen of Professor Paul Gérard Pougoué, whose analysis invites us to question the very advisability of a uniform act on contract law. According to this author, the question is felt all the more since such an act is quite far from the general field of standardization of the OHADA treaty.[19]. Even more, if the content and the main characteristics of the preliminary draft reflect the advantages of a future contract law inspired by the UNILAWPrinciples with a view to modernization and proven adaptation to international contractual and arbitral practice, important questions revolve around the problems of reference and consistency[20]of the preliminary draft. Anything that brings the meeting of the OHADA Council of Ministers, held in Niamey on December 12, 2007, to relaunch the reflection on the development of a uniform act relating to the law of contract and evidence. It is in this vein that the Foundation for Continental Law, with the consent of the Permanent Secretariat of OHADA, has charged Professors Joseph ISSA-SAYEGH, Paul Gérard POUGOUE and Filiga Michel SAWADOGO with a design mission of a draft text on obligations, proof and prescription[21]. This text, finalized in 2010, was officially submitted to the Permanent Secretary of OHADA in November 2015, and it is currently the subject of some promotion through publications and conferences.[22]. The preliminary draft uniform text on general law of obligations in the OHADA area, which does not purify the contractual rules inherited from the colonial legislator until then applicable, marks certain advances with regard to the classic law of obligations.[23]. In short, the preliminary draft alternative uniform text of the FDC (Foundation for Continental Law) pursues the objectives of legal security, freedom, economic attractiveness and contractual justice.[24]. That text therefore rightly took into account the requirement of good faith in contractual matters. However, the question that we are entitled to ask revolves around the degree, better still, of the importance of this consideration. In other words, what place to recognize good faith in the development of this set of standards? Reading article 35 of the preliminary draft reveals that good faith is established as the guiding principle of contracts. A principle generating obligations that are not only explicit and implicit, but also positive and negative towards the parties to the contract. The good faith which is recognized a place during the pre-contractual period, at the time of the birth, the execution and the extinction of the obligation[25] is therefore a behavioral norm generating obligations (I) and the violation of which is variously sanctioned (II).

I- Good faith as a behavioral norm generating obligations in the future OHADA contract law

Good faith today "dominates from above all contract law"[26]in general and the future OHADA contract law in particular. Indeed, elevated to the rank of the guiding principles of the future OHADA contract law in the same way as contractual freedom and the binding force of the contract, good faith is omnipresent in the contractual part of the preliminary draft uniform text on general law. obligations in the OHADA area. Provided for in Articles 21 to 262 of the said text, this part dealing with the contract is governed from end to end by Article 35 which requires the parties to comply with the requirements in good faith, both during the pre-contractual period and at the time of birth., the performance and termination of the obligation.

A- The explicit obligations enshrined in the preliminary draft uniform text on general law of obligations

Consistently used in everyday language, the obligation which is considered to be one of the major pillars of civil law[27]appeared in French vocabulary at the beginning of the 13th century (1235) to designate the action of

[18]AKONO Adam Ramsès, "Reflections on the theory of unforeseeability in OHADA contract law", available at https://www.afdd.fr/images/Divers/Les_Horizons_du_Droit_Bulletin_n8_oct2019.pdf, accessed March 21, 2021.

[19]POUGOUE Paul Gérard, "The preliminary draft OHADA Uniform Act on contract law: the tribulations of an academic", OHADATA D-07-41, p.5

[20]POUGOUE Paul Gérard et alii, "Uniform acts", POUGOUE Paul Gérard (Dir.), Encyclopédie du droit OHADA, Lamy, 2011 p. 149.

[21]Report on the presentation of the draft uniform text on general law of obligations in the Ohada area, Rev. dr. unif. 2008, p. 203.

[22]AKONO Adam Ramsès, "Reflections on the theory of unforeseeability in OHADA contract law", op. cit.

[23]BILE KANGAH Junior Emile, "Some considerations on the preliminary draft OHADA Uniform Act on contracts", "The preliminary draft OHADA Uniform Act on contract law, Proceedings of the Symposium on the harmonization of law OHADA contracts, op. cit. p. 481.

[24]AKONO Adam Ramsès, "Reflections on the theory of unforeseeability in OHADA contract law", op. cit.

[25]Presentation report of the draft uniform text on general law of obligations in the OHADA area, op. cit. p. 9.

[26]LE TOURNEAU Philippe, "Good faith", in Rep. civ. Dalloz, Paris, DALLOZ, 1995, volume III, p.5 cited by LOIR (R), op.cit. p.6

[27]MEVOUNGOU NSANA Roger, "The variability and stability of legal obligations", in Studies offered to Professor Paul-Gérard POUGOUE, op. cit., p.1070.

engaging. Whether we place it in the field of morality, law or even other human activities, what makes the essence of the obligation is the idea of constraint, coercion or even on-call. Etymologically, this notion comes from the Latin "obligare"[28]; "Ligare" meaning to bind. By therefore resorting to the notion of constraint, we simply emphasize the fact of feeling bound by a rule, a standard, a contractual commitment[29]by linking it to the sanction imposed on a person who has not acted in accordance with the law. Explicit obligations refer to those which are clearly and solemnly specified in a text. As regards the preliminary draft of the uniform text on the general law of obligations, these explicit obligations are exhaustively enumerated (1) although in certain provisions, this precision seems superfluous (2).

1- The typology of the explicit obligations enshrined in the preliminary draft uniform text on general law of obligations

With the exception of the guiding principle which itself explicitly establishes the obligations to negotiate, contact, perform and terminate the contract in good faith, other provisions of the text revert to this requirement of good faith. It should already be noted that the preliminary draft of the Uniform Act drafted by Professor Fontaine explicitly provided for the prohibition of contradicting oneself in article 1/7, the duty of collaboration in article 5/3, l obligation to minimize damage in article 7/26, the prohibition of injury in article 3/10… The letter of these provisions has not been taken up by the ISSA Professors' preliminary draft text - SAYEGH, POUGOUE and SAWADOGO which firstly provides in article 37 that "the initiative, the conduct and the termination of the talks are free, but they must meet the requirements of good faith.*30*, talks refer to the exploration phase of the contract in which the parties try to construct the future contract. This phase is governed by two apparently contradictory rules: on the one hand, the freedom to break off negotiations, even advanced, and on the other hand, the obligation to negotiate in good faith. Knowing that the obligation to negotiate consists "in forcing individuals to an exchange of proposals and counter-proposals possibly implying reciprocal concessions, and whose goal, for the lawyer, is to reach precisely a negotium, binding decisions for his authors "[31]It should be noted that this good requirement is also valid when it is necessary to renegotiate the contract following the upheaval of circumstances[32]. This also contributes to weakening once again the classic distinction between formation and execution of the contract, since the initial negotiation is likely to be followed by periodic renegotiation.[33]. As some authors point out, "the contract no longer expresses the final point of equilibrium resulting from a confrontation of opposing interests, but it reflects, through its successive modifications, the evolution of the community of interests which is established between the parties, linked in the long term by relationships that cannot fail "[34]. The contract is above all a living thing[35]. And it is on this basis that the parties can, by an agreement in principle, undertake to negotiate a contract at a later stage. This commitment gives rise to another obligation enshrined in the preliminary draft uniform text on general law of obligations, in particular the obligation to contribute in good faith to the determination of the elements of the contract to be negotiated subsequently.

This requirement is explicitly enshrined in Article 39 of the preliminary draft which creates a kind of obligation in another obligation. Indeed, not only are the parties obliged to subsequently negotiate a contract in good faith, but also they are subject to the obligation to contribute in good faith to the determination of its content. However, these details seem superabundant and bring practically nothing significant in relation to the place of good faith in the future OHADA contract law.

[28] Petit Larousse in color, Larousse, 17, Rue du Montparnasse-75298, Paris CEDEX 06, p.689.

[29]MBONDA Ernest-Marie, "Obligation: by what right and for what purpose? »In Studies offered to Professor Paul-Gérard POUGOUE, op. cit., p.442

[30] ABDOURAOUFI Ibrahim, L'OHADA et la commonlaw, Harmattant, 2020, p.104

[31]CEDRAS Jean, "The obligation to negotiate", Rev. trim. dr. civ. 1983, No. 1, p.265; See also on the obligation to negotiate: PICOD Yves, The duty of loyalty in the execution of the contract, thesis, Dijon, 1989, n ° 176, p.199.

[32]V; in this sense, article 162 of the preliminary draft of the text which provides that "in the event of upheaval in circumstances, the injured party may request the opening of renegotiations. The request must be made without undue delay and be justified "and for a recent study in OHADA law, AKONO Adam Ramsès," Reflections on the theory of unforeseeability in OHADA contract law ", op. cit.

[33] In the same vein: FONTAINE Marcel, International contract law: Analysis and drafting of clauses, Bruylant (Emile), p. 279.

[34]FONTAINE Marcel, "The hardship clauses, conventional arrangement of unforeseen circumstances in long-term contracts", DPCI, 1976, p.42.

[35] ABOUBAKAR Saidou, The moralization of the law of contractual obligations, thesis, University of Yaoundé 2-Soa, 2015, p.169.

2- The overabundance of explicit good faith obligations in the preliminary draft uniform text on general law of obligations in the OHADA area

A careful reading of the preliminary draft uniform text on general law of obligations in the OHADA area shows that the concept of "good faith" has been used five times in articles 35, 37, 39, 54 and 55. If in Articles 54 and 55, the texts refer to the rules for the protection of bona fide third parties and therefore do not explicitly establish any new obligation, Articles 35, 37 and 39 are real niches of obligations and in accordance with the relevant provisions of the 'Article 3 of the said preliminary draft, "the obligations are explicit or implicit. Implied obligations arise from subjective or objective considerations, such as: - the intention of the parties; - the nature and purpose of the contract; - the law ; - uses ; - the practices established between the parties; - equity; - good faith ; - the reasonable. »Since good faith is well enumerated as one of the considerations generating implicit obligations, it seems superfluous to us to devote it further to Articles 37 and 39 relating to contractual negotiation, whereas the requirement of good faith is previously established in guiding principle in the same way as contractual freedom and binding force of the contract. This means that article 35 where the good faith which is recognized a place during the pre-contractual period, at the time of the birth, the performance and the extinction of the obligation it seems superfluous to us to devote it further to Articles 37 and 39 relating to contractual negotiation when the requirement of good faith is previously established as a guiding principle in the same way as contractual freedom and the binding force of the contract. This means that article 35 where the good faith which is recognized a place during the pre-contractual period, at the time of the birth, the performance and the extinction of the obligation it seems superfluous to us to devote it further to Articles 37 and 39 relating to contractual negotiation when the requirement of good faith is previously established as a guiding principle in the same way as contractual freedom and the binding force of the contract. This means that article 35 where the good faith which is recognized a place during the pre-contractual period, at the time of the birth, the performance and the extinction of the obligation[36], would have been sufficient to testify that the contractual obligation of good faith takes an important place and its influence increases in the matter of civil law in general and in contractual relations in particular. This movement towards the moralization of contractual obligations in OHADA law takes place in a context marked by full consideration by the UNILAWPrinciples as well as the Principles of European contract law.[37]and in particular the French ordinance of February 10, 2016 reforming contract law, the general regime and proof of obligations, which entered into force on October 1, 2016. Article 1104 of the Civil Code, resulting from this ordinance states that "Contracts must be negotiated, formed and performed in good faith." Much more, thearticle 1112 of the Civil Codespecifies that: "the initiative, progress and termination of pre-contractual negotiations are free. They must imperatively meet the requirements of good faith. " We simply note that the idea is the same in France as in the future OHADA contract law where we first devote a guiding principle of good faith before explicitly providing that the pre-contractual negotiations are subject to the requirements of good faith. . However, as in criminal law with the intentional element of the offense, the guiding principle of good faith would have sufficed to illustrate that good faith radiates the entire contract by giving rise to implicit obligations.

B- The implicit obligations arising from the consecration of good faith as a guiding principle in the preliminary draft uniform text on general law of obligations

As previously indicated, good faith is part of the subjective or objective considerations, generating implicit obligations that Professor Isidore Léopold MIENDJIEM calls implied obligations.[38]. Moreover, DEMOGUE[39]had drawn up a list of what he called "secondary" obligations resulting from article 1134 paragraph 3 and already insisted on cooperation between the parties and the information that they owed each other. Following DEMOGUE and relative to the future OHADA contract law, the guiding principle of good faith enshrined in article 35 of the preliminary draft of the text creates secondary obligations, implied or implied, positive (1) and negative (2).

1- Positive implicit obligations arising from the guiding principle of good faith

How many are these positive implicit obligations born from the guiding principle of good faith in the preliminary draft uniform text on the general law of OHADA obligations? It is difficult to answer this question with exactitude, but there is no longer any doubt that good faith plays a role at all stages of the life of the contract: negotiation, formation, execution, circulation, termination and in any case: obligations of information,

[36]Presentation report of the draft uniform text on general law of obligations in the OHADA area, op. cit. p. 9

[37] The principles of European contract law state in article 1-106 that "in the exercise of its rights and in the performance of its obligations, each party is required to act in accordance with the requirements of good faith".

[38]MIENDJIEM Isidore Léopold, "The vigor of implicit obligation", in Studies offered to Professor Paul-Gérard POUGOUE, op. cit., p.475

[39]DEMOGUE René, Treaty of Obligations, Paris, 1923, t IV, p. 9 and sn ° 3 and s.

cooperation, loyalty, confidentiality, giving notice, giving reasons… and with a few circumstantial exceptions, no serious excess is to be deplored.

The obligation of cooperation or loyalty is a general requirement that exists at all stages of the contract. It is important to indicate at the outset that unlike Professor Fontaine's text which explicitly devotes it to article 5/3, the preliminary draft of the trio of Professors ISSA-SAYEGH, POUGOUE and SAWADOGO does not do the same. and there is reason to believe that this obligation is embedded in the guiding principle of article 35. Consequently, it is found in its various forms as intended by the drafters of the preliminary draft.

The obligation of collaboration is part of this broad movement of moralization which innervates all of contemporary contractual law in general and the future owes OHADA in particular. This concept is more demanding than any other concept by implying in a positive way, attitudes and behaviors converging in the service of a common interest. It is necessary to develop between the contracting parties a kind of "affectio contractus" symbolized by this spirit of collaboration.

It is therefore desirable to use the word "obligation" and not that of "duty" or "spirit of collaboration", because the term "obligation" has a legal meaning even if this obligation is of moral inspiration. Regarding the essence of the concept of collaboration, it conveys the idea of solidarity between the contracting parties. "The contract is respectable according to human solidarity"[40]. This concept also satisfies the trust that the two contracting parties had in each other when the contractual relationship was formed. The obligation to cooperate may apply to all contracts if the situation so requires. Likewise, it concerns both professionals and consumers. The obligation of collaboration exists whenever the parties do not have completely antagonistic interests, but on the contrary pursue, at least in part, common objectives. The obligation to collaborate requires that we help others when we derive no interest from them. Likewise, as one author rightly points out, "the parties must understand that their mutual good will determines them to a kind of association, of collaboration" which will help them to satisfy their particular ambitions.[41]. "Each of the contracting parties is required to take into account, beyond its own interest, the interest of the contract and that of the other party, by deploying itself in their service, or even by accepting certain sacrifices, in order to promote the conclusion, the execution and maintenance of the contract understood as the basis of a collaboration"[42]. Even going beyond the concept of collaboration, some authors have spoken of contractual fraternity[43].

The obligation of cooperation arising from the guiding principle of good faith is omnipresent in the contract. It is found at the time of the formation of the contract where it is intended to clarify the consent of the parties. Article 60 of the uniform preliminary draft provides for this purpose that "the contracting party who knows or should have known information of which he knows the decisive importance for the other has the obligation to inform him". It is therefore an "obligation to provide information which, however, only exists in favor of those who have been unable to obtain information for themselves or who have legitimately been able to trust their co-contracting party, due to the, in particular, of the nature of the contract, or of the quality of the parties "[44]. This obligation can also be broken down into a duty of advice and even a warning. It is imposed on contractors mainly because of concerns related to the dangerous nature of the object of the service. "The caveat is to draw the attention of the contractor to a negative aspect of the contract or the subject of the contract. It is mainly against a danger, a risk, that we are required to warn someone"[45]. In the obligation to warn, there is a concern to protect the physical integrity of the contractor. The obligation to warn reflects a need for protection, a public necessity against physical attacks linked to improper use of the object of the contract. This obligation makes it possible to avoid a risk, a disadvantage but it does not participate in the fight against the imbalance of services.[46].

The obligation of collaboration is also encountered in the execution phase of the contract to allow its satisfactory and above all balanced execution. In this phase in particular, there is a sort of sub-obligation to provide information which is incumbent on both parties and it is for this reason that it is the symbol of the idea of collaboration which must predominate in contractual relations because, " The mere fact that we know or that we can know is in itself a not insignificant element of moralization "[47]. The imbalance of services in the

[40]DEMOGUE René, "Changes to contracts by the unilateral will", RTDCiv.1907, pp.246 et seq.

[41]ALISSE Jean, The obligation of information in contracts, thesis Paris II, 1975, p.90.

[42]MESTRE Jacques, "The evolution of the contract in French private law", in Contemporary evolution of contract law, PUF, 1986, p.45; also quoted by THIBIERGE-GUELFUCCI Catherine, "Libre propos sur la transformation du droit des marchés", RTD civ., 1997, n ° 31, p.382.

[43]THIBIERGE-GUELFUCCI Catherine, "Free talk on the transformation of contract law", art. prev., p.382

[44]See article 60 of the preliminary draft text.

[45]M. FABRE-MAGNAN, On the obligation of information in contracts, thesis Paris I, ed. 1992., No. 467.

[46]ABOUBAKAR SAIDOU, thesis op. cit. p.48.

[47]Report of the French Prime Minister chaired by BOUCHERY Robert, in Prevention of corruption and transparency of economic life, Doc. Franç., 1993, p.33. quoted by VOUDWE Bakréo, The transparency

execution of the contract will be reduced if each party collaborates and ensures that their interests are respected by trying by all means to treat as equals with their contracting party.

The obligation to cooperate is also manifest at the end of the contract. Indeed, articles 196 and 204 of the preliminary draft impose a formal notice and even a notification of the breach of the contract. Whether it is the obligation of collaboration or the obligation of loyalty, this behavioral requirement innervates the entire contract as well as the implicit negative obligations.

2- Negative implicit obligations arising from the guiding principle of good faith

The consecration of the guiding principle in good faith does not give rise only to positive implicit obligations. It also generates negative implicit obligations; that is to say linked to the obligation not to do. The purpose of the latter is to provide a negative service, the debtor being required to refrain from such or such action. Apart from a simple clause establishing an obligation not to do, positive law has also enshrined a variety of negative obligations which actively contribute to moralizing the law of contractual obligations. This is the case with the prohibition of disloyalty through the obligation not to deceive and the obligation not to abuse.

The obligation not to deceive is first and foremost a duty of good faith[48]imposed by the French Court of Cassation which constitutes the first leaven of contractual ethics. While the Civil Code had confined it to the sole stage of the execution of the contract, the Court of Cassation emancipated itself from the restrictive letter of article 1134 paragraph 3, to ensure the influence of the good faith of the negotiation. at the end of the contract[49]. The obligation not to deceive is therefore one of the instruments of contractual moralization and, if it existed at least implicitly from the Civil Code, it has taken on a considerable scale due to the evolution of contract law. It is therefore this development that the preliminary draft uniform text on general law of obligations has endorsed by enshrining the obligation not to deceive which manifests itself, among other things, through the prohibition of fraud and the granting of withdrawal period.

With regard to fraud, article 71 of the preliminary draft defines it as "the fact that a contracting party takes the consent of the other by means of maneuvers, lies or the intentional concealment of a fact which, if he had been known to his co-contracting party, would have dissuaded him from contracting, at least under the agreed conditions. Unlike the Civil Code, the draft uniform text provided for a definition of the notion of fraud, which designates behavior intended to mislead a person in order to decide to conclude a contract. It is therefore an error, but it is the fault of the other party. Whoever is the victim was not mistaken, he was deceived[50]. Therefore, deception is a deception or a maneuver used to induce a person to contract.

The prohibition of disloyalty is also manifested by the granting of a withdrawal period. In principle, the binding force of conventions seems to set the commitment in stone. One could not detach oneself from the word given, much less withdraw once the wills have been exchanged. The immutable nature of the commitment is the fair counterpart of legal certainty. In reality, the contract is formed by the sole exchange of consents. This instantaneous training should not mask the important intellectual phase which systematically precedes the externalization of said consents. Before making his offer known, the solicitor questions himself, weighs the pros and cons. Likewise, before accepting, the recipient of the offer thinks about the advisability, for him, to conclude the contract. Reflection is therefore an integral part of the contract formation process. The value of consent depends on its quality. To allow the contracting party to mature his consent, positive law has two methods. The first, illustrated by the Anglo-Saxon formula of "cooling-off period", consists in offering the contractor, after signing the agreement, a period during which he can renounce the contract. "Because we better measure the scope of the act performed than the consequences of an act to come"[51], this right of withdrawal[52]

requirement of commercial companies in the OHADA space, Thesis, University of Ngaoundéré, 2013, n ° 537, p.572.

[48]Good contractual faith is to be distinguished from the good faith of the contracting party. While contractual good faith is defined "as a reason for decision which makes it possible to determine the binding content of a contract, and simultaneously to assess the legal consequences of the acts which follow and relate to it", good faith d 'a contracting party is defined on the contrary, "as a subjective state which is proper to him", it is subsequently purely individual and therefore capable of being taken into consideration without this appearing absolutely necessary in order to attach the effects of rights to it. for the benefit of the one in whom it has manifested itself.

[49]MAZEAUD Denis, "The contractual policy of the Court of Cassation", Mélanges in honor of Philippe JESTAZ, p. 383, no.16.

[50]TERRE François, SIMLER Philippe and LEQUETTE Yves, Droit Civil, Les obligations, Dalloz, 9th ed. 2005, p.234, n ° 228.

[51]FERRIER Didier, "The provisions of public order aiming to preserve the reflection of the contracting parties", D. 1980, Chron. pp. 177 et seq., Spec. n ° 8, p. 178.

presents for the consideration of the contracting party a major interest since it is considered as a right to withdraw or the acceptance can be revoked[53]. The second, considered as an instrument of reflection, consists in granting the recipient of the offer a mandatory reflection period during which the conclusion of the contract is impossible, acceptance cannot be given before this period. The two methods are enshrined in the draft text in its article 62[54] just like the obligation not to abuse.

Addressing the issue of the obligation not to abuse amounts to questioning the fate of clauses which are generally defined as "unfair terms"[55]. It is a question of controlling the content of the contract in order to eradicate the stipulations which tarnish the desirable balance between the services. This consists in imposing an obligation not to do; therefore, a negative obligation; that of not imposing contractual stipulations that are morally disadvantageous for the weak party. This solution is dictated by a higher imperative allowing the modification of the terms of the contract: that of elementary justice. The common law of contracts must itself forge its instruments of retaliation against the practices denounced. In the preliminary draft of the text, we do not find the expression "abusive clause", but provisions which are similar to it, in particular article 113 which specifies that "the clause which creates a significant imbalance in the contract to the detriment of one of the parties may be revised or deleted at the latter's request, in the cases where the law protects it by a particular provision, in particular in its capacity of consumer or when it has not been negotiated ". We are justified in believing here that the drafters of the project are referring to unfair terms since the consumer, as far as Cameroon is concerned, is protected by the 2011 law on consumer protection.[56]. But the obligation not to abuse also finds expression in the preliminary draft uniform text through, among other things, article 109 relating to the manifestly abusive price.[57] and article 258 authorizing the judge to moderate or reassess the amount of fixed price clauses and clearly excessive or derisory penal clauses[58]. These provisions of the future OHADA contract law are revealing in the background of the fact that good faith is not only a standard of behavior but also a standard of behavior variously sanctioned.

II- Good faith as a behavioral norm generating various obligations sanctioned in the future OHADA contract law

While the drafters of the draft uniform text explicitly devoted a sanction for the violation of the obligation to negotiate in good faith (A), they failed to provide a general sanction for the violation of the guiding principle of sincerity ; situation which militates for the use of other concepts while recalling the need for precise sanctions in the event of contractual behavior violating the guiding principle of good faith (B).

[52]For evocative studies on the subject, BOUJEKA Augustin, "The reflection period and the withdrawal period", Banking RD 2004, p. 219; DESTRAZ Stéphane, "Advocacy for a functional analysis of the right of withdrawal", Contracts, conc. consume 2004, p. 7; BAILLOD Raymonde, "The right to repent", RTD civ. 1984, p. 226; BRUN Phillip, "The Right to Reverse Your Engagement," Dr. et Patr. 1998, p. 60.

[53]BENABENT Alain, Droit civil, Les obligations, Domat-Montchrestien, 12eed., 2010, p.57.

[54]"The period of reflection is that until the expiration of which the recipient of the offer cannot effectively consent to the contract" while "the period of repentance is that until the expiration of which the recipient of the offer is allowed. 'offer to withdraw their consent to the contract at their discretion. "

[55]For the use of this term before any legislation, BERLIOZ Georges, The contract of membership, 2nd ed., LGDJ, Paris 1973, n ° 234; V. among general works; TERRE François, SIMLER Philippe and LEQUETTE Yves, Les obligations, op.cit., N ° 305; FLOUR Jacques and AUBERTJean-Luc, Les obligations, 1. L'acte juridique, op. cit. No. 134; The obligations, 2. The legal fact, op. cit., No. 194; CARBONNIER Jean, Civil Law, Les obligations, T4, 20th ed., PUF, 1996, n ° 79; MALAURIE Philippe and AGNES Laurent, Civil Law, Les obligations, 8th ed. Cujas, 1998, # 863, # 612, # 491; LARROUMET Christian, Civil law, The obligations, The contract, T. III, 3rd ed. Economica, 1996, No. 430.

[56] V. Art 2 of the framework law n ° 2011/012 of 6 May 2011 on consumer protection in Cameroon which defines the abusive clause as being "any clause which is or which appears to be imposed on the consumer by a supplier or service provider who has economic superiority over the consumer, giving the first an unfair, unreasonable or excessive advantage over the second ".

[57] This article provides that "If the price is manifestly excessive, the other party may apply to the judge in order to obtain, depending on the circumstances, the reduction of the price, which may or may not be combined with damages or the termination of the contract"

[58] The exact letter of this article is: "The judge may, of his own motion or at the request of the party who has an interest therein, moderate the amount of the forfeit clauses and of the penalty clauses if it is manifestly excessive or reassess it if" it is ridiculous".

A- The award of damages for breach of the obligation to negotiate in good faith.

The failure of a negotiation can only be a source of tort liability if it is attributable to the bad faith or to the fault of one of the parties, in particular when it has entered into or continued negotiations without intention of reaching a conclusion. a deal. This is the exact provision of the second paragraph of Article 37 of the preliminary draft text which lays down the conditions (1). Their analysis will then allow us to focus on the subject of damages (2) in the event of a breach of the obligation to negotiate in good faith.

1- The conditions for the payment of damages in the event of failure of negotiation

Practically using the terms of article 1382 of the civil code[59], Article 5 of the preliminary draft uniform text provides that "the fact which causes, without right, damage to another obliges its author to repair it. It generates civil liability". It is therefore clear that for the civil liability of a party to the negotiation of the contract to be engaged, the meeting of three conditions is necessary: an event giving rise to liability, damage and a causal link between the chargeable event and the damage.

The chargeable event is the trigger for liability; it generally consists of a fault. On the one hand, this fault can be intentional or unintentional. Or, it can consist either of an action or of an omission or abstention. The fault giving rise to the responsibility of the personal fact supposes on the part of its author a capable and free will. It is said that the fault must be attributable to the author. Therefore, the act of an incapable person does not constitute a fault. It only assumes that the author is able to discern right and wrong. If to engage the responsibility of a party the preliminary draft text naturally requires a fault, in particular when it started or continued negotiations without intention to reach an agreement in order to thus demonstrate its disloyalty, the same text also mentions bad faith as an event giving rise to liability. On the other hand, the text remains silent on the situations where, despite the bad faith of a party in the negotiations, the latter have resulted in the conclusion of the contract. Should we refer to the guiding principle to sanction? The answer is yes; the guiding principle of good faith is a norm of subsidiarity and it can fully regain its force on this occasion. Because, the good faith in the negotiation can be qualified as special good faith which derogates naturally from the guiding principle. But when the special disappears, logically the general takes his place. these led to the conclusion of the contract. Should we refer to the guiding principle to sanction? The answer is yes; the guiding principle of good faith is a norm of subsidiarity and it can fully regain its force on this occasion. Because, the good faith in the negotiation can be qualified as special good faith which derogates naturally from the guiding principle. But when the special disappears, logically the general takes his place. these led to the conclusion of the contract. Should we refer to the guiding principle to sanction? The answer is yes; the guiding principle of good faith is a norm of subsidiarity and it can fully regain its force on this occasion. Because, the good faith in the negotiation can be qualified as special good faith which derogates naturally from the guiding principle. But when the special disappears, logically the general takes his place. good faith in negotiation can be qualified as special good faith which naturally departs from the guiding principle. But when the special disappears, logically the general takes his place. good faith in negotiation can be qualified as special good faith which naturally departs from the guiding principle. But when the special disappears, logically the general takes his place.

The second condition is the damage or prejudice which is the attack that a person suffers either on his patrimony, or on his physical integrity, or on his feelings. It is a question here of the failure of the negotiations which must be real, certain and current.

The third condition is the causal link. Indeed, the first two conditions stated above are not sufficient for the tort liability of the author of the negotiations to be engaged. There must also be a cause and effect link called a causal link between the bad faith or the fault of the author and the failure of the negotiations. The latter must therefore be the consequence of the bad faith of the author and the proof of the causal link consists for the victim in establishing that without the bad faith of the author, she would not have suffered the damage of which she complains. . In the absence of a causal link, the damage will be said to be due to a foreign cause and the person sued will be exempt from liability.

2- The object of damages in the event of failure of negotiations

The failure of a negotiation following a fault or bad faith can be a source of responsibility. This is a common law action in tort in principle based on the text of Article 5 of the preliminary draft uniform text under the terms of which "the fact which causes, without right, damage to others obliges its author to repair it. It generates civil liability". This provision, as noted above, is not new because it practically reproduces the

[59] Any fact whatsoever of man which creates damage to others, obliges him through whose fault he has arrived to repair it.

provisions of article 1382 of the Civil Code.[60]which lays down that "Any fact whatsoever of man, which causes damage to another, obliges the person through whose fault he has arrived to repair it": in other words, when the fault of a person causes damage to a third party, the person responsible must compensate the victim. Except that the draft text specifies that "the damages resulting from this liability cannot be intended to compensate for the loss of the expected benefits of the contract not concluded. "[61] What exactly should be understood from this provision when we know that, to be reparable, a prejudice must, in reality be: certain, personal and lawful[62]. By certainty of damage, we mean that the damage has occurred either because the victim suffered a loss or because he missed a gain. The wording of article 37 of the preliminary draft uniform text only retains the first hypothesis, that where the victim has experienced a loss and rejects the one where she has missed a gain, however, the loss of a chance is a long time recognized as reparable damage. Indeed, in a founding judgment of July 17, 1889, the French Court of Cassation recognized, for the first time, the reparable nature of loss of chance.[63] Since then, this high court has consistently recognized loss of chance as reparable damage.[64]. It is quite simply desirable that the OHADA legislator follow this path traced by a case law that has become constant.

As we can see, the transformation of contract law in member countries of the Organization for the Harmonization of Business Law in Africa is a source of debate and sometimes passion.[65]for twenty years. Debates and passions that will continue to fuel the daily life of OHADA contract law in construction as there are other areas to review.

B- The use of other concepts and the need to devote specific sanctions to the violation of the guiding principle of good faith.

Reading the preliminary draft text reveals a reality: there is no clear and precise sanction in the event of non-compliance with the guiding principle of good faith. Article 35 was only limited to its consecration, which suggests that other concepts will be used to sanction its violation (1). Anything that deserves to be reviewed by the consecration of explicit and autonomous sanctions in the event of violation of the guiding principle of good faith (2)

1- The use of other concepts to sanction the violation of the guiding principle of good faith

Defects in consent constitute the first bulwark of the guiding principle of good faith when it comes to sanctioning its violation. The case of fraud is more evocative and deserves attention as such.

As a civil offense, fraud opens the victim to an action for compensation for the damage suffered on the basis of the text of article 5 in fine of the preliminary draft uniform text.[66]. These damages can be awarded in addition to the cancellation of the agreement. In reality, compensation can be requested in addition to the cancellation if the latter leaves a loss such as a loss of profit or contract costs for example, or because the contractor has been required to pay sums. to its co-contracting party. Thus, the plaintiff for the nullity of a contract can concomitantly with this action, claim damages on the basis of fraud.[67]. The action for nullity is therefore coupled here with an action in tort since he suffered a loss resulting from the fraudulent maneuvers of his co-contracting party.[68]. About the action for invalidity and an action for liability[69], the question arises as to

[60] In French law, the terms of the provision of article 1382, which remained in force until the reform of the law of obligations which entered into force on 1 October 2016, have been transposed to article 1240 of the Civil Code.

[61] Article 37 of the draft uniform text

[62] A part of the doctrine adds the direct and actual characters.

[63]req., July 17 1889

[64]See in this sense 1st civ., Jan. 27, 1970; Cass. 2nd civ., Feb. 7 1996; Cass. 1st civ., Jan 16, 2013

[65]JOLIVET Emmanuel, "Harmonization of OHADA contract law: the influence of the UNILAWPrinciples on contractual practice and arbitration ", Report presented to the Colloquium on" Harmonization of OHADA contract law "held in Ouagadougou (Burkina Faso) from November 15 to 17, 2007, having as its object the discussion of the preliminary draft OHADA Uniform Act on contract law (2005) drawn up by UNILAWat the request of OHADA. This text, as well as the related Explanatory Note drafted by Professor Marcel FONTAINE are available on the UNILAWwebsite (<http://www.unidroit.org>), Rev. dr. unif. 2008, p. 127.

[66] In Cameroonian law, this is article 1382 of the civil code

[67]V. Cass. Com., Oct. 18, 1994: Bull. IV, No. 293, p.235; D. 1995, 180, ATIAS note; Cass. Com., Jan. 4, 2000: Contracts, conc., Consom. 2000, 79, LEVENEUR note.

[68] Thus, in a judgment of September 10, 1999, the Aix en Provence Court of Appeal adjudicated the annulment of the agreement with the award of damages given the importance of the concealments to which the contracting parties had engaged. (CA Aix -en-Provence September 10, 1999 Chopo c / Rabate; Jurisdata n ° 104589).

whether the victim of deceitful maneuvers is admissible to bring against the author, an action in tort for compensation for the damage caused to him by the agreement that he was thus led to contract and if so, how quickly can she do it? The French Court of Cassation in a judgment of February 4, 1975, on the visa of article 1382 of the civil code, quashed the appeal judgment by stating that "the right to request the nullity of a contract by application of articles 1116 and 1117 C. civ. does not exclude the exercise, by the victim of fraudulent maneuvers, of a liability action to obtain from the author compensation for the damage he has suffered "[70].

The conditions for tort liability must be present[71]. The victim exercising both actions simultaneously must establish the fault of his partner in the conditions of the action for annulment; that is to say, deceitful maneuvers.

In addition, nullity for fraud is a relative nullity in accordance with article 78 of the OHADA draft uniform text and the victim of a principal fraud may wish to retain his status as contractor and will then be satisfied with the award. damages. A repair is then requested instead of the cancellation, in the form of a price reduction.[72].

Clearly, the nullity and the award of damages constitute the possible sanctions for fraud. Damages are then presented as an accessory sanction to the nullity when the nullity is not sufficient to remove the damage or as an alternative sanction when the victim opts for an action for compensation for the damage suffered or in the event of fraud caused by a third party. This means that the choice between an action for nullity and an action for compensation based on fraud may prove to be decisive for the contracting party who is the victim of fraud.

Beyond fraud, the guiding principle of good makes use of the notion of abuse to sanction its violation. Articles 109 relating to manifestly abusive pricing[73] and in article 258 authorizing the judge to moderate or reassess the amount of the forfeit clause and the penalty clauses manifestly excessive or derisory[74] are perfect illustrations.We should also note article 259 which refers to cases which prevent the application of the exemption or limitation clauses of reparation.[75]But these remedies deserve to be further limited by the dedication of autonomous sanctions to the violation of the guiding principle of good faith.

2- The need to enshrine autonomous sanctions of the guiding principle of good faith

We cannot say it enough, the number of standards is increasing considerably in contract law. This multiplication correlatively implies a development of the role of the judge which it is necessary to supervise[76]. The role of the judge will therefore be increased in the OHADA space given the particularly open character of the guiding principle of good faith, the manifestations of which are becoming more and more numerous, especially when it comes to sanctioning unfair behavior. The risk of divergence or jurisprudential inconsistency in the OHADA area, a factor of legal insecurity must be considered. It is true that the resulting advantage is that the standard is flexible and more likely to be adapted to the circumstances, unlike a "closed" legal system which tries to regulate with the maximum of detail in the hope that the solution of any dispute can be read directly from the standard.[77]However, the future OHADA contract law would become more efficient and further

[69]Article 78 of the draft uniform text deals with the question in these terms: "Regardless of the cancellation of the contract, violence, fraud or error which causes damage to one of the parties obliges the party through whose fault he got to fix it. "

[70]V. Cass. 1st civ., 4 Feb. 1975: JCP 75, II, 18100, LARROUMET note.

[71] In a judgment rendered on April 16, 1992, the Paris Court of Appeal agreed to annul the agreement but refused to award damages because the victimized co-contractors did not demonstrate that they had suffered damage (CA Paris April 16, 1992; Bul . Joly 1992 § 204, p. 624).

[72]Cass. com., March 14, 1972: D. 1972, 653, note GHESTIN, Cass. com., May 27, 1997: JCP E 97, I, 710, obs. VIANDIER and CAUSSAIN.

[73] This article provides that "If the price is manifestly excessive, the other party may apply to the judge in order to obtain, depending on the circumstances, the reduction of the price, which may or may not be combined with damages or the termination of the contract"

[74] The exact letter of this article is: "The judge may, of his own motion or at the request of the party who has an interest therein, moderate the amount of the forfeit clauses and of the penalty clauses if it is manifestly excessive or reassess it if" it is ridiculous".

[75] See article 259 which stipulates that "the clauses exempting or limiting compensation cannot be applied in the event of willful, intentional, inexcusable or gross negligence".

[76]In this sense, BLANC Nathalie, "The judge and legal standards", RDC, June 2016, n ° 02, p. 394; MAZEAUD Denis,
"On standards", RDA February 2014, n ° 9, p. 35. quoted by AKONO Adam Ramses, "Reflections on the theory of unforeseeability in OHADA contract law", op. cit., p. 10

[77]BILE KANGAH Junior Emile, Reflection on the future harmonization of contract law in the OHADA area, thesis op. cit, p.24

strengthen legal certainty if it took into account the need to explicitly devote sanctions to the violation of the guiding principle of good faith. It is true that no sanction can simultaneously respond to the violation of an obligation relating to the pre-contractual phase or to the formation, execution and termination of the contract, but the OHADA legislator could well proceed to a " step-by-step incrimination" of the violation of the general principle of good faith. A method which will consist in providing for sanctions according to whether the guiding principle has been violated in good faith during the pre-contractual period, at the time of the birth, performance and extinction of the obligation.

II. CONCLUSION

To round up this study on good faith in OHADA forward-looking contract law, it is clear that the question is at the center of the concerns of the drafters of the draft uniform text on general law of obligations. Overcoming the shortcomings of the civil code which expressly provides for it only for the execution of the contract, the future OHADA contract law undoubtedly enshrines the wishes of Africans in favor of the recognition of good faith as a guiding principle of contracts in the same way as contractual freedom or the binding force of the contract. With the adoption of the preliminary draft uniform text on general law of obligations in the OHADA area, it will no longer be simply a question of executing agreements in good faith, but also of negotiating, forming and extinguishing them in good faith. faith. This constitutes, despite the necessary need to define the concept of good faith and the sanction for its violation, a major step forward in the process of moralizing contractual obligations, a guarantee of the attractiveness of investors in the space. OHADA.

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