

TRIP REPORT - IDEF ACTIONS IN WASHINGTON, DC – March 23 - April 1, 2011

Following the panel on the OHADA co-organized by IDEF and the American Society of International Law (ASIL) on October 13 at ASIL headquarters in Washington, DC, IDEF was invited to participate to the 105th annual meeting of ASIL and to speak on the OHADA at Howard University, George Washington University and at the World Bank.

Prof. B. Mercadal, Vice President and Secretary General of IDEF, chaired the delegation, composed of Corinne Boismain and Jimmy Kodo, both co-draftsmen of the OHADA annotated code produced by IDEF.

The delegation from France was joined by Mssrs. Renaud Beauchard, attorney at the bars of New York and District of Columbia and Henry SAINT DAHL, attorney at the bars of Texas, New York, District of Columbia, Buenos Aires and Madrid. Both are residing members of IDEF in the United-States.

I. Intervention at ASIL's Annual Event

ASIL's 105th annual event took place from March 23-26 at the Ritz Carlton Hotel in Washington, DC.

On March 24, Ms. Boismain, Assistant Professor at the University of Metz School of Law and author of a doctoral thesis on relational contracts in French and US law, participated to a panel on the "Legal Origins, Doing Business and Rule of Law Indicators: The Economic Evaluation of Legal Systems", moderated by Renaud Beauchard, representative of IDEF in Washington, DC.

The panel focused on the economic evaluation of legal systems through investments climate and governance indicators.

The panel benefited from a large audience (the room, which could fit in 50 persons, was full and some attendants stood outside the door in the corridor to listen to the panelists), which could only partly be explained by the circumstance that the panel was eligible for continuing legal education.

The moderator introduced the theme. During his presentation, he emphasized that the key question raised was less the finding of the indicators than the method of economic evaluation of legal systems purely in terms of metrics assessing the transaction costs and the delays associated with legal operations.

The first panelist, Kevin Davis, professor at New York University and expert on law and development, made a presentation of the legal origins theory, which directly influenced the doing business reports. The legal origins provide that law matters, that is to say that a well-designed law can stifle economic development, while a badly designed law can hamper it. With humor, Kevin Davis introduced the more controversial aspect of the theory, which consists in ranking the legal systems, finding that the common law provides a legal blue print for economic growth, while it caricatures the civil law system as being a path to slow growth. Very critical of the

theory, while at the same time acknowledging that it is a moving target, Kevin Davis exposed how the theory, initially centered on business law, credit and finance, gradually contaminated the governance debate, accrediting the idea that there is a civil law governance model, which is nothing else than an economic orthodoxy.

The second panelist, Corinne Boismain, assistant professor at the University of Metz School of law, provided a perspective on the Legal origins based on an illustration of the OHADA by US case law. In doing so, Ms. Boismain emphasized that the problems and the solutions often are similar but also that the civil law method is not so different of the common law than it is commonly thought.

Prior to that, Ms. Boismain presented the OHADA as well as IDEF's activities on the OHADA. Based upon her own experience, she explained how US decisions are integrated in the IDEF's OHADA annotated code. She supplemented her demonstration with comparative case law examples on the definition of merchant, the corporate interest and contract interpretation.

The third panelist, Carolin Geginat, is an economist at the International Finance Corporation (IFC) in the Doing Business Unit. Ms. Geginat explained how her unit had responded to the criticisms addressed by the continental law states after the publication of the first Doing Business Indicators, emphasizing the merits of the econometric approach.

Finally, the last speaker, Ralf Michaels, professor of Comparative law at Duke University (North Carolina), and recently appointed member of the consultative committee of the Doing Business Indicator, exposed that comparative law and economics have equal vocation to evaluate legal systems, but that the effort should be placed on a larger aggregation of the analysis, without necessarily lead the analysis jointly.

The general idea emanating from the interventions was that the Legal origins was becoming a rear guard theory, being viewed as reductionist and oversimplifying.

A very stimulating phase of discussion followed. Many questions were addressed to Carolin Geginat on the Doing Business Methodology and the data collection methods, raising the issues of the identification of consulted persons and the transparency of the system put in place or the follow up by the Doing Business Team to conduct the aggregation of the data collected.

A professor at McGill University (Montreal) asked whether the field of research exploring the relationship between law and economic growth was also supplemented with investigations on the link between law and poverty. A professor of Georgetown University asked what were the lessons learned by the Doing Business team after the financial crisis and whether some bridges were made with international trade. Another asked whether the Doing Business Indicator did not in fact perpetuate the tendency to deregulate.

II. Symposium at Howard University

Upon the invitation of Prof. Marsha ECHOLS, a seminar was held at Howard University on the OHADA on March 28, 2011.

Mr. Jean-Alain PENDA and Ms. Kékéli KODJO, respectively co-founder and Vice-président of the Foundation for a Unified Business Law in Africa (FUBLA) joined the IDEF delegation, answering the Institute's invitation.

Prof. Echols chaired the seminar.

After a presentation of the participants, Ms. P. Shah introduced the students International Society which she presides.

Jimmy Kodo gave a brief overview of the history and the current state of the OHADA and its institutions.

Prof. Mercadal concluded in English the first part of the seminar with a presentation on the value of OHADA law.

The second part was dedicated to the practical applications of the Convention on International Sales of Goods (CISG), the Uniform Commercial Code and the Uniform Act of the OHADA on general Commercial Law (AUDCG).

Mr. Renaud Beauchard made a normative comparison between the CISG and the OHADA.

Before the seminar, Ms. Echols' students in International sales all received an assignment to study the AUDCG in English and to study its specific provisions. Two students were tasked with the presentation of US decisions to be analyzed under a comparative perspective with the AUDCG.

Mr. Michael BLACKMON presented a case study on '*Contract Formation: The Treatment of Additional Terms under the UCC and OHADA*'.

Mr. Nurudeen Elias attempted A UCC-OHADA Comparison.

Both mentioned and identified specific domains in which OHADA seems more protective than the UCC and domains where the UCC appear more flexible than the OHADA.

After a lively discussion followed by a brief pause, the work resumed with a comparison of the different systems as follows:

'The CISG in France : A case Analysis' par Corinne Boismain ;

'INCOTERMS and the Transfer of Risk under the Uniform Commercial Code', by Prof. Alice Thomas, Howard University;

'OHADA and the Transfer of Risk' par Jimmy Kodo.

Another discussion session followed before the closing remarks of Prof. Echols.

The participants were supplied with documentation on the OHADA and OHADAC and another event was planned. Several questions revealed the perception of the OHADA by the students. The questions also gave the opportunity to the representatives of FUBLA and IDEF to exchange with the participants.

III. IDEF Intervention at George Washington University

On March 28, 2011, the IDEF delegation was hosted at George Washington University.

Jimmy Kodo gave a conference titled '*Convergence of Common Law and Civil Law on the Basis of African Business Law*'.

Elaborating on an etymological definition of the notion of convergence, the speaker emphasized that the convergence of two things does not mean that they are identical or equal but that they tend to become closer. Jimmy Kodo highlighted those commonalities through a series of examples taken from a selection of US decisions compared with OHADA provisions. It provided a good opportunity to introduce the OHADA and IDEF initiatives dedicated to its promotion, including the annotated code and the US case law inserted in the annotations.

The speaker also mentioned the OHADAC in the Caribbean as yet another illustration of the convergence.

A lively discussion followed, during which Prof. Susan Karamanian, Dean of the International Legal Studies at GWU, who organized the event, said that she is a member of the board of trustees of the United-States Library of Congress and offered to recommend that the IDEF annotated code be included in the catalogue. Further information will be provided after the follow up and when this project becomes effective.

IV. IDEF's Intervention at the World Bank

On March 29, 2011, the World Bank hosted IDEF upon the invitation of Barry Walsh at the Legal Vice Presidency for a presentation on the current challenges the OHADA must face to ensure its sustainability.

The event was chaired by Christina Biebsheimer, lead counsel of the Justice Reform Practice Group, Legal Vice Presidency (LEG).

Initially, it was planned that Mr. Kodo would intervene jointly with Prof. Antoine Oliveira, president of the OHADA Common Court of Justice and Arbitration (CCJA). However, Mr. Oliveira was unexpectedly prevented by a last minute impediment to attend the event.

Mr. Kodo's intervention was titled: "*Harmonization of Business Law in Africa: Contemporary Achievements and Challenges of OHADA Institutions*" and gathered about 30 participants in the room where the board of directors of the World Bank is held.

After a brief historic presentation of the OHADA, its institutions and what has already been accomplished, the speaker insisted on the challenges facing the main institutions of the OHADA, that is to say the CCJA, the Permanent Secretary and the Magistracy School (ERSUMA) . He also emphasized the key importance of training all OHADA actors, which must include a more thorough presentation of the case law applying the Uniform Acts.

A lively debate followed. For reasons of time constraints, not all questions could be answered.

A working meeting was organized on March 29 after the conference between the organizers at the World Bank (Barry Walsh and Harold Epineuse) and Mr. Kodo. It was planned to broadcast the event's video recording on the World Bank's website and to publish a research paper along the lines of the conference in the World Bank's Justice and Development Working Paper Series.

IDEF seizes the opportunity to express its gratitude to all persons and institutions who have contributed to make this series of intervention possible, especially:

The Foundation for the OHADA Law which provided a subsidy to fund the transportation costs of the French delegation;
Howard University,
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The World Bank Group.

Report made on April 14, 2011 by:

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