

ON THE POSSIBLE CHINESE INVOLVEMENT IN THE LEGAL AND DIGITAL PROCESS OF DEVELOPMENT IN THE OHADA AREA*

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1. Introduction

During the late 20th century there has been an increased interdependence between the nations of the world. Unprecedented trade liberalization at the multilateral, regional and bilateral level accompanied by the quick development of new information technologies have changed the way how sovereign states, businesses and citizens interact among themselves. Huge trade liberalization and a change from protectionist to open market economies have given the basis for the growth of transnational business activity while democratic values and institutions have been progressively strengthened.

The establishment of a legal and regulatory environment where private transnational exchanges can safely take place becomes essential for developing countries to attract further investment, as well as to promote the development of the local private sector. Legal and judicial reforms directed both at the domestic judicial institutions and at the law itself are then core issues to be addressed in order to support further economic development in Africa.

Such reforms after all should support economic growth by facilitating

* Paper presented at the *Journées nationales OHADA* in Bangui on “*Application et implantation du nouveau Droit des Affaires OHADA en Centrafrique*”, Bangui, Central African Republic, 8-9 December 2006.

transnational business transactions, and may include different measures from writing, or revising commercial codes, bankruptcy statutes and company laws, and updating the mandate of regulatory agencies. This process also gives the opportunity to eliminate uncertain provisions, promotes transparency, and improves competitiveness for domestic and international trade in addition to attracting more investment due to the reduction of the transaction costs.

Anyway, while any economic integration cannot occur without a previous political process, both at the national and international level, it cannot subsist without a solid legal framework.

The problem of diversity of laws has been for a long time an important (even if indirect) obstacle to the African economic development which for a long time has not been taken into proper consideration by the African States. Since the attainment of independence the issue of harmonization of laws in Africa has been addressed: Professor Allott observed that “*the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny*”².

But now African countries realized that it is in their interest to try to remove as much as possible the problem of diversity in all the forms which can affect their participation both in intra-regional and extra-regional trade, considered that either the diversity of national laws and the complexity of private international law rules existing in the region affect considerably trades, particularly into the region³. Being in the interest of the African countries to promote trade and investment, they should also deal with the legal facilitation of this goal, directing their activities of legal harmonization either to the substantive law relating to trade and investment activities and to the procedural aspects of international trade law relating to the protection and the enforcement of the rights acquired further to international commercial transactions⁴.

In this regard, the present African experience shows us how most of all the attempts to the harmonization of commercial laws have been pursued through the establishment of regional international organizations⁵.

The Organization for the Harmonization of African Business Laws (*Organisation*

2 A. N. ALLOTT, *Towards the unification of laws in Africa*, in (1965) 14 *Int. Comp. Law Quarterly*, 366-378.

3 M. NDULO, *Harmonisation of trade laws in the African economic community*, in (1993) 42 *Int. Comp. Law Quarterly*, 101-108.

4 G. BAMODU, *op. ult.cit.*

5 One of the first examples that can be recalled is the East African Community between Kenya, Uganda and Tanzania created immediately after the independence of such countries, that failed in the early '70s and that has been recently re-launched.

pour l'Harmonisation en Afrique du Droit des Affaires - OHADA)⁶ was established by a Treaty between African countries mainly in the French-speaking area⁷ and belonging to the Franc zone, signed in Port Louis, Mauritius, on 7 October 1993 and entered into force on July 1995⁸. The objective is the implementation of a modern harmonized legal framework in the area of business laws in order to promote investment and develop economic growth. The Treaty calls for the elaboration of uniform acts to be directly applicable in member states notwithstanding any provision of domestic law. OHADA consists of a Council of Ministers assisted by a Permanent Secretary⁹, a Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage - CCJA*)¹⁰, and a training school for judicial personnel and lawyers (*École Régionale Supérieure de Magistrature - ERSUMA*)¹¹.

In particular, uniform law takes concrete form with the adoption of texts called uniform acts. These acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the States parties to the Treaty which established OHADA. The Council of Ministers, a body established under the Treaty, discusses and adopts the acts on the advice of the Common Court of Justice and Arbitration (CCJA). It is useful to keep in mind that national parliaments are excluded from the proceedings for adopting uniform acts. The Council of Ministers has sole competence in this area. This makes it possible to avoid the drawbacks of indirect procedures that could lead to the adoption of conflicting legal texts that would be difficult to implement. The acts become effective immediately after they are published in the Official Gazette of OHADA, without the need for additional domestic legislation from the States parties. They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws¹².

6 See the OHADA's website at: <www.ohada.com> where the full text of all Uniform Act, as well as the related cas law and a selected bibliography can be found.

7 14 of the 16 present member countries are French-speaking countries.

8 The 16 countries that are part of OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. In 2004 Democratic Republic of Congo started the process to join the OHADA. Angola and Liberia showed interest to join OHADA. Nigeria is also currently debating if joining OHADA or not: see for a favorable approach on it J. A. YAKUBU, *Harmonising Business Laws in Africa: How Nigeria Can Benefit*, available on www.thisdayonline.com/archive/2004/09/29/20040929dev04.html, accessed on 13 October 2005.

9 They are based in Yaounde, Cameroon.

10 This Court is based in Abidjan, Ivory Coast.

11 The school is located in Porto Novo, Benin.

12 See S. BA, *How Can Effective Strategies be Developed for Law and Justice Programs? Are There Models for Legal Reform Programs? The Example of the Organization for the Harmonization of Business Law in Africa (OHADA)*, available at <www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Ba.pdf>, accessed on 13 October 2005.

Up to now, the Uniform Acts that have been adopted relate to General Business Law, Company Law and Pooling of Economic Interest, Organization of Securities, Bankruptcy Law, Debt Collection and Enforcement Law, Accounting Law, Arbitration and Contracts for the Carriage of Goods by Road¹³. This legislation is affecting business operations that are of particular interest for foreign investors. Texts are in preparation for labor law, transport law, contracts law, telecommunications law, competition law and law on cooperatives.

This new legal framework also provides a mechanism for the settlement of disputes, one of the goals of the Treaty being to establish judicial security in the countries involved. The CCJA is the highest level of jurisdiction for all matters involving the application of the Treaty, as well as the Uniform Acts. It has jurisdiction over judicial (it rules on decisions rendered by the Courts of Appeal of the member States) and arbitration matters (supervisory role to the appointed arbitrators and granting enforceable status to the award), thus ensuring the harmonized interpretation of the Treaty, Uniform Acts and corresponding regulation and arbitration agreements¹⁴.

The OHADA law has a fundamental feature: it takes into consideration the complexity and the peculiarities of the African legal systems¹⁵. Even if the uniform acts are obviously strongly inspired by the French model, some member States have been influenced by the English law and it would have been also unrealistic to totally disregard the customary law, even it plays a smaller role in commercial law than in other branches of law like family law or land law.

Indeed, the Treaty is also influenced by English law, as well as by German law, Portuguese law and Islamic law too¹⁶, to realize a synthesis acceptable for all

13 The bibliography on the OHADA is now extremely wide. The journal "Penant" dedicates most of each quarterly issue to doctrine and cases related to OHADA. For a general overview on the OHADA see: L'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), Petites Affiches n. 205, 13 octobre 2004; J. Issa-Sayegh, L'intégration juridique des Etats africains dans la zone franc, Penant 1997-1998, p. 5 et 120; Id., Quelques aspects techniques cit.; M. Kirsch, Dixième anniversaire de la signature du Traité concernant l'harmonisation du droit des affaires en Afrique (Libreville, 17 octobre 2003), Penant 2003, p. 389; L. Benkemoun, Quelques réflexions sur l'Ohada, 10 ans après le Traité de Port-Louis, Penant 2003, p. 133 ; C. Sietchoua Djuitchoko, Les sources du droit de l'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), Penant 2003, p. 140; G. Kenfack Douajni, L'abandon de souveraineté dans le traité OHADA, Penant 1999-2000, p. 125 ; J.-J. Raynal, Intégration et souveraineté : le problème de la constitutionnalité du traité OHADA, Penant 2000, p. 5 ; B. Boumakani, Le juge interne et le droit OHADA, Penant 2001-2002, p. 133.

14 J. ISSA-SAYEH, *Quelques aspects techniques* cit.

15 See R. NEMEDEU: *OHADA: de l'harmonisation à l'unification du droit des affaires en Afrique*, available at <www.univ-nancy2.fr/recherche/actualites/04-05/ohada_janvier_2005.pdf>, accessed on 12 October 2005.

16 As R. NEMEDEU remarks in his paper quoted in the previous footnote, taking into account Islamic law

the citizens of the member States.

The present dominance of the French language and of civil law within OHADA is expected to change over time as OHADA embraces other African countries. *“Although OHADA was conceived in a French-speaking area, African leaders have quickly come to understand that this priceless tool of economic integration should be extended to other countries”* says Judge Kéba Mbaye, the former president of the International Court of Justice. *“Guinea-Bissau and Equatorial Guinea are already members, and now, with the advent of the New Partnership for Africa’s Development, OHADA’s extension to English-speaking African countries is inevitable”*.

2. The legal and digital process of development in the OHADA area

It is widely acknowledged that African countries belonging to the OHADA zone have a deep technological gap towards the western countries which prevents their economies and markets to actively participate in the modern business arena, thereby severely threatening their competitiveness and economic growth prospects.

Indeed, in the telecom industry, proper laws and regulations are essential factors which must accompany ongoing and rapid technological change; they are a condition necessary for the dynamism and efficiency of the telecom sector and the competitiveness and affordability of its services. A proper legal and regulatory environment is also necessary to achieve satisfactory, non-discriminatory and cost effective access to telecommunication services, an essential requirement today for economic growth and human development.

A regionally harmonized legal and regulatory environment will undoubtedly represent an extremely useful instrument enabling countries to join their strengths and share their skills to face the huge challenges they are confronted with in the commercial sector.

For all the above-mentioned reasons, the implementation of a telecoms legal and regulatory reform encompassing the countries belonging to the OHADA zone will be an extremely useful contribution to the implementation and the growth of the commercial activities in sub-Saharan Africa.

But before entering into the details of such possibility, a preliminary question shall be addressed: can a uniform act on telecommunications law be considered under the coverage area of the OHADA Treaty?

The answer to this question must be given taking into consideration that the role of telecommunications in the area of commerce is already wide and it is increasing

has brought to special provisions with reference to interests in business transactions and testimonial evidence.

every day. Telecommunications, indeed, are maybe the main instrument through which commercial transactions are concluded in the business arena: telefax, e-mail, internet, they all play today an essential role to secure contacts among commercial entrepreneurs, to provide them the necessary information on a specific issue, to make contractual negotiations, to enter into a contract too. It is undoubted that international business transactions are today sustained by the telecommunication instruments among the countries.

It is now taken for granted that the interpretation of the expression “*commercial law*” set forth in Article 1 of the OHADA Treaty given by the following Article 2 is extremely wide, up to include the regulation of all the different components of the economic life¹⁷.

Thus, it is possible to conclude on such assumptions that a uniform act on telecommunications law can be considered as included within the scope of the OHADA Treaty.

If we move to consider the situation within the region of telecommunications in general, and telecoms laws in particular, then it is clear that the absence of a legal framework covering the various aspects of telecoms is a factor that can certainly jeopardize the development of investments in the OHADA countries.

The situation related to telecoms laws in the countries belonging to the OHADA group is extremely variegated. We have countries (e.g. Senegal) where the legal framework on telecommunications is well developed, others (e.g. Benin, Congo) where the issue is poorly addressed, if not completely absent.

Moreover the issue of the enforcement of the “law in the books” remains: sometimes the existing rules are not applied, and if applied pressures are exercised over the members of the above mentioned authorities.

Such kinds of situations are perceived as a risk by the investors, whose consequence is the delay of their investments or even their cancellation. There are only a few investments – and mainly addressed to the natural resources sector – in sub-Saharan Africa due to the investors’ risk aversion and the presence of such risks is linked to the absence of regulations. Moreover the lack of harmonized rules in a core sector like the telecommunications has also a direct impact on the consumers who pay dearly services without benefiting of the best technologies in the absence of a competitive market.

The harmonization of the legal framework on telecommunications in the OHADA countries can contribute to put in place a common telecommunications market by removing all the juridical, technical, bureaucratic, and protectionist barriers among the States.

17 See J. ISSA-SAYEGH and others, *OHADA, Traité et Actes uniformes commentés et annotés*, 2nd ed., 2002, comment to Article 2 of the Treaty.

3. The possible Chinese role

Besides OHADA's geographic expansion, there are still important challenges ahead, including the financing of OHADA institutions after 2004. However, a great deal has already been accomplished in a relatively short time.

China has a great interest towards Africa. The new Sino-African axis is based on the strong relations that China has with almost all African countries, especially with reference to the economic partnership.

A strong emphasis is given to the fact that both China and African countries are developing countries with common fundamental interests: *“China is the largest developing country, and Africa is home to the largest number of developing countries. Our combined population accounts for over a third of the world total. In this new era, China and Africa share increasing common interests and have a growing mutual need”*¹⁸.

This new type of strategic partnership between China and Africa is based on political equality and mutual trust, economic win-win cooperation and cultural exchanges, and is being developed through the new South-South cooperation model. This South-South cooperation model *“is an important means through which developing countries may effectively respond to the changes in the international situation and meet the challenges that may be brought about by economic globalization. It helps developing countries to give full play to their advantages in natural and human resources, tap to the full their respective productive and technological potential, take advantage of the others' strengths to make up for their own weaknesses, and achieve common improvement”*¹⁹.

The model is based on taking various measures to tap the potential and explore new ways and areas of economic cooperation and trade so that a new pattern of China-Africa economic relations and cooperation based on mutual benefit and aimed at common development will gradually take shape.

There are no limitations with reference to the fields that this cooperation model can cover. The objective is to *“upgrade cooperation in human resources development and explore new ways of cooperation so that both sides will share the benefits of development. We will enhance exchanges and cooperation in education, science and technology [...] to provide intellectual motivation and cultural support for China-Africa cooperation”*²⁰.

Therefore, if it is also considered that over the next three years China proposes itself to train 15,000 African professionals, and to increase the number of Chinese

18 From the opening speech of the Chinese President, Hu Jintao, at the last Forum on China-Africa Co-operation, held in Beijing, November 2006.

19 From the speech of the former Chinese Premier, Jiang Zemin, delivered to the same Forum.

20 From the opening speech of the Chinese President, Hu Jintao, above cit.

government scholarships to African students from the current 2000 per year to 4000 per year by 2009, it can be affirmed that legal education is a subject that can be covered by the next Sino-African cooperation.

The support that China can give to OHADA in this area can be really significant.

OHADA countries need support and assistance to enhance the legal education in their legal environment with proper formation of their legal professional. This will bring to a wider level of information and application of the OHADA harmonized laws in the member countries providing Chinese investors with an always more reliable legal environment.

But it would be unrealistic to pretend that all legal professionals in the OHADA member countries should be sent to ERSUMA to improve their knowledge on OHADA laws. This would imply an enormous amount of time and money to be spent in such activities, both unavailable in African countries. It would be more advisable that ERSUMA would represent a place where the high level legal formation on OHADA laws is provided, but also an entity that secures an effective coordination for formation projects held at national level using the human resources that the local Universities and OHADA clubs – where present – can provide, integrating them when necessary.

China should considerably help such process, either financially and in terms of human resources, by exchanges of scholars and education of the future legal professionals. The interest on African law studies in China is growing. There are already at least three centers of African studies in China, one of them devoted to African law; an OHADA club has been recently created in Macao S.A.R. of China, that – together with Hong Kong – can represent the cultural and linguistic bridge towards Portuguese and English speaking African countries. Conferences on OHADA laws are to be organized very soon in various Chinese universities, and Chinese scholars are interested in researching on African law. Law students from OHADA countries are doing their law studies in China, doing their thesis on OHADA laws in China. There are indeed the bases for a profitable work together.

Technology is one of the areas expressly mentioned by China in its cooperation programs towards Africa. China could support the adoption of the future uniform act on telecommunications, providing also proper assistance to its implementation due to its high technological level. This will ensure better communications between China and Africa and will facilitate Chinese investors in their investment activities in OHADA countries.

4. Conclusion

African countries became aware of the necessity to harmonize commercial laws to promote trade and investment within their territories by creating a suitable

legal environment.

The realization of the objective of establishing fair and equitable rules for the governance of international business transactions may sometimes necessitate the promotion of the harmonization initiatives, especially when the existing legal framework on which they will be inserted does not reflect the desirable level of fairness, confidence and international compromise.

The OHADA process for the harmonization of commercial laws is playing a remarkable role having undoubtedly gaining a high degree of success and respect at different levels. The text of the uniform acts already adopted want to reflect the economic reality and the life of African companies in order to foster trade and make it save for all economic operators, particularly individual traders, companies and the judges or arbitrators who will have to ensure their implementation.

Scholars and legal professional are strongly contributing to the knowledge and the diffusion of the OHADA system. One of the most famous and old journal in French on African law – *Penant* – is now almost entirely dedicated to contributions related to OHADA and to the analysis of the related case law. Conferences and seminars are often organized even in Europe and will be organized also in China very soon to enhance the awareness of the OHADA framework by legal professionals and business actors. Other countries showed their strong interest in joining the OHADA Treaty and adopting the uniform acts already in place, a case law on OHADA matters is rapidly developing and the member countries are very active in promoting the harmonization of further sector of business law. OHADA has revealed to be as an important opportunity for integrating African economies into the global economy, enabling regional member countries to increase intra-African trade, and as an example of economies of scale in making law reforms. The OHADA achievements are the best evidence of the quality and the success of the project.

The results already achieved show how it is therefore essential for African countries to further explore all the possible opportunities related to the harmonization or uniformization of the law in Africa to increase the opportunities for the development of this continent.

The future Uniform Act on Telecommunications Law should tend to the modernization of this sector in the OHADA countries through the application of its principles of law to the new economic background²¹.

But it can not be forgotten that a new uniform act cannot be enough by itself. It is necessary also the presence of other factors equally important to encourage foreign investors to divert their resources to Africa, like political stability, lack of corruption

21 Again with reference to the issue of contract law F. ONANA ETOUNDI, *Les Principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats*, in *Uniform Law Review*, vol. 10, 2005, 683 and ff.

and more privatizations and liberalizations.

The harmonization of telecoms law in the OHADA area is certainly an ambitious project, but it also feasible. The results and the success reached by OHADA in other sectors of commercial law are the guidelines to reach this important objective too, and China can play a key role in contributing to this possible new success.



LIÇÕES

