

The future for Ohada

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Summary

The process of improving the legal framework in the OHADA zone, thus promoting foreign trade and investment in the region, is starting to bring real benefits to investors – although the traditional difficulties encountered have not disappeared. Our view, set out here, is based on our own hands-on experience in Africa – and notably in Chad – as practitioners using the OHADA legal instruments, in particular before state courts.

Context

International resource companies investing in Africa tend to view African legal regimes as a potential risk. Legal and judicial uncertainties can deter international investors and weigh heavily on one of Africa's main structural problems, which is a lack of investment.

OHADA is an attempt to remedy this situation. The Organisation for the Harmonisation of Business Law in Africa, known as OHADA, was set up to improve legal security and predictability in order to foster investment and trade and to promote economic growth in Africa. The Treaty on the Organisation of Business Law in Africa was signed on 17 September 1993. It provides a framework which makes it possible progressively to replace national business law with a communal law. The framework comprises eight areas of regulation given effect by Uniform Acts directly applicable in the 16 member states.

OHADA will not fulfil its aims, however, without resolving certain structural and legal issues.

Strategic impact

The OHADA process has a strategic impact on Africa's development because it is creating a secure legal and judicial framework. OHADA helps to foster improved economic development. Recent infrastructure projects demonstrate the interest of foreign investors in the OHADA region. The Chad-Cameroon Development and Pipeline Project – which since October 2003 has allowed the exploitation of the oil fields landlocked within the Doba basin in Chad – is a good example of an infrastructure project which was largely structured on the basis of OHADA law.

Investors' concerns

The life of a project is, however, not limited to its legal and financial structure: investors worry about being implicated in local procedures which are difficult to master. OHADA's response to this wariness with respect to local courts has been to implement arbitration law in

compliance with modern practice and to set up the Common Court of Justice and Arbitration (CCJA) to conduct institutional arbitration.

Even by resorting to arbitration – which assumes at one moment or another that the parties agree to have their dispute referred to arbitration – it is virtually impossible to avoid proceedings before local state courts. During implementation all development projects give rise to tensions and resentment at a local level; it is natural for these resentments to form against local subsidiaries of international groups.

Structural issues

OHADA will not fulfil its aims without resolving certain structural issues. The main difficulties involve interaction with national law, which in turn affects the jurisdiction of the courts.

There are two basic, and straightforward, principles: OHADA law supersedes contradicting national legislation; and the CCJA is the supreme court on OHADA law issues (while national law disputes will ultimately be referred to the national supreme court). However, real world issues are never that simple. It is often difficult to say whether a given national rule should be held as abolished, because it contradicts an OHADA rule, or whether it is actually merely supplementing the OHADA rule.

Conversely, many disputes cannot be resolved by applying only OHADA rules or only national rules. The judges are often obliged to apply a combination of both, which creates uncertainty as to which supreme court should have jurisdiction – and, thereby, tensions between national supreme courts and the CCJA.

These difficulties should diminish over time, as more fields of law are harmonised and new uniform acts enter into force. At present, however, there are as many sources of difficulty and conflict as there are areas of law which remain to be harmonised.

Contract law

The rules relating to several types of commercial contract have been harmonised (commercial sales, commercial lease, security documents). General contract law has not been harmonised. As a result, the rules relating to the execution of a commercial sale (offer, acceptance, etc) are governed by national rules – whereas the rules on the performance of the sale itself are OHADA rules.

Procedural law

Many aspects of civil procedure (arbitration law and enforcement measures) have been harmonised. The rest of civil procedure has not. No enforcement measure can be taken under the OHADA uniform act without applying national legislation as well. It is largely for this reason that the uniform act on enforcement measures gives rise to the greatest amount of litigation.

At this stage, there are no plans to harmonise the rules of civil procedure. A uniform act would reduce the large number of conflicts which result from the coexistence of harmonised rules on enforcement measures alongside national rules of civil procedure.

OHADA alone cannot resolve the many difficulties associated with the local state court system.

Legal issues

The harmonisation of legal rules has improved the reliability of the state court system in OHADA countries.

Enforcement

The Uniform Act on enforcement measures protects against unfounded garnishments (where notice is served as a means of seizing money as part of a debt or claim). In civil law jurisdictions, the seizure of assets is common practice. In Africa, this practice has led to certain extreme situations.

In the OHADA zone, laws on enforcement were modernised when the uniform act on enforcement measures was introduced. These laws (inspired by French law) may be flawed in certain areas – due in particular to conflicts with national law regarding civil procedure – but their immense advantage is that they provide a clear legal framework which makes it possible to fight efficiently against certain abuses.

In one recent case, it was possible to resist repeated attempts by plaintiffs to seize and re-sell movable assets. The plaintiffs had in their favour the fact that the assets targeted belonged to a solvent company which clearly had the means to absorb the loss. The seizures were, however, irregular in many respects (including the fact that the creditor making the claim did not have an enforceable decision). By using the formal requirements of OHADA law, supported by French case law, we were able to have these garnishments revoked.

National judges are aware that the CCJA judges will not hesitate to quash their decisions. The possibility of sanction by the CCJA acts as an incentive for them to comply with OHADA principles, even in cases where this may not seem particularly favourable to national interests.

Investors' rights

Norton Rose recently acted in another case that touched on the Uniform Acts on sureties and the Uniform Act on enforcement. This case involved a conflict between an international company and local claimants over security granted to international financial institutions. As is common practice in civil law jurisdictions, the claimants carried out protective garnishments on the bank accounts of the international company. The amounts had to remain frozen until the end of the proceedings. These garnishments were problematic, because the bank accounts had been pledged within the scope of various guarantees granted to financial institutions which had participated in the funding of a particular project. There was a clash between the rights that the claimants wanted to enforce from the Uniform Act on enforcement measures and the acknowledged rights of financial institutions regarding the guarantee of their loan under the Uniform Act on security interests.

The court rejected the defendant's claim. The court of appeal, however, quashed this decision and held that the pledges should prevail as they had been granted well before the plaintiffs

garnished the defendants' bank accounts. In other words, the court favoured the Uniform Act on securities over the Uniform Act on enforcement measures.

This case is interesting from both a legal and a political standpoint. The decision confirms that, by pledging the balance of a bank account, the accounts become exempt from attachment (ie, unseizable). This is real protection not only for banks but also for investors.

This case also highlights the tensions between international lenders and local parties, each seeking a favourable interpretation of a new body of the law. It required some courage on the part of the court to resist local pressure and to rule against the plaintiffs on the basis of purely legal and technical reasoning.

Conclusion

The application of OHADA law before national courts is now allowing investors to gauge the extent to which the protection of the law is increasing. These laws and regulations have, for the most part, become standard practice and are applied on a regular basis. Fear of sanctions by the CCJA exerts a real pressure on local judges. When these judges are presented with well-constructed arguments based on OHADA law, they do not hesitate to apply such law – even if it means incurring hostility on a local level.

There are still huge challenges facing state-level African jurisdictions today, particularly those within OHADA. But without doubt progress is being made.

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