

## **Communication : OHADA, a Continent-wide Perspective**

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It is disappointing to note that very few Egyptian jurists know of the existence of the ambitious harmonisation project that is OHADA, even though membership of the Organisation is open to all States of the African Union <sup>1</sup>. This lack of awareness amongst African jurists, especially in non-francophone African States, is due to OHADA's failure to convince them and their respective governments that it is the most promising harmonisation project in the Continent, and this lack of conviction affects not only jurists in non-member States, but more surprisingly, also judges and lawyers in OHADA member States <sup>2</sup>.

I am of the opinion that if OHADA is intended as a Continent-wide project, it must introduce significant reforms in respect of two main aspects to achieve its future Continent-wide goals, *i.e.*, its ability to adapt to different legal cultures and its dispute settlement mechanism.

### **1. OHADA's ability to adapt to different legal cultures**

Although not sufficiently up-to-date compared with the most recent global developments <sup>3</sup>, the OHADA Uniform Acts have been acknowledged as

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<sup>1</sup> Art. 53 of the Treaty on the Harmonization of Business Laws in Africa.

<sup>2</sup> Claire MOORE DICKERSON, "Harmonizing Business Laws in Africa: OHADA calls the tune", 44 *Columbia Journal of Transnational Law* (2005), 17, 30, fns. 169 and 170 (Interview with Helen Fonachu, Magistrate, Court of Appeals, in Douala (Cameroon) (7 July 2004) (reporting on the experience of certain magistrates in Cameroon's Anglophone South West Province).

<sup>3</sup> Michael U. KLEIN, Notes published in the *Summary on the Fourth International Conference on Law and Economy: The Convergence of Law*, Paris (2005): "It should be noted that while some of OHADA's rules represent progress relative to previous legislation, they are still outdated in international terms" (available at <[http://www.parisplacdedroit.org/2006/pdf/livre\\_paris\\_2005.pdf](http://www.parisplacdedroit.org/2006/pdf/livre_paris_2005.pdf)>, 67.

remarkably simple, common and modern laws<sup>4</sup>. In this regard, OHADA has introduced substantial legal reform in its member States.

However, a vital matter remains unsolved. How efficient is OHADA in performing its role as a harmonisation project? Given that the majority of OHADA member States at this time are francophone States, it is only to be expected that its current Acts are based on French law<sup>5</sup>. Yet OHADA's main objective, which is the harmonisation of business law within its member States, itself dictates that other legislative views be taken into consideration. The experience of Cameroon, a dual judicial system, is living proof of the obstacles lying in wait for a new member State with a different linguistic or legal background. A heated debate over the Organisation's identity may be expected once purely anglophone States join the Organisation<sup>6</sup>.

Therefore, the harmonisation initiative will never work from a Continent-wide perspective if OHADA retains French as its sole working language<sup>7</sup>. The matter of language is intimately linked to the harmonisation objective, since failure to acknowledge the diversity of languages in the African Continent may place the entire project at risk if this matter is not carefully handled. Translations of the up-to-date OHADA law texts from French into English, Spanish and Portuguese have already been branded by some scholars as "*literal, inadequate and rather nebulous*"<sup>8</sup>. Moreover, the *Advanced Regional School of Magistracy* (ERSUMA) also teaches only in French, which effectively precludes non-French-speaking jurists from understanding the key features of OHADA. Consequently, failure to envisage introducing Arabic as one of the working languages once Arab African States<sup>9</sup> express an interest in joining the harmonisation project will be sufficient reason for these States not to sign up.

Another aspect of the problem of adaptability is the mechanism by which the uniform laws are issued. Although the current mechanism governing the drafting and adoption of laws is considered practical and efficient, a total

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<sup>4</sup> Michael J. BONELL, "The CISG, European Contract Law and the Development of a World Contract Law", 56 *American Journal of Comparative Law* (2008), 1, 39.

<sup>5</sup> DICKERSON, *supra* note 2, 21. It is noteworthy to state that the preliminary draft Uniform Act on contract law is a remarkable step in the endeavours to establish truly harmonised rules, as it follows the pattern of the *UNIDROIT Principles of International Commercial Contracts*.

<sup>6</sup> DICKERSON, *supra* note 2, 33, referring to ongoing negotiations with Ghana and Nigeria to join OHADA.

<sup>7</sup> Article 42 of the OHADA Treaty.

<sup>8</sup> Martha TUMNDE, Notes published in the *Summary ... supra* note 3, 59.

<sup>9</sup> The Comoros Islands, a member of the Arab League, is already a member State of OHADA.

disregard of national parliamentary involvement will eventually create further political problems, in light of the attempts made by many African States gradually to introduce more democratic tools into their political systems. In my opinion, Uniform Acts, while prepared by the Secretariat, should be debated and approved by a joint assembly of national parliamentary committees rather than by the Council of Ministers. This would help to counter the oft-heard complaint of insufficient national participation in the drafting of laws, and will undoubtedly enrich the debate. Furthermore, new OHADA member States that were not involved in the drafting phase nor voted on the adoption of Acts in the Council of Ministers should be entitled either to re-negotiate existing laws in a reasonable manner, or to declare reservations with regard to certain provisions. Otherwise, in my opinion, potential member States will hesitate to commit themselves blindly to such laws.

## 2. The OHADA dispute settlement mechanism

The Common Court of Justice and Arbitration, located in Abidjan in Côte d'Ivoire (*Cour Commune de Justice et d'Arbitrage* – CCJA), is a supranational judicial body with jurisdiction over the Courts of Appeal in member States, its decisions overriding even those of national Supreme Courts. It is, moreover, the final authority on the interpretation and enforcement of the OHADA Treaty. The CCJA therefore plays a vital role in the uniform application of OHADA laws; however, there are problems linked to its location and to the fact that the member States' national courts are at times reluctant to accept the CCJA's supranational jurisdiction.

90% of the cases decided by the CCJA are transferred locally from Ivorian courts. While the present OHADA members are primarily West African States that are relatively close to Abidjan, the difficulty of transferring cases from other, geographically more distant jurisdictions may be readily imagined.<sup>10</sup> Although Article 19 of the CCJA Rules of Procedure entitles the Court to hold sessions in any member State of its choice, the decision to do so is entirely at the Court's discretion. The inconvenience to the parties in a dispute resides in the cost of transferring the case from a member State's court to Côte d'Ivoire. Some authors suggest that this problem can only be resolved either by having a touring court in the OHADA member States or by diverting the Court's supranational power to fall within the responsibility of a special bench or circuit at every national Supreme Court<sup>11</sup>. To guarantee uniformity of appli-

<sup>10</sup> DICKERSON, *supra* note 2, 30.

<sup>11</sup> TUMNDE, *supra* note 8, 61.

cation, national Supreme Court judges sitting on such a special bench would have to be familiar with the OHADA laws as taught by ERSUMA.

The latter suggestion would also solve the transfer of sovereignty dilemma, which has inhibited CCJA power. National courts have declined so far to transfer all their business disputes to the CCJA.<sup>12</sup> By introducing the circuit reform, national judges would decide disputes within the perspective of uniform application. A national bench handling OHADA law disputes is anyway desirable, since a conflict on jurisdiction between the CCJA and national courts impedes the efficiency of the dispute settlement mechanism. After all, the decisions of the CCJA eventually return to national courts to be enforced.

Even if cases are handled by special circuits within the national courts, there is no reason why uniformity of application should not be achieved within the OHADA member States. Surely, such uniformity cannot be nearly as difficult to attain as that which is being gradually established within the *Vienna Convention on Contracts for the International Sale of Goods* (CISG) worldwide.

### 3. Conclusion

There have been many organisations in Africa that have attempted to harmonise the law: e.g., COMESA<sup>13</sup> or the AEC,<sup>14</sup> but unfortunately none of these have made much headway in this respect. OHADA on the other hand has issued eight uniform laws that govern vital aspects of business law in 16 African countries. The simplicity and modernity of the laws are without precedent in this part of the world. However, cultural barriers and the dispute settlement mechanism may well prove to be major obstacles in developing this regional project into a Continent-wide initiative. Serious reform would be needed to embrace the distinctive particularities of the current as well as future member States if OHADA is to achieve the necessary acceptance among the subjects of its Uniform Acts. If such reform is introduced, the economic benefits of harmonisation would surely become self-evident.

<sup>12</sup> DICKERSON, *supra* note 2, 30.

<sup>13</sup> COMESA Treaty Art. 4 on Specific Undertakings, para 6, states as follows: "In order to promote the achievement of the aims and objectives of the Common Market as set out in Article 3 of this Treaty and in accordance with the relevant provisions of this Treaty, the Member States shall (b): Harmonise or approximate their laws to the extent required for the proper functioning of the Common Market."

<sup>14</sup> Protocol on the Relationship between the African Economic Community (AEC) and the Regional Economic Communities, Art. 7(3)(b) states that among the functions of the Coordination Committee is coordinating and harmonising integration legislation.