

The Organisation For The Harmonisation Of Business Law In Africa (OHADA) System: Overview Of Some Benefits And Problem Areas

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Abstract: As much as the Organisation for the Harmonisation of Business Law in Africa (OHADA) aims to improve the legal environment for business, the harmonisation process should be seen as a tool of economic integration with several advantages. Despite the achievements and benefits, OHADA, like other regional integration efforts in Africa, has some temporary drawbacks that may become permanent if no effort is made to overcome them. The primary focus of the paper is to present OHADA's background; offer an overview of some of the salient benefits of OHADA's institutional and regulatory framework; consider OHADA's problem areas; and propose possible solutions to the problems. The value of the paper, therefore, lies in the insight it offers into OHADA, the benefits and problems of its institutional and regulatory framework. It is also important because it is laying the foundation in making the OHADA structure available for all Africans.

Keywords: Business Law, Harmonisation, Organisation, OHADA

I. Introduction

In the early 1960s, the African states in the franc zone applied outdated and inconsistent French laws ranging from the French civil code to the 1804 commercial code [1]. This inconsistency resulted in legal uncertainty regarding the applicable laws and incurred unnecessary costs to cross-border business transactions, considerably harming investment prospects in the zone.[2] Consequently, the ministers of finance in the franc zone decided to appoint a high-level working group to investigate the problem, and consider possible solutions. After months of investigations, the group concluded that it was feasible and necessary to create a new business law for the francophone African states. This led to the signing of the Treaty [3] relating to the harmonisation of business law in Africa (OHADA treaty) by 14 African states which established OHADA, literally translated as the Organisation for the Harmonisation of Business Law in Africa, with the signatory states agreeing to relinquish some of their sovereignty [4]. OHADA is designed to create a single economic space for investors, and to promote economic integration of the member states through the creation of supranational institutions such as the Conference of Heads of State and Government, the Common Court of Justice and Arbitration (CCJA), the Permanent Secretariat, and the Regional School of Magistracy and Administration (ERSUMA), and adoption of commercial rules called Uniform Acts that are directly applicable in the member states [5]. The establishment of these institutions and the adoption of the Uniform Acts sought to improve the legal and judicial protection in commercial transactions. These developments facilitate regional solidarity and trade among its member states, and also promote certainty that cannot be achieved in isolation by individual states. As much as the Organisation for the Harmonisation of Business Law in Africa (OHADA) aims to improve the legal environment for business, the harmonisation process should be seen as a tool of economic integration with several advantages. Despite the achievements and benefits, OHADA, like other regional integration efforts in Africa, has some temporary drawbacks that may become permanent if no effort is

made to overcome them. The primary focus of the paper is to present OHADA's background; offer an overview of some of the salient benefits of OHADA's institutional and regulatory framework; consider OHADA's problem areas; and propose possible solutions to the problems. The value of the paper, therefore, lies in the insight it offers into OHADA, the benefits and problems of its institutional and regulatory framework. It is also important because it is laying the foundation in making the OHADA structure available for all Africans.

2. Background to the Organisation for the Harmonisation of Business Law in Africa (OHADA)

OHADA is an organisation that strives for the harmonisation of business law in Africa. This aim is underpinned by OHADA's objectives to guarantee legal certainty and judicial security for investors [7] and the African economies and, hence, to attract foreign investment in order to foster regional economic integration and development of the member states [8]. These objectives fall within the framework of the New Partnership for Africa's Development (NEPAD), as agreed at the Group Eight (G8) Kananaskis Summit. To this effect, the Council has adopted nine Uniform Acts [9] and five institutions have been created to oversee the implementation of OHADA's objectives. OHADA is the manifestation of the political will of the ministers of finance and justice of the franc zone [10] to create uniform rules for the restructuring and amendment of the legal environment. Keba succinctly describes OHADA as "a legal tool thought out and designed by and for Africa to serve the purposes of regional integration and economic growth on the continent" [11]. Dickerson provides a more elaborate definition; she states that:

OHADA is a system of uniform laws; it is a unified legal system designed to protect and enhance the pro-investment qualities of OHADA laws. It accomplishes this by erecting an

entire legislative and judicial structure that formulates and interprets the OHADA laws, and prepares them for enforcement. [12]

OHADA may also be described as an international organisation with a legal personality distinct from those of its members [13]. As a legal entity, it has the capacity to conclude international contracts. It is useful to note that OHADA cannot be sued but can appear before a domestic court, [14] and it enjoys privileges and immunities in the exercise of its functions in all of the member states. The judges of the CCJA enjoy diplomatic immunity, and so do the officials, employees, and the court-appointed arbitrators. OHADA is not a federation, [15] economic or monetary union, [16] but it does possess certain characteristics thereof. OHADA member states have control over their own affairs, but are subject to OHADA for national decisions pertaining to business laws. Although it remains to be seen how anglophone countries might be integrated into OHADA, by virtue of Article 53 of the OHADA treaty, it may be described as a continental organisation that seeks to unify the business law of the African states.

2.1. The basis of OHADA: The OHADA treaty

The origins of OHADA can be traced to the signing of the OHADA treaty as amended. The OHADA treaty constitutes the legal basis and framework for achieving OHADA's mission. The treaty is self-executing in that it is directly applicable in the domestic jurisdiction of the member states, and as such form part of the internal legal order. This implies that the treaty and its Uniform Acts (UAs) have a binding effect on the member states. Apart from Cameroon, which was colonised by the Germans and then the French and British, the rest of OHADA's member states are French colonies where consequently, the French imparted their tradition and laws on which OHADA is largely based. Accordingly, French is the official language and Article 42 of the OHADA treaty provides "*Le français est la langue de travail*", meaning that French is the working language of OHADA. This means that the drafting of the Uniform Acts (UAs), the language of instruction at ERSUMA, and proceedings at CCJA and Council meetings are all conducted in French. [17] It is worth noting that the OHADA treaty is to be read with the Revised OHADA treaty. The revised OHADA treaty incorporated significant changes, including: the creation of the fifth institution (Conference of Heads of State and Government); the creation of four official languages (French, English, Spanish and Portuguese); and the increase of the CCJA judges from seven to nine. The author commends OHADA for its effort and postulates that the new Article 42 will have a far-reaching effect on the membership of OHADA and will encourage other African states to join the organisation. The new Article 42 does not only portray OHADA's effort to integrate English-, Spanish-, and Portuguese-speaking African states into the system, but it is also a laudable step towards the fulfilment of Article 53 of the OHADA treaty. A significant feature of the OHADA treaty is the opportunity it provides for other African states to join. Article 53 of the OHADA treaty offers every member and non-member of the African

Union (AU) the opportunity to join OHADA. Considering the benefits to be derived from a unified business law, many African leaders have agreed to the extension of this priceless tool of economic integration to their respective countries. Nigeria, Ghana, Liberia and Angola have expressed interests in joining OHADA. This is a sign of confidence in the OHADA initiative. The initiative has also attracted the attention of the international community which, through the World Bank, European Union (EU) and the United Nations Development Program, has significantly contributed to and participated in its projects. [18] To date, the treaty has been ratified by 17 francophone African states. Ratification is in accordance with the constitutional procedures of the member states. Like the constitutions of most of the member states, the Republic of Cameroon's constitution requires the intervention of the national parliament for its authorisation. [19] The immediate effects of such ratification are as follows: firstly, it modifies the internal laws of the signatory states; and secondly, it engages the states financially. In other words, upon ratification, member states are obliged to apply the Uniform Acts and to contribute financially towards the functioning of OHADA institutions. In respect of Cameroon, constitutional issues have arisen within the jurisdiction. The incompatibility of the OHADA treaty and the constitution of Cameroon gives rise to the question: Is the OHADA treaty constitutionally valid in Cameroon given its mixed legal system: the civil and common law systems? The ratification of the OHADA treaty violates a constitutional provision, that is, article 1 (3) of the constitution, a provision which Cameroonian authorities should have insisted on during the negotiations leading to the signing of the treaty and which they failed to do. Thus, the treaty should not have been ratified or better still should not have been ratified in the present form. Despite the verdict in anglophone Cameroon, the OHADA treaty is constitutionally valid and remains so notwithstanding the numerous arguments against its application which, though logical, are void of statutory backings.[20] Thus, anglophone Cameroonians cannot appeal against the fact that the president has not complied with the constitutional requirements as justification for noncompliance with the treaty. OHADA is designed to create a single economic space for investors, and to promote economic integration of the member states through the creation of supranational institutions such as the Conference of Heads of State and Government, CCJA, the Permanent Secretariat, and ERSUMA, and adoption of commercial rules called UAs that are directly applicable in the member states. The establishment of these institutions and the adoption of the UAs sought to improve the legal and judicial protection in commercial transactions. These developments facilitate regional solidarity and trade among its member states, and also promote certainty that cannot be achieved in isolation by individual states.

2.2. OHADA's institutional and regulatory framework

The current state of affairs in Africa illustrates that a study of the UAs and the structures is necessary in the sense that it contribute to the corpus of knowledge and provides an understanding of the institutions and the UAs.

a) Regulatory framework

In terms of Article 5 of the OHADA treaty, the UAs are “Acts enacted for the adoption of common rules as provided for in Article 1 of the present treaty ... known as ‘Uniform Acts’”. At present, nine UAs are in force in the member states. They are [21]:

- Uniform Act on General Commercial Law;
- Uniform Act on Commercial Companies and Economic Interest Groups;
- Uniform Act on Organising Collective Proceedings for the Writing Off of Debts;
- Uniform Act on Accounting;
- Uniform Act on Securities;
- Uniform Act on Contracts for the Carriage of Goods by Road;
- Uniform Act on Simplified Recovery Procedures and Enforcement Measures;
- Uniform Act on Arbitration; and
- Uniform Act on Co-operatives.

The UAs are modelled on the French civil and business laws, [22] a fact due not to the arbitrary choice of the member states, but to that of history and the socio-cultural realities of the member states. It is worth mentioning that the applicability of the UAs is derived from the OHADA treaty itself, in the sense that once the Treaty is ratified according to the constitutional procedures of the member states, the UAs become automatically binding on the member states. Article 10 of the present Treaty indicates the legal value of the UAs in terms of which “*les Actes uniformes sont directement applicables et obligatoires dans les états parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*”. This means that the UAs are directly applicable in the territory of the member states and substitute both pre-existing and subsequent national legislation. Article 10 signifies two things: firstly, it signifies that the UAs are automatically applicable in the member states upon adoption and publication in the official Journal of the OHADA and the member states. By implication, the member states do not need to enact any legislation to assure the transposition of the UAs within their internal legal order (direct effect). Secondly, Article 10 signifies the supremacy of the UAs over national laws, which means that in the event of conflict between a UA and national law, the UA will prevail. [23] Article 10 emphasises the point that the UAs are an integral part of the national legal systems which the national courts are bound to apply and uphold, thus may not deviate from their provisions. It follows therefore that, once a UA is adopted, the member states no longer have the right to apply national laws in respect of the matter regulated by the UA. Rather, they are required to review their laws with the view to set aside national laws that do not conform to the UA. The interpretation of Article 10 has raised many concerns. The doubts as to the wording of Article 10 have however been settled by the CCJA. Following an advisory opinion sought by the Côte d’Ivoire, the CCJA confirmed the supremacy of the UAs by pointing out that:

Article 10 du traite comporte bien une règle de supranationalité; qu’il entraîne l’abrogation des dispositions nationales contraires ou identiques a celles des actes uniformes et emporte interdiction pour les Etats de prendre, ultérieurement a la publication desdites actes, des dispositions législatives ou réglementaires qui leur soient contraires ou identiques.

According to the CCJA, the UAs replace national provisions that are contrary or similar to the UAs. Article 10 indicates the supranationality of the UAs in terms of which member states are prevented from enacting laws that are similar or contrary to the UAs. The same position was upheld by the CCJA in *Couple Karnib v The General Bank of the Côte d’Ivoire Coast (SGBC)* [24] wherein the CCJA set aside an order of the Appeal Court of Abidjan rendered on the basis of Articles 180 and 181 of the Civil procedure code of the Côte d’Ivoire, on the grounds that it was contrary to Article 32 of the UA on Debt Recovery and Enforcement Act. [25] For Ndibo, [26] there should be no difficulty in applying the UAs, because they do not compete with the internal laws of the member states in the subjects they govern. The question has been raised whether there is uniform application of the UAs in Cameroon, given that it operates a mixed legal system. In view of the fact that the UAs have their origins in the present French law, one could easily say that there is no uniform application of the UAs in Cameroon.

b) Institutional framework

In general, OHADA operates through five institutions, namely the Council, the Permanent secretariat, the CCJA, ERSUMA, and the Conference of Heads of State and Government. The latter institution, the Conference of Heads of State and Government has been formalized and serves as a forum to address political concerns relating to OHADA. With the exception of the Conference of Heads of State and Government and the Council, which operate on a rotating basis, the Permanent secretariat, the CCJA, and ERSUMA are permanent structures or institutions located in Yaounde, Abidjan, and Porto-Novo respectively. The institutions do not work in isolation, but in collaboration with one another. This section begins with an analysis of the Conference of Heads of State and Government, followed by the Council, Permanent secretariat, ERSUMA, and the CCJA.

i. The Conference of Heads of State and Government

The Conference of Heads of State and Government is OHADA’s supreme institution and serve as a forum to address political concerns relating to OHADA. It is composed of the heads of member states, and the presidency of the Conference is held on a rotating basis by each member state for one-year terms. It is chaired by the head of state who chairs the Council and decisions are taken by consensus, failing which it is by absolute majority of the parties present. The Conference of Heads of State and Government is convened by its president, or the initiative of two-thirds of its member states.

ii. *Council of ministers (Council)*

As the name indicates, the Council is an institution composed of ministers of finance and justice in the member states. The office of the Council is held by each member state in alphabetical order, on an annual basis. Meetings are held by the presiding state on its own initiative, or upon request of at least one-third of the member states. If for some reason the presiding state is unable to take office, the state immediately following the presiding state alphabetically will be appointed by the Council. Decisions are taken by an absolute majority of the member states present, each state having one vote. This is to encourage compromise and to avoid domination by a country on the voting procedure. The Council expresses the political will of the member states through its approval of the annual programs for the harmonisation of business law, and the adoption of the UAs. The publication of the UAs is an important step in OHADA's harmonisation process because it promotes transparency, which is a principle of good governance in the exercise of power. [27] However, two-thirds of the representatives may be required for the validity of UAs. Moreover, each state has the power to veto any proposed legislation. This is designed to allay the fears of other Africa states that may wish to join the OHADA family, and to ensure general consensus of the member states. [28] Admittedly, the decision-making process is less democratic because it excludes the local community, that is, business executives, lawyers, and academics who work with the laws on a daily basis. It also excludes the national legislators. The paper appreciates the difficulties in reaching an agreement, but proposes that the council should communicate with the representatives of commerce and industry, and professionals, and that the draft UAs be submitted to various representatives for their comments or observation to give the UAs and OHADA's decision-making process a democratic flavour. Having recognised the need for a "democratic" OHADA, it is possible for OHADA's drafters to strengthen OHADA position and role over time, to benefit all, irrespective of their legal landscape.

iii. *Permanent secretariat*

The Permanent secretariat is the executive organ of OHADA and is based in Yaoundé, Cameroon. It is independent from the member states, and does not meddle with the political and economic affairs of OHADA's member states, to ensure that it is not affected by political pressures. It is headed by a permanent secretary appointed by the Council for a four-year term that may be renewed once. The permanent secretary in turn appoints other members of the bureau in accordance with the recruitment criteria determined by the Council. The permanent secretary is assisted by three directors in charge of legal affairs and relations, finance and accounts, and general administration respectively. The board of directors evaluates the laws of the member states, and proposes more efficient ways for the harmonisation of the laws. [29] This board function is co-ordinated by the office of the Permanent secretariat, which has both a legislative and administrative function. In terms of legislation, the permanent secretariat assists the Council in the adoption of the UAs. In this regard, it proposes the

annual programme for the harmonisation of business law, and is responsible for the drafting of the UAs. The draft UAs are presented to the member states for consideration, and to the CCJA for its opinion. Upon receipt of the member states' comments and the CCJA's opinion, the Permanent secretariat finalises the draft and then submits it to the Council for adoption. Once adopted, it becomes the internal legal order of the member states. Administratively, the Permanent secretariat is responsible for the compliance of the list of candidates for election to the CCJA, and publication of the UAs in the OHADA legal journal, which becomes directly enforceable in all the member states.

iv. *The Higher Regional School of Magistracy and Administration (ERSUMA)*

ERSUMA is a regional institute attached to the Permanent secretariat, located in Porto- Novo, Benin where it enjoys diplomatic privileges and immunities in the exercise of its functions. Its creation is in response to the insufficient legal training of magistrates and auxiliaries of justice, and judicial insecurity in the zone. Justifying the creation of the school, the Director General of the school declared "There would be no success in the harmonisation of business law, without training of persons capable to understand the law, to disseminate the law, and to effectively apply them within the OHADA region". ERSUMA is composed of a board of directors responsible for its administration. The board of directors comprises the permanent secretary, who acts as chair, the president of the CCJA or its representative, three representatives from the national Supreme Courts of member states, two representatives from national training centres and two representatives of the permanent staff of the school. It also has an academic council to ensure academic standards, and a management team headed by a director general appointed by the Council. ERSUMA's function is to train judges and legal officers such as lawyers, notaries, court experts, registrars, and bailiffs, as well as business executives and academics in OHADA law and the laws of other regional bodies, in order to improve the legal environment in the member states. Visiting professors who have in-depth knowledge and experience of the laws provide training that enables professionals to apply OHADA laws properly and efficiently. To date, only legal officers from the francophone countries have been admitted for training, due to the lack of trained common law professors in the OHADA structure. Candidates are selected by their ministries of justice and finance, and/or national training centres or professional organisations, on the basis of their professional responsibilities, educational and professional background, and their legal functions. ERSUMA is a documentation centre for legal and judicial matters and a centre for the promotion and the development of research in African law, works on the harmonisation of law, and case law relating to communal and national courts.

v. *The Common Court of Justice and Arbitration (Cour Commune de Justice et d'Arbitrage-CCJA)*

OHADA is charged with establishing a strong and independent judicial system that ensures the proper application of the law, and efficient settlement of

disputes. A supranational court has been established under the aegis of the CCJA to ensure the reliability of the judicial systems and to assure investors of their investments. The CCJA functions as an appellate court for all of the judgments handed down by the national Courts of Appeal in matters relating to the UAs. [30] It is also a forum for international arbitration. This combination is an innovative idea that has been greatly welcomed and has brought particular advantages. The first and perhaps the most obvious is that it saves time and money for parties, and does not deprive parties of their day in court. Secondly, it makes it possible for economic operators to include an arbitration clause providing for arbitration proceedings in any of the member states governed by modern laws - the UA on Arbitration and the CCJA Rules on Arbitration. The decisions of the CCJA have the status of *res judicata*, which means that the decisions of the court are final and conclusive. For Lohouse-Oble, “this reflects clear judicial supranationality, in which a transfer of competencies from national jurisdictions to the community-level jurisdiction has occurred”. The supranationality of the court [31] is underlined in Article 16 of the treaty, which states, “Seizure of the court suspends every cassation proceedings engaged before the national jurisdiction against the contested decision. Any proceedings of the national jurisdiction can take effect only after judgment of the CCJA declaring its incompetence to deal with the matter”. Thus, any proceedings before a national jurisdiction, after the seizure of the court, shall be invalid. It is useful to point out that OHADA maintains a dual system of remedies in the settlement of litigation/disputes regarding the implementation of the Uniform Acts. The fact is, national courts retain jurisdiction in the first instance, and on ordinary appeal to the national appeal courts on matters related to the Uniform Acts. From the national appeal courts, the matter is taken on appeal at the supreme level to the CCJA. An appeal to the CCJA can be made in three different situations:

- A party can directly file an appeal before the CCJA against a decision of a national Appeal court. Such an appeal must be made within two months of the service of the challenged decision. If the decision is quashed, the CCJA hears the case on its merits, though a process known as *evocation a de novo*;
- A party can also apply to challenge the jurisdiction of a national Supreme Court and if the CCJA finds that the national Supreme Court lacks jurisdiction, it will declare null and void the judgment of the national Supreme Court. Appeal in this respect is made within two months of notification of the decision to the national court ; and
- Appeal can also be made by a national Supreme Court that considers that it does not have jurisdiction to hear a case relating to the Uniform Acts. When this happens, all proceedings before the national Supreme Court are suspended.

The national Supreme Courts are replaced by the CCJA. This means that if a dispute falls within the jurisdiction of the CCJA and is taken on appeal to a Supreme Court, the Supreme Court must refer the parties to the CCJA. In the case between the *Standard Chartered Bank S.A. v Sinju Paul and others* [32], the Supreme Court of Yaoundé,

Cameroon, referred the matter to the CCJA because of lack of jurisdiction. Failing this, the decision of the Supreme Court will be declared null and void. The lack of jurisdiction of national Supreme Courts may be raised by the court itself, or any party to the dispute. In the matter between *Bamba Fetique v Adia Yego Therese*, [33] the CCJA declared a decision rendered by the judicial bench of the Supreme Court of Côte d’Ivoire null and void, on the grounds of lack of jurisdiction to rule on matters pertaining to the application of Article 864 of the Companies Act such as partnership matters. Similarly, in *Muvrielle Corinne Christel Koffi et Sahouot Cedric Koffi v Société ECOBANK*, [34] the CCJA declared the incompetence of the Supreme Court of Côte d’Ivoire to rule on issues pertaining to the granting or suspension of provisional measures. This is because issues pertaining to the granting or suspension of provisional measures fall within the competence of the CCJA. [35] Conversely, a manifest lack of jurisdiction of the CCJA may be raised *proprio motu* by the court itself, or by the parties to the litigation in *limine litis*. In such cases, the CCJA is required to reach a decision within 30 days. In *Société Générale Prestation Service v Société Catering International Service*, [36] the CCJA declared its incompetence because it was a matter that fell within the jurisdiction of the Appeal Court of Chad.

3. The benefits of OHADA’s regulatory and institutional framework

As much as OHADA aims to improve the legal environment for business, the harmonisation process should be seen as a “technical tool” of economic integration with several advantages. The principal advantage lies in OHADA’s creation of a secure legal environment for its member states and investors. Before 1993, there was a combination of different laws, many of which were outdated, dating back to the 19th century. As a consequence, investors wanting to invest in the region encountered numerous difficulties in trying to understand different legal traditions, for which very little literature existed. OHADA has eradicated this impediment by issuing modern commercial laws that now govern many commercial aspects. [37] Member states are provided with modern commercial laws which are accessible through publications in the OHADA Official *Gazettes*, the International Law Institute of French Expression and Inspiration’s annotated Code, [38] as well as on the website www.ohada.com. The website is operated by the African Association for a Unified System of Business Laws in Africa (UNIDA). Through the website, the UAs, the judgments, and advisory opinions of the CCJA, have been published. The merits of the UAs are evident in the assistance they provide in the identification of applicable laws, the limitation of legal conflicts and the encouragement of cross-border transactions among member states. According to Paillusseau, “the unity of the applicable rules will facilitate the operation, the legal organisation, functioning and commercial trade of a company that operates in several countries”. Economic operators (investors) are now free to conduct business in the region, and to transfer assets in the event of insolvency at a reduced (legal and transactional) cost. The 2012 Doing Business Report shows a decrease in the average cost of doing business, from 110% to 38% of the average

per capita income across the OHADA region, and a decrease in the time required to register a property. The Senegal power plant project, the Chad-Cameroon oil project, the Manantali Dam in Mali, and the Azito power plant in Côte d'Ivoire [39] are examples of large-scale operations between different OHADA member states and are largely structured based on OHADA rules. OHADA rules have made it possible to extract the Doba basin oil deposits in southern Chad. The UAs provide clarity and better understanding of the laws and also help to avoid confusion and duplication. Another benefit is the improvement of the reliability of the judicial systems within the member states through the creation of the CCJA. The consequence is that investors have legal and judicial certainty in the interpretation of the laws and settlement of contractual disputes, and, hence, investment is promoted. Considering the benefits to be derived from a unified business law, many African leaders have agreed on the extension of the OHADA initiative in their respective countries. While the Democratic Republic of Congo (DRC) has ratified the OHADA treaty, Cape Verde, Djibouti, Ethiopia, Madagascar, Mauritania, Mauritius, Rwanda, Sao Tome, Burundi, Nigeria, Ghana, Liberia, and Angola have expressed their interests to join OHADA. These are signs of confidence in the OHADA initiative. Despite the achievements and benefits outlined above, OHADA, like other regional integration efforts in Africa, has some temporary drawbacks that may become permanent if no effort is made to overcome them.

4. Problems in the OHADA system and the way forward

OHADA faces a number of problems that have undermined its ability to develop standardised and pan-African business laws. [40] In the main, OHADA suffers from the problem of incomplete integration, gaps in the regulatory framework, and implementation.

4.1. Incomplete integration challenge

The notion of business law encompasses all branches of business law such as insolvency law and contract law. OHADA does not cover all aspects of business law and to date, there is no UA relating to mergers and acquisition, investment, or contract and employment (there are draft laws on contract and employment that are yet to be implemented). This leads to the co-existence of modern laws and outdated national laws, and while an investor enjoys the benefit of modern laws in relation to many aspects of his investment, he may find some aspects still governed by outdated national laws [41] such as the determination of exempted assets in the event of a seizure. The determination of the amount of a wage claim to be paid to an employee in the event of insolvency is also left to the member states, as are criminal provisions relating to UAs and the payment of interest when a party fails to pay the contract price agreed for a commercial sale. The co-existence of UAs and national laws creates legal uncertainty, which, according to Tiger, is "an uncertain situation related to the result of an eventual procedure in which the traders could be involved in as a party, and its inability to influence the course of justice in the sense of fairness if necessary". [42] The problem of incomplete integration is however temporary because OHADA continues to legislate, and there are hopes for

future UAs on employment, sales law, and other matters. [43] It should be noted that although a successful extension of the UAs might help solve the problem of the conflict of laws, it could constitute a major threat to other regional organisations. For example, the harmonisation of investment law will be a major threat to the Economic and Monetary Community of Central African States (CEMAC). [44] In order to overcome the challenge of conflict of laws between the different regional bodies, it is vital for regional bodies to collaborate in the harmonisation of laws in Africa.

4.2. Gaps in the regulatory framework

Regulation of the insolvency profession is now a dominating theme in OHADA states, and the OHADA states play a significant role in the regulatory process. The Article 4 gives each state the right to adopt rules of application of the present chapter relating to the regulation and supervision of legal representatives. Member states equally have the right to control the exercise of the functions of legal representatives and to supplement the conditions for the appointment of legal representatives. If every state must set its own rule for mediation and regulation of legal representatives, it will lead to a disaster, and thus weakened the binding nature of the Revised Insolvency Act (RIA). The author finds it a bit opposite to the spirit of unity and harmony that sustains the OHADA treaty. Article 4 (1) of the RIA establishes the conditions for appointment. To qualify for appointment as a legal representative, the person must be registered on the national list of legal representatives. To be registered on the national list, the following conditions must be fulfilled: the person must exercise his full civil rights; must never have been subjected to any disciplinary sanction, imprisoned and must be an accounting expert. The person must justify his domicile in the state in which he wishes to register and to present sufficient guarantee to the competent court. The idea of a sufficient guarantee is welcomed but the amount should be specified to avoid confusion and embezzlement. Regrettably, any person may be appointed as legal representative for a complex field as this. No special qualification, knowledge or experience to act as a legal representative is needed. This has resulted in the poor understanding and interpretation of the law by legal representatives. In the case of *SOH Cameroon S.A v. UDEC*, [45] SOH filed for the opening of a collective proceeding against its debtor UDEC S.A on the ground of insolvency. The judge declared bankruptcy without precision of the type of procedure. In the author's view, the poor quality of legal representatives is behind the lengthy insolvency proceedings in the country. This creates uncertainty for all parties involved and reduces the assets of the estate and, hence, creditors chances of recovering outstanding debts. [46] This is bad for the country's performance in the Doing Business ranking resolving insolvency. To bridge these gaps, reference could be made to the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency (Legislative Guide), and Model Law on cross-border insolvency (Model Law). [47]

4.3. Interpretation challenge

The harmonisation of business law in Africa dictates that other legislative views and cultures should be considered. [48] Regrettably, the OHADA harmonisation process only reflects the views and cultures of its francophone states. and Articles 42 and 63 of the OHADA treaty attest to this deficiency. To anglophone Cameroonians, this undermined their common law culture, and thus cannot be applied in Cameroon. The resentment by anglophone Cameroonians is behind the on-going anglophone crisis with devastating effects on lives and properties. Justice Aya Paul in the case of *Akiangan Fombin Sebastian v. Fotso Joseph and others* (unreported) [49] dismissed the application of the OHADA treaty in Cameroon on the basis that, “a treaty which is basically French suffers from self-exclusion from the English-speaking provinces”. [50] He further argues that “no piece of legislation can bring in Napoleonic or civil law principles through the back door and even parliament cannot make laws which will abrogate the duality of laws in Cameroon since it was a matter at the heart of negotiations leading to the reunification of the federated states.” For Ayah, the treaty as well as the UAs are not applicable in Cameroon, and are thus constitutionally invalid. Leno argues that the OHADA treaty and its UAs are constitutionally valid and applicable in Cameroon. This is for a number of reasons; one of which is the fact that no threat was used against the president of Cameroon to secure its consent, which implies that, the treaty is legally binding on Cameroon in accordance with the principle of *pacta sunt servanda*. Based on the differences in legal education and training in francophone and anglophone Cameroon, the judges approached the question of statutory interpretation differently, which, according to Tabe-Tabe, [51] hinders the uniform interpretation and application of the UAs in Cameroon. In francophone Cameroon, as in France, judges rely on the grammatical, logical, historical, and teleological approaches to the interpretation of statutes. [52] On the other hand, in anglophone Cameroon, like its counterparts in England and other anglophone countries, the judges rely on rules of construction, such as the literal rule, the golden rule, the mischief rule, and the *ejusdem generis* rule, to interpret statutes. The lack of awareness due to either the language barrier, or OHADA’s inability to disseminate the laws, has made it difficult for anglophone judges and magistrates to interpret the UAs and the treaty. As a consequence, anglophone lawyers and judges have been reluctant to refer their cases to the CCJA, fearing that they may be challenged because of the inconsistency between the English and the French. [53] The truth is that most of the people are unaware of the laws. Dickerson cited the case of a Cameroon judge who only became aware of OHADA from a lawyer pleading a case before her, while Kanté [54] cited the case of Niger where some judges and lawyers continued to apply the former companies’ law of the country, despite the entry of the OHADA Companies’ Act. This problem of interpretation is compounded by the lack of a definition section in the UAs, which makes it difficult for readers to ascertain the precise meaning of terms used. Consequently, the CCJA has, in some cases, declined its competence because of incorrect interpretation of the law. The case of *SOCOM SARL Ltd v SGBC* [55], illustrates the problem of language where the CCJA declined its

competence on the grounds of misinterpretation of Article 32 of the Uniform Act on Debt Recovery and Enforcement Measure. To a large extent, the language and court procedure have strongly militated against anglophone lawyers pleading their cases before the CCJA. Inasmuch as countries do not want to be left out of any reform process, they cannot apply laws in a language that they do not understand. This problem must be attended to if the fears of sceptics are to be allayed. Efforts are underway towards increasing awareness of the laws. In Benin, the Millennium Challenge Corporation (MCC) recently funded the training of all Beninese judges and a significant proportion of court registrars at ERSUMA, as well as the purchase of the laws and scholarly analysis for all trainees. [56] The UAs have also been translated from French into English, Portuguese, and Spanish, [57] but scholars have criticised the translations, stating that they are “literal, inadequate, and nebulous”. One of the regrettable translations is Article 3 (2) of the UA on Security in terms of which a surety-bond is defined as a “contract in which the guarantor undertakes, to perform the debtor’s obligation in the event of default by the latter”. [58] As a contract between the creditor, guarantor and debtor, it must be contracted with the knowledge of the parties. The English translated version states that the contract cannot be contracted without the creditor’s authority or knowledge. Even though it is a risk for non-French-speaking countries to rely on the translated versions of the UAs, these versions do at least provide an understanding of the laws. It is equally worth noting that a draft code is currently being drafted in English and Chinese in order to attract Chinese investors. Zhu [59] points out that the adopted laws have enabled Chinese investors to make full use of their provisions, and to expand their business in Africa. The Department of Western Asian and African Affairs reports that “among the top 20 Africa countries of the China-Africa trade, there are 14 OHADA member states, five of which come into top ten of the China-Africa trade”. [60] The expansion of Chinese investment into Africa is attributed to a number of reasons, one of which relates to the similarity in the legal culture – civil law tradition between OHADA francophone states and China. The second reason is that the commercial laws of OHADA and China are influenced by the French modern commercial laws. Thirdly, both systems emphasise the role of arbitration in resolving commercial disputes. [61] It is suggested that more effort should be made to educate Africans on the existing laws through seminars, conferences, and training. It is worth noting that legal practitioners of anglophone Cameroon are increasingly receiving training on the UAs. In order to avoid the problem of translation Tumnde suggested co-drafting of future UAs, and recommended a co-revision team to revise existing UAs to clarify the misunderstanding of legal jargons and technical terms. [62] It is submitted that a co-drafting process should be performed according to the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (UNIDROIT Principles), [63] to suit the African legal peculiarities in the incorporation of the diverse legal systems. This will no doubt obviate any confusion that may arise, and thus foster a better understanding of OHADA’s objectives in the rest of the world. The

preliminary draft UA on contract law is a significant step in OHADA's attempt to establish a truly harmonised rule, because it follows the pattern of UNIDROIT Principles. [64] The African Development Bank believes that through further contact and discussion with African anglophone countries, the OHADA initiative could be easily extended into these countries, and achieving its goal of regional integration. [65]

4.4. Institutional challenge

Although the institutions are well established, there is a lack of finance and staff with adequate knowledge of the UAs and training to discharge their functions effectively. Funding remains a big hurdle for OHADA and its institutions in general. The OHADA treaty requires each member state to contribute to the functioning of OHADA, [66] but the contributions have proven insufficient, leaving the institutions underfunded. A capitalisation fund of 12 billion CFA has also been created, and is expected to cover the operating costs of the OHADA institutions for a ten-year period. In addition, a community tax of half a percent has been approved on imported goods from third party states, [67] and although it is not yet in force, the idea seems promising. There is a training school for legal officers located in Porto-Novo, Benin, but because of budgetary constraints, it falls short of the needs of trained lawyers and magistrates to conduct court proceedings in English. In this regard, ERUSMA offers trainings at a fee to sustain its programmes. The CCJA faces the most important challenges due to the lack of finance and staff to handle the constant increase in caseloads. The anglophone judges have also been reluctant to refer cases to the CCJA because the practice and procedure of the court are civil law oriented, and because of the inconvenience and cost to non-Ivorians in pleading their cases before the court. The truth is that most Cameroonian cases referred to the CCJA are from the French-speaking regions, for examples: the *Industrial and commercial company of Cameroon (SOCINCAM) v Peter Meunier Company of Cameroon* [68], and *Michel Ngamko v Guy Deumany Mbouwoua* [69]. The question often asked is what would happen to a case that is referred to the CCJA by anglophone Cameroon? Undoubtedly, such a case will be sent back to the English court from which it arises. This indicates that litigations from the English speaking parts find their terminal point at the National Appeal Courts depriving anglophone Cameroonians of their fundamental right to justice. As a way forward, it is submitted that common law judges from anglophone countries should be trained in OHADA law to cater for cases from anglophone Cameroon and other English-speaking countries. For Tabe-Tabé, the training of judges from anglophone countries "will encourage anglophone lawyers to appeal to the CCJA and to represent clients there". Article 19 of the CCJA Rules of Procedure was adopted to address the problem of location. In terms of Article 19, "the seat of the court shall be in Abidjan. However, the court may, if it deems necessary to meet in other places on the territory of any member state with the prior consent of such state which shall under no circumstances be involved financially". The emphasis is on may, which means that the court is not a mobile court per se, and that the assembly of the court in other member states is upon the discretion of the court. Exacerbating this issue is that

Article 19 does not state the conditions or circumstances under which the court may deem it necessary to move. This is one aspect of the law that must be clearly defined. Tumnde suggested the establishment of a circuit court, or a permanent court in each of the member states. Tumnde believes this will bring "the court nearer to the people and would allay the fears of poor litigants or lawyers". The danger of establishing a permanent court in each state is that it is likely to give rise to different interpretations, which in turn defeats the very purpose of uniformity. Even though the establishment of a circuit court would be costly for the organisation, it seems to be the most appropriate alternative. Another suitable alternative would be to train judges from each of the member states who will appeal to the CCJA and represent clients there. This calls for equal representation by the judges at the CCJA. According to Kruger, [70] "a practical necessity for the efficacy of regional dispute settlement bodies is workable and reliable enforcement mechanisms". OHADA has a UA on Debt Recovery and Enforcement, which is a lengthy legislation divided into two parts. The first part contains two major procedural possibilities: the traditional order to pay procedure, and the more innovative order procedure of restitution of goods. The second part contains simplified enforcements and rules of protective seizure of goods, movables, and immovables. The CCJA's publication of its decisions and detailed references have increased transparency, but many local professionals still acknowledged that the transparency promoted by CCJA has not eradicated corruption in the national judicial systems. This is seen in the lack of predictability in the execution of judgement when local authorities are called to execute a judgement or an arbitral award. However, in order to move away from such a problem, it is proposed that OHADA advocate the transfer of sovereignty to the point of establishing a uniform method of enforcement. [71] While such promotion will not be an easy task, it must be remembered that any reform, whether judicial or legal, must start somewhere.

5. Conclusion

Prior to 1993, Legal diversity was a major challenge to the economic development of the African states of the Franc zone. As earlier mentioned the legal diversity resulted in legal uncertainty regarding the applicable laws and incurred unnecessary costs to cross-border business transactions, considerably harming investment prospects in the zone. In a bid to attract foreign investors and to foster the development of African countries, OHADA was established by the treaty on the harmonisation of business laws in Africa. As mentioned above, OHADA is designed to create a single economic space for Africa through the creation of supranational institutions and the preparation and adoption of UAs. It is evident from the foregoing that OHADA has standardised the business laws of its member states. It replaces the national business laws with a communal law, thereby creating a stable and conducive business environment for investors doing business in the franc zone. Considering the benefits to be derived from a unified business law, many African leaders have agreed on the extension of the OHADA initiative in their respective countries. Despite the achievements and benefits outlined above, OHADA, like other regional integration efforts in Africa, has some

temporary drawbacks that may become permanent if no effort is made to overcome them, one of which is the problem of incomplete integration. In view of the above, it is submitted that if the problems inherent in the current system are given due consideration, the prospect of a unified business law for Africa will become a real possibility, and the unity will act as impetus to significant foreign investment in the continent. While significant strides have been made towards making OHADA a project for the benefit of all Africans, it is argued that it has not had the desired impact, given that many of the strides or changes have not been implemented. Nevertheless, OHADA remains of great potential benefit to the African states and the continent at large. It is against these contexts that the author concludes that the benefits of uniformity outweigh the cost of preserving state sovereignty.