

OHADA: A COMMON LEGAL SYSTEM PROVIDING A RELIABLE LEGAL AND JUDICIAL ENVIRONMENT IN AFRICA FOR INTERNATIONAL INVESTORS

Barthélemy Cousin¹ & Aude-Marie Cartron²

Introduction

Financial backers often complain of legal and judicial uncertainties in Africa. This has obviously a dissuasive impact on international investors and weighs heavily on one of Africa's main structural problems, which is: lack of investment. However, Africa's subsoil is so rich of commodities that are essential to the world's economy that Africa can simply not be avoided by foreign investors.

The birth of the Organisation for the Harmonisation of Business Law in Africa ("OHADA") was a consequence of the awareness by certain African states - mostly former French colonies - of the challenge represented by the globalisation of markets.

Recent experiences in the OHADA zone and in particular in Chad stress that the harmonisation of business law in this zone is having numerous positive effects, although some difficulties remain to be resolved.

What is the OHADA?

Signed on 17 October 1993 by fourteen African states - now sixteen - from West and Central Africa, the OHADA Treaty aims at creating a uniform, secure and modern legal environment for the stimulation of economic activity and investments within the Member States.

The Treaty has put in place a system which is gradually replacing domestic legal provisions with harmonised regulations.

The OHADA framework presently consists of eight areas of regulation (on corporate law, commercial law, securities, enforcement measures, arbitration, etc) given effect by Uniform Acts directly applicable in the sixteen member states, while other harmonizing activities are being prepared (on contract law, the law of evidence, telecommunications law and employment law).

Considering that the OHADA harmonises general business law but not the material mining or oil regulation, mining and oil companies may believe that this system is not truly helpful tool for implementation of a project. However, the OHADA provides for a framework which can avoid many difficulties while a project is in progress.

¹ Avocat au Barreau de Paris, Associé au sein du département contentieux et arbitrage du cabinet Norton Rose LLP Paris.

² Avocat au Barreau de Paris, Associé au sein du département contentieux et arbitrage du cabinet Norton Rose LLP Paris.

Stipulating in the mining/oil contract an OHADA arbitration clause seems all the more appropriate that many African countries have not signed the New York Convention of 1958.

The adoption of identifiable uniform and modern rules has thus made it possible to modernise business law infrastructures and to create a more stable environment for companies wishing to invest in the OHADA zone. Consequently, the OHADA improves legal security and predictability in order to foster investment and trade, and promote economic growth in Africa.

Who are the Member states?

As of today, the OHADA encompasses 16 Members States: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea-Bissau, Guinea-Conakry Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

The OHADA aims at extending to the whole African continent. The issue of broadening the geographical range of OHADA is indeed under discussion. The Democratic Republic of Congo is soon to join the OHADA community. Ghana, Nigeria or Liberia, who are not French speaking countries have expressed an interest - which remains to be materialised - in the OHADA system.

What are the advantages in using the OHADA law for a mining company?

The OHADA has two main advantages:

- it creates a stable environment by the adoption of modern law, and
- it improves the reliability of dispute resolution system by (i) modernising the recourse to arbitration and (ii) creating a common Supreme court which has exclusive jurisdiction over disputes relating to Uniforms Acts - to the exclusion of all national supreme courts.

The OHADA creates a stable environment by the adoption of modern law

The harmonisation of business law has thus permitted the creation of a stable legal environment within the OHADA zone, key to the development of this region.

For instance, in terms of project finance, the OHADA provides for a modern set of securities regulation. This piece of regulation - together with the Uniform Act relating to the organisation of simplified procedures for debt recovery and enforcement - also offers an efficient protection of assets against unlawful garnishments.

Should a project require setting up a subsidiary in the considered country, the OHADA provides for a uniform act on corporate law. Should this business be discontinued, the OHADA act on insolvency will apply. The OHADA has undeniably fostered development and investment in the region. Several investments have in fact been made in the Member States.

The Chad-Cameroon oil project - which since October 2003 has made it possible to extract the Doba basin oil deposits in the South of Chad - is a good example of a large scale operation involving two OHADA Member States and which is largely structured on the basis of OHADA rules.

The OHADA has not only stabilised the legal environment of business law within the zone. Another under-appreciated benefit is also the improvement of the reliability of the judicial systems within the Member States.

Investors are indeed traditionally suspicious with regards to national judicial systems. The OHADA's reply to this wariness has been the implementation, on the one hand of arbitration law and, on the other hand, the creation of a Common Court, which has exclusive jurisdiction to rule upon disputes relating to the application and interpretation of the Uniform Acts.

The OHADA improves the reliability of the judicial system by providing the recourse to arbitration

Arbitration is viewed by the OHADA as essential. The OHADA is actually providing two paths toward the goal of improving dispute resolution through arbitration. Firstly, an arbitration institution was created under the auspices of the CCJA, which is therefore both a supreme court for OHADA law matters and an arbitration centre.

The OHADA is also considering the situation of those who do not want to submit their arbitration dispute to the CCJA (as an arbitration institution) and has therefore enacted a uniform act on arbitration. However, this piece of legislation is applicable only if the seat of the arbitration is based within an OHADA Member State.

Following either of the two OHADA paths for arbitration seems all the more advisable that some OHADA Member States have not signed the New York Convention of 1958 (Chad and Congo Brazzaville). The Republic democratic of Congo has also not signed the New-York Convention but should join OHADA in a near future.

However, the arbitration culture is poor within the Africa region.

Recourse to arbitration is consequently not always sufficient to protect the interests of international mining investors who cannot be sure of avoiding as all proceedings before national courts.

The creation of a common Court only competent to rule over harmonised matters, is the Treaty's answer to the problem of judicial insecurity.

The OHADA improves the reliability of the judicial system by creating a Common Court of Justice

An underestimated side effect of the OHADA is the huge improvement that it brought to the State court litigators through the creation of the CCJA. The consequences are that apart from its role as an arbitration institution, the CCJA interprets and monitors the application of the OHADA uniform acts which provides certain stability to the national judicial systems.

The CCJA operates as a Supreme Court for all the decisions handed down by the national Courts of Appeal and relating to the OHADA texts.

This major surrender of sovereignty has first of all the automatic effect of removing entire sections of the case loads of the national Supreme Courts and concurrently of placing national Courts of Appeal under the direct control of the CCJA.

The possible overturning of the judgements handed down by the national Courts of Appeal weighs therefore upon national judges.

Hence, the first thing that has to be verified once an investor is facing a new piece of litigation is whether it is an OHADA matter. If the answer is "yes", it augurs well.

Since the whole of the aspects of a mining project (from the mining concessions up to the bank accounts) can be placed under securities, it means that all funds and debts of a mining company will not be subject to seizure proceedings.

It confirms the effectiveness of the OHADA securities and offers a real protection to the investors.

Therefore, the OHADA undeniably ensures via the CCJA, a certain reliability of the judicial system.

What is the future for OHADA?

The reliability of the judicial system offered by the CCJA is not always sufficient. Judges are indeed still targeted and therefore tend to favour national laws over OHADA law (in order to hand down judgements which favour their nationals). Since the decisions of the Court of appeals are enforceable, the recourse before the CCJA can be of late.

In this context, foreign investors also have an important role to play against those pressures. By way of an example it is possible to refer to the original payment process implemented by an occidental company which participated in an oil project in Chad. Having been ordered to pay 10 million euros to 4,000 employees, this company had two choices: (i) one single payment between the hand of one bailiff or (ii) distributing the funds to each and every beneficiary. The last option has been followed. This operation helped avoiding the evaporation of the funds.

Moreover, the OHADA must deal with structural difficulties, linked notably with problems of co-existence between the OHADA rules and national laws. Disputes may indeed bring both OHADA rules and domestic laws, thus identifying the competent court is not always a straightforward matter.

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Conclusion

Legal and judicial security has certainly not yet been achieved. The procedure of reforming business law must continue.

Despite these imperfections, the adoption of modern, identifiable and harmonised laws, as well as the creation of a common Supreme Court, has certainly made it possible to stabilise the legal and judicial environment for business within the OHADA zone to the benefice of both the international investors and the nationals.