

OHADA : AS A BASE FOR CHINESE FURTHER INVESTMENT IN AFRICA

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Résumé

Le but de la création de l'OHADA est de coordonner et de moderniser le droit commercial des Etats membres, de promouvoir l'arbitrage comme un moyen de règlement des différends contractuels, d'éliminer les incertitudes des pouvoirs législatif et judiciaire des Etats membres, afin de réaliser l'intégration économique régionale.

Jusqu'à présent, huit Actes uniformes ont été adoptés et sont entrés en vigueur. Ainsi, on a non seulement introduit un droit moderne, une législation favorable au marché en Afrique, mais encore on a créé un espace juridique commun dans la zone de l'OHADA. L'attractivité du système OHADA a donné aux investisseurs, y compris les investisseurs chinois, une large confiance pour des investissements dans la région.

L'OHADA et sa législation sont très importantes pour les opérateurs économiques chinois car les relations économiques entre la Chine et les pays de droit OHADA sont complémentaires, tout comme l'adhésion à d'autres organisations régionales africaines est propice aux entreprises chinoises pour développer le marché africain.

En outre, ils ont une tradition commune de droit civil, et leurs systèmes commerciaux sont plus ou moins soumis à l'impact du Code de commerce français. Pour profiter des avantages de l'OHADA, les investisseurs chinois doivent faire attention aux Actes uniformes de l'OHADA. Aussi, les juristes chinois ont activement promu la connaissance du droit des affaires OHADA en Chine afin de renforcer la sensibilisation du public à sa compréhension. Ces efforts ont ainsi contribué à la croissance des investissements de la Chine dans la région.

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Introduction

The article first analyses the background of the establishment of OHADA, and then discusses the achievements that it has made. The author points out next that OHADA and its laws provide great benefit for Chinese investors to do business in this region, and finally the author concludes that the Chinese investors shall know more about OHADA and its laws in order to make full use of its provisions to expand their business in Africa. In fact, in China there are more academic efforts to promote OHADA laws among the business and academic circle, OHADA has done lots of work in this regard as well.

1. The Background of the Establishment of OHADA

For historical reasons, diversity of laws has long existed on the African continent (1). It is generally recognized that diversified legal systems will impede the international commercial activity and have negative effects on the commercial transactions between African merchants and foreign business partners (2), especially foreign investment in Africa and trade between Africa and other countries.

Trade is the primary instrument for economic development; however, diversity in the legal regimes of African countries for international trade affects not only intra-African trade but also trade between African merchants and their counterparts from other countries (3). So it is necessary for African countries to tackle the diversity of laws in order to promote international trade both intra-regional and extra-regional (4).

It is the same with African investment laws, which are of vital importance to the national economic development of African countries (5). The lack of co-ordination of African investment laws not only at the sub-regional level but also at the regional level, due to the fact that they are promulgated without regard to the policies of other African countries, hinders "the prospects of meaningful sub-regional or regional economic co-operation and complimentary economic development", and also makes "the investor who would prefer to invest under uniform condition in a group of African countries instead of in one small one" feel confused (6).

(1) Diversity of laws exists in Africa at least in three ways: First, there is internal diversity within individual countries; Second, there is diversity among different African countries (intra-African diversity) and the third, perhaps yet more important, there is diversity between African states and other (non-African states), see Gbenga Bamodu, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa", 38 *J. A. L.* (1994), p. 125.

(2) Gbenga Bamodu, *op. cit.*, p. 125.

(3) *Ibid.*, pp. 128-129.

(4) *Ibid.*, p. 130.

(5) A. M. Akiwumi, "A Plea for the Harmonization of African Investment Law", 19 *J. A. L.* (1975), p. 134.

(6) *Ibid.*, p. 134 and p. 153.

Furthermore, the diversity of international commercial laws among African countries is likely to impact the achievement of the objectives of the economic integration schemes (7). Economic integration has been promoted as essential for the development, peace, and stability of Africa and "the imperative of integrating the economies of African countries is more urgent than ever" (8). Various regional organizations were set up for this goal, such as the Economic Community of West African States (ECOWAS), the Southern Africa Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), etc., the most ambitious one being the African Economic Community (AEC) aiming at the establishment of a common market in Africa.

In fact, "the integration of markets has gone hand in hand with a proliferation of efforts to harmonize key aspects of the law relating to finance and trade," and the harmonized legal rules will not only "prevent a race to the bottom between different jurisdictions" but also "lower the transaction costs and therefore foster international trade and commerce" (9). So "law and policy in Africa needs to embrace global trends which, by definition, transcend national boundaries" (10). As an African commentator has observed, "the harmonization of trade laws and commercial practices is an important ingredient of regional integration, without which meaningful economic integration cannot be achieved" (11). Nevertheless, little work has been done in the area of harmonization of law in Africa until OHADA was set up in 1993.

2. The Achievements of OHADA

For a long time, there have been many calls from African scholars for the harmonization of commercial laws (12), and OHADA perhaps is the strongest echo. "OHADA" is the French acronym for the Organization pour l'Harmonization en Afrique du Droit des Affaires, with the English meaning Organization for the Harmonization of Business Law in Africa (OHBLA). The organization was created according to the Treaty on the Harmonization of Business Law in Africa signed in Mauritius in 1993.

(7) Gbenga Bamodu, *op. cit.*, p. 125.

(8) Richard Frimpong Oppong, "Private International Law in Africa: the Past, Present, and Future", 55 *Am. J. Comp. L.* (2007), p. 702.

(9) Katharina Pistor, "The Standardization of Law and Its Effect on Developing Economies", 50 *Am. J. Comp. L.* (2002), p. 97 and p. 104.

(10) Olusoji O. Elias, "Globalization, 'Law and Development', and Contemporary Africa", 2 *European Journal of Law Reform* (2000), p. 259.

(11) M. Ndulo, "Harmonization of Trade Laws in the African Economic Community", 42 *I.C.L.Q.* (1993), p. 107.

(12) Gbenga Bamodu, *op. cit.*; A. M. Akiwumi, *op. cit.*; M. Ndulo, *op. cit.*; Richard Frimpong Oppong, "Private International Law and the African Economic Community: A Plea for Greater Attention", 55 *I.C.L.Q.* (2006). The Institute for Private International Law in Southern Africa is involved with drafting a code of private international law contract for the SADC region and/ or African Union (AU), see <http://general.rau.ac.za/law/English/ipr/ipr.htm>

Currently OHADA has 16 member states (13), most of them – Benin, Burkina Faso, Central African Republic, Chad, Comoros, the Republic of Congo, Côte d'Ivoire, Gabon, the Republic of Guinea, Mali, Niger, Senegal and Togo – are Francophone, but Guinea-Bissau is Portuguese-speaking, while Equatorial Guinea is Spanish-speaking. There is one bilingual member state, Cameroon, both Anglophone and Francophone. The Treaty is open to all African states, whether or not they are members of the African Union (AU) (14). The Democratic Republic of Congo has officially announced its decision to become an OHADA member and is currently proceeding with the admission process.

It has been made clear in the Treaty that the main objective of OHADA is to remedy the legal and judicial insecurity that prevails in member states by modernizing and harmonizing commercial laws and promoting arbitration as a means of settling contractual disputes and in the end to realize the economic integration (15). In pursuance of its aims, OHADA issues unified legislation in the form of Uniform Acts on particular areas of the law (16).

So far, 8 Uniform Acts have been adopted in relation to general commercial activities, securities, company law and commercial interest grouping (GIE) laws, bankruptcy, debt recovery and enforcement law, arbitration, accounting, and road transport contracts. These Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they give rise to in respect of previous or subsequent enactment of municipal laws (17). "OHADA is therefore a process of unification, rather than harmonization" (18). OHADA is not just a system of uniform laws; it is a unified legal system designed to protect and enhance the pro-investment qualities of the OHADA laws (19).

To assure the uniform application and interpretation of the Acts in the Contracting States, a Common Court of Justice and Arbitration (CCJA) was set up. All these efforts are thought highly of, as Mr Aregba Polo, Permanent Secretary of OHADA, indicated that OHADA efforts are more ambitious than the EC harmonization effort due to the direct application of the Acts and the harmonized interpretation made by CCJA (20).

(13) Republic of Democratic Congo is on the way to becoming the 17th member state of OHADA.

(14) Article 53 of the OHADA Treaty.

(15) Preamble to the Treaty on the Harmonization of Business Law in Africa.

(16) Boris Martor, Nanette Pickington, David S. Sellers and Sebastien Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process*, Kogan Page (2002), p. 6.

(17) Article 10 of OHADA Treaty.

(18) Xavier Forneris, "Harmonizing Commercial Law in Africa: the OHADA", available at http://www.ohada.com/biblio_detail.php?article=480

(19) Clarire Moore Dikerson, "Harmonizing Business Laws in Africa: OHADA Calls the Tune", 44 *Colum. J. Transnat'l L.* (2005), p. 55.

(20) Marc Frilet, "Uniform Commercial Laws, Infrastructure and Project Finance in Africa", 28 *International Business Lawyer* (2000), p. 215.

Although the OHADA system is still under construction, lawyers and businessmen already acknowledge that OHADA has made a significant contribution to enhancing the legal environment for investment in Africa (21). It not only introduces modern and market-friendly legislation but also creates a common legal area in the region (22), thus enhances the investor's confidence in the region.

3. The Benefits of OHADA for Chinese Investment in Africa

Most of the member states of OHADA locate in the western and central Africa, and are rich in natural and mineral resources. Some of the countries hold important position in some resources supply in the world market. The economy between the member states and China is strongly complimentary and there is great potential for the mutual trade and investment. In the past few years, the trade volume between both sides has been increasing significantly and constitutes a large part of the China-Africa trade.

According to the data from the Department of Western Asian and African Affairs, Ministry of Commerce, People's Republic of China, the trade volume between China and such OHADA member states as Congo, Gabon, Benin, Guinea, Equatorial Guinea, Cameroon, Togo, has always been on the top of the list of the China-Africa trade volume (23). Furthermore, there are vast investment opportunities for Chinese investment in the transportation, energy, communication, and other infrastructure construction in these countries.

The legal uncertainty in these countries has long been a great obstacle for foreign investments, including the investment from China, while the efforts that OHADA has made is to improve the situation in its member states, minimize the uncertainty in legislation and judicature, and enhance the investors' confidence in this region. As mentioned above, OHADA has made great achievements in the unification of its member states' commercial laws, and the uniform laws it adopted deal with different aspects of doing business, which will guarantee that the investors will not change their decision to invest here due to the lack of their knowledge about the different laws in different countries.

(21) Jacques Andy Isabelle, "OHADA: Reforming Business Law in Africa", available at http://www.ohada.com/infohada_detail.php?article=348

(22) Xavier Forneris, *op. cit.* but we should also bear in mind, OHADA, like any other regional integration in Africa, has its own problems and shortcomings, for example, insufficient national participation, too much influence from France, lack of the participation of common law countries, uneasy access to court decisions and scholarly commentaries on the Uniform Acts, poor judicial system, etc. see Xavier Forneris, *op. cit.*; Claire Moore Dickerson, *op. cit.*, p.67; Jean Alain PENDA and Dr. TUMNDE, "The Roadmap of the Harmonization of Business Law in Africa", available at http://www.ohada.com/biblio_detail.php?article=452

(23) See the data provided by the Department of Western Asian and African Affairs: <http://xyf.mofcom.gov.cn/date/date.html>, visited on 6 September, 2009.

In the OHADA region, the member states apply the same commercial laws, which makes it easy for the investors to do business here if they know these laws. Though there currently 16 member states, OHADA is open to all the African countries, more and more African states will join it with its development. For example, Ghana, Angola and Nigeria have expressed their intention to be member state in the future. With the adhesion of more African countries to the organization, it will definitely be very convenient for the investors to do business in a broader territory.

Furthermore, investment into the region will help the investors to extend their business to northern, eastern and southern Africa, taking the advantage of the locations of most of the member states of OHADA in western and northern Africa. On the other hand, many member states are also parties to other African regional organizations. For example, Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo are parties to UEMOA and ECOWAS; Central African Republic, Chad, the Republic of Congo, Gabon, the Republic of Guinea, Equatorial Guinea are parties to CEMAC. Thus, the investors may enjoy the preferential terms and conditions that the member states of OHADA enjoy in these regional organizations if they invest in this region, and can therefore expand their market to other African regions.²⁴

And last, China and OHADA member states, except the common law province of Cameroon, share the civil law tradition and their commercial laws are influenced by the modern commercial laws in France more or less, which will make it easy for the Chinese investors to learn about the OHADA commercial laws due to the similarities in the legislation, legal concepts, legal education, procedure in the civil law jurisdictions, thus avoiding the unnecessary losses resulting from the misunderstanding of the laws. As to the dispute settlement, both China and OHADA emphasize the role of arbitration in resolving the commercial disputes. There are some similarities between the arbitration rules of OHADA and those of the China International Economy and Trade Arbitration Committee. Undoubtedly, this will be another element that the Chinese investors will take into account when deciding to invest in the region (24).

4. Conclusion

For those Chinese businessmen and enterprises intending to do business in the OHADA region, they had better first have some knowledge about the present 8 uniform Acts adopted by OHADA and make full use of their provisions, choosing the appropriate investment model and business type, and protecting their legal rights and interests through

(24) Roland Amoussou-Guenou, "The OHADA Arbitration Reform and the Chinese Investment in Africa: Challenges and Opportunities", in Salvatore Mancuso (eds): *The Harmonization of Commercial Laws in Africa and Its Advantage for Chinese Investment in Africa*, 2008, p. 210.

litigation or arbitration in the CCJA when a dispute arises. Only when the investors know about the legal system in a region and are aware that their legal rights and interests will be legally guaranteed, will they decide to do business in the region.

Chinese investors should pay more concern to the harmonized commercial laws in Africa, if they want to invest under uniform conditions in a group of African countries instead of in a small one. It is generally recognized that the commercial laws of OHADA are properly designed; they reduce legal uncertainty and insecurity, replace outdated national legislation in member states, and thus create a more attractive legal environment for companies doing business in Africa. Therefore the Chinese scholars and investors are paying increasing attention to the present OHADA laws.

More and more Chinese scholars and investors are beginning to realize the significance of learning African law, especially the commercial laws, and the interest in African law studies is increasing in Chinese academic circles. For example, many journals in China opened the African Law Columns (25), some of the articles in the columns specially related to OHADA and its laws (26). Additionally, Dr. Zhu Weidong from the Centre for African Laws and Society, Xiangtan University, China, has translated the book *Business Law in Africa: OHADA and the Unification Process* (written by Boris Martor, Nanette Pilkington, David S. Sellers and Sébastien Thouvenot, and published by GMB Publishing Ltd (UK)) into Chinese, which was warmly welcomed by the Chinese academics and investors (27).

These efforts have promoted the OHADA laws in China to some extent. But frankly speaking, research into the harmonized commercial laws in Africa is still far behind the development of China-Africa trade and investment; it is therefore suggested that more efforts be spent on the OHADA law so as to raise public awareness of it in China.

Encouragingly, OHADA is also actively engaged in promoting its laws worldwide in the recent years in order to attract the foreign investments, and it has set up over 60 OHADA Clubs globally. Because of the increasing trade volume between its member states and China, OHADA pays tremendous attention to the promotion of its commercial laws in China. As early as in September 2006, the representative of OHADA in

(25) For example, the African Law Columns in *Hebei Legal Science and West Asia and Africa*.

(26) Weidong Zhu, A Preliminary Review of OHADA, *West Asia and Africa*, No.1, 2009; Weidong Zhu and Fenglin, A General Introduction of the Arbitration System of OHADA, *Arbitration and Law*, No. 110, 2008; Weidong Zhu, OHADA-A New Base for Expanding African Market, *Overseas Investment and Export Credit*, No.4, 2009.

(27) 朱伟东译:《非洲商法: OHADA 与统一化进程》, 英国 GMB 出版公司 2008 年版。
« Business Law in Africa: OHADA and the Unification Process » translated by Zhu Weidong, GMB Publishing Ltd (UK), 2008.

Asia, professor Salvatore Mancuso, from the Faculty of Law, University of Macau, registered the Club OHADA Chine-Macau which has established close cooperation with the Centre for African Laws and Society, Xiangtan University- the sole African laws research institute in China, to promote the public awareness of OHADA commercial laws through joint publications and seminars (28).

Through the above efforts, more and more Chinese investors know about OHADA and its laws, which promoted Chinese investment into the OHADA region to some extent. For example, according to the data of the China-Africa trade in the first three months of 2009 provided by the Department of Western Asian and African Affairs (29), among the top 20 African countries of the China-Africa trade, there are 14 OHADA member states (30), 5 of which come into top 10 of the China-Africa trade (31).

(28) They have jointly edited and published (*Research on the Legal Environment for Chinese Investment in Africa*), 《中国对非投资法律环境研究》 [意]沙尔瓦托·曼库索、洪永红主编、湘潭大学出版社 2009 年版 (Salvatore Mancuso and Hong Yonghong eds, Xiangtan University Press, 2009).

(29) The data were calculated according to the statistics form provided by the Department of Western Asian and African Affairs: <http://xyf.mofcom.gov.cn/aarticle/date/200905/20090506224130.html>, visited on 6 September, 2009.

(30) They are Congo, Benin, Ghana, Togo, Gabon, Cameroon, Equatorial Guinea, Senegal, Guinea, Cote d'Ivoire, Niger, Mali, Chad, and Burkina Faso.

(31) They are Congo, Benin, Ghana, Togo and Gabon.