

Support Programme of the Organisation for the Harmonisation of Business Law in Africa (OHADA)/Ghana – France Chamber of Commerce, Industry and Agriculture

(GFCCIA)

OHADA Seminar from 22nd – 24th May, 2007

GENERAL REPORT

From 22nd to 24th May 2007, the OHADA Seminar was held at the Crystal Palm Hotel, Tesano, Accra, Ghana.

The list of participants is attached to this report.

The deliberations started after the opening Ceremony under the Chairmanship of Mr.EL HADJ MATHY MOUSSA, Minister for Justice, Attorney General of the Republic of Niger, current Chairman of the OHADA Council of Ministers.

I - OPENING CEREMONY

This Ceremony comprised six speeches by namely Ms. Darko, Mr. AHO, the President of the GFCCIA and Madam DECORPS, Chargé d'Affaires of the French Embassy, Justice AKOTO BAMFO and finally the current Chairman of the OHADA Council of Ministers.

Ms. DARKO started by recalling the existence of the OHADA project in neighbouring countries and the visit by some Ghanaian judges to Benin from 12th to 16th March, 2007 to learn more about it.

Mr. Ferdinand AHO of the OHADA Project then outlined the programme for the first day.

On behalf of the economic operators, Mr. Christian Hesse TETTEH, in a short speech called for the expansion of the economic and legal framework for businesses.

On her part, Madam DECORPS, Chargé d'Affaires of the French Embassy in Ghana recalled the constant support of France towards the OHADA project, emphasizing the importance of the role of integration of this organization in the sub-region and its support towards the development of the private sector. Madam DECORPS then expressed her profound appreciation for the activities of the GFCCIA in the organization of the Seminar. After acknowledging the presence of the Minister and Chairman of the OHADA Council of Ministers, she recalled the European Union model which starting with trade arrangements has ended up today in very profound common achievements.

Justice AKOTO BAMFO welcomed participants and asked them to participate actively in this sharing of experience.

To end this part of the Ceremony, Mr. EL HADJ MATHY MOUSSA first on behalf of the Council of Ministers, expressed gratitude to President KUFUOR for allowing the meeting to be held in Accra. He then extended to President Kufuor greetings from President Mamadou TANDJA of the Republic of Niger who has emphasized the commitment of his colleague to the process of integration in Africa, whose ascension to the leadership of the African Union is a concrete

example. He then thanked the Ministers of Foreign Affairs and Justice of Ghana, all the leaders of the country and the people of Ghana.

The Minister and Chairman of the Council then recalled the origin of OHADA, its objectives, the uniform acts already adopted and more generally, the progress made in the area of harmonization since the Treaty signed in Port-Louis (Republic of Mauritius) on 17th October, 1993 and the harmonization of business law in Africa. He recalled that several States are currently knocking at the door of OHADA which has a continental vocation. He also emphasized the benefit of economic integration which calls for legal and judicial structures. He expressed the desire to see Ghana join OHADA. He finally asked that participants closely follow the interventions of the speakers.

The deliberations then started after the opening ceremony.

II - DELIBERATIONS

The deliberations are spread over three days with presentations followed by discussions.

A. DELIBERATIONS ON THE FIRST DAY

These comprised a series of presentations as introduction for discussions namely:

- 'OHADA, Factor in Effectiveness of Regional Strategies' by Prof. Akwete Pedro SANTOS;
- 'OHADA: scope of application Today and Tomorrow' by Mr. Idrissa Kere
- 'Canadian Experience of bijuridism: Contribution to thoughts on the Prospects of having a Diversity of Legal Traditions in the OHADA Zone' by Mr. Serge BOURAUE; and
- 'OHADA and National Jurisdictions' by the Permanent Secretary of OHADA, Mr. Koleka BOUTORA-TAKPA;

Justice AKOTO BAMFO was the Moderator.

1 - OHADA, factor in Effectiveness of Regional Strategies

Professor SANTOS indicated from the start that the objective of OHADA is the search for unity considered by African States as a favorable factor for economic and social progress. This has led to an abundance of regional organizations. But with economic globalization, it became necessary to rationalize regional strategies; this evolution a need arose for rationalization of these organizations and OHADA is the result of this evolution. The territory of this organization is extensive and the intention of its founders is to make the law contribute to development, instead of it being an obstacle. The Speaker therefore wondered about the ambitions of OHADA as well as what it could effectively achieve.

OHADA has produced a clear business law, easily accessible presenting three main advantages in the methods of its promoters, its aim and its space.

The OHADA's method leads to a unification and not in reality, to a harmonization of community law which avoids the differences and the conflicts of law. Supranationality, dominance of community law over national law and the creation of a Common court of Justice and Arbitration to regulate the implementation of this law are the main features.

Concerning the objective, the notion of business law is understood generally as going beyond the law of economic activities and encompassing for example Procedural law. Article 2 of the Port-Louis Treaty aims at a flexible business law not addressing specific economic sectors as for

example specific economic sectors as the African Conference of Insurance Market (CIMA) and the African Organisation for Intellectual Property.

Regarding the OHADA Zone, it included initially French Speaking countries but has already gone beyond this linguistic area. In all cases, the Treaty affirmed the interafrican vocation of the organization and the OHADA programme could serve the objectives as those of the Economic Community of West African States (ECOWAS) such as the creation of a common currency or economic and fiscal harmonization policies. The speaker intimated that ECOWAS works towards the convergence of sectorial policies whereas OHADA works with very convincing results towards greater performance of companies through the creation of modern laws adapted to national situations, for a fair and speedy justice system and the promotion of arbitration in the settlement of differences.

This presentation of Professor Santos led to a lively discussion which led essentially to informing more completely common law lawyers on certain points of the OHADA law and thus to address the concerns expressed in spite of the fact that moreover, the fundamental differences between the two systems are minimal.

2 – ‘OHADA: Scope of application today and tomorrow’

Tackling this second theme, Mr. KERE recalled the objectives of OHADA, citing the uniform acts already adopted (general business law, commercial companies and economic interest groupings, guarantees, simplified procedures for recovery and implementation, joint procedures for settlement of debt, arbitration law, accounting law, road transport contracts) citing those in the pipeline (labour law, consumer rights, laws on contracts, law on cooperatives, law of the evidence), to bring out outstanding issues (civil societies, banking law, competition law).

The speaker then recalled that sanctions for offences by uniform acts is left for the State as well as for the competent State Courts in the application based on the OHADA law.

The Speaker also reviewed the geographical scope of application of OHADA texts to emphasise its panafrican vocation.

The discussions particularly brought out the fact that in reality the informal scope of application of the treaty and uniform acts of OHADA goes beyond the formal scope.

3 – “Canadian Experience of Bilingualism and Bijurisdim: Contribution to thoughts on the Prospects of having a diversity of legal traditions in the OHADA zone”.

Mr. BOURQUE began by emphasizing that both the Common Law and the Civil Law achieve the same results by different methods. After a brief presentation of Canada’s history, he indicated how the Quebec law presents certain characteristics inherited from the Paris custom which distinguishes it from the dominant Common law system. But this situation is less evident in the company law where the social procedures are quite largely shared in Canada.

Mr. BOURQUE indicated that in Canada, the Federal State as well as each provincial State has competent legislation on company laws. He intimated that up till 1970 the applicable law was based on the old British system of granting patents in which the establishment of a company is a privilege granted by the State and not a right of each citizen. Since then, the Federal Government of Canada and provincial Governments of the country are all derived from the American State of New York, adopted laws which have modernized the subject. Mr. BOURQUE emphasized that basically, these laws are comparable to those of OHADA company law, from which there is minimum deviation.

Mr. BOURQUE indicated moreover that Quebec belonging to the Romano Germanic family through its judicial heritage has in no way put an obstacle in the emergence of company law almost uniform to Canada.

In conclusion, the speaker observed that the company law tends to be in harmony with the current world in spite of the coexistence of several judicial concepts.

4 – OHADA and national jurisdictions

The Permanent Secretariat of OHADA indicated the primary community standards used by the Organization, the rule of supranationality, the distribution of responsibilities between OHADA and the States, the community legal supremacy of the CCJA.

B – DAY 2 (Wednesday 23 May, 2007)

There were two presentations on this second day followed by a discussion, namely:

- “The dual category of business operators and the specific provisions relating to traders”, by Prof. Jacques DAVID.
- Specific Rules and Regulations relating to the different business operators’ groups (companies, economic interest groups) by Prof. Akuete Pedro SANTOS.

Justice C.J. HONYENUGA was the moderator for the first theme and Justice KWOFIE for the second.

1. The dual category of business operators and specific provisions relating to traders.

Prof. DAVID, after a brief presentation of Juriscope, of which he is the Director, and the activities of this institution concerning the dissemination of the OHADA law, indicated the peculiarities of OHADA law, its advantages and certain disadvantages. The characteristic of the OHADA law, he said is its articles which favour the creation and development of companies. He illustrated his point by emphasizing the rules relating to the notion and status of the trader, the notions of commercial lease and “fonds de commerce”. He then referred to the Uniform Act relating to securities and that on the settlement procedures under the Bankruptcy law.

With reference to the commercial law, the speaker noted that the OHADA legislation is inspired by the French law where the trader is the one who undertakes trading activities or acts within the framework of a commercial establishment. He thus distinguished the non-commercial actors such as the cooperatives (which he hoped could be governed by a Uniform Act), the artisans, farmers, etc. He defined the status of trader notably through his accounting and administrative obligations. According to the speaker, the basic particularity of the commercial law lies in its provisions relating to the commercial lease, the “fonds de commerce” which sanctions the sharing of prerogatives and obligations between the owner of the property and that of the commercial activity. This legal division is in line with the concern for flexibility in commercial law and activities and does not make cumbersome the commercial operations and transactions of the enterprise. That makes it possible to attach specific laws to the “fonds de commerce” (sale, transfer) which are peculiar to the French or francophone legislations.

On the subject of securities, the speaker regretted that the legislator was unable to take certain customary forms of securities into consideration such as the “pledging without dispossession”. He however appreciated the system of movable securities without dispossession.

Concerning the uniform act on the debt settlement procedures under the bankruptcy law, the speaker commended the privilege granted by the OHADA legislator to safeguard companies in difficulty (preventive settlement, legal recovery, etc) to the detriment of the elimination of the company which is legal liquidation.

There were fruitful discussions on this topic which began before the coffee break and resumed afterwards on the OHADA concepts, institutions or procedures that are either unknown or little

known by Common law lawyers. The main concerns were about the commercial lease, “fonds de commerce” and collective procedures others questioned the effectiveness of the OHADA law on the African informal sector. Answers were provided for all these questions by both the speaker and some participants.

2. The Rules and Regulations relating to business operator’s groups (companies, economic interest groups) under OHADA law and uses in Common law.

After Prof. DAVID, Prof. Santos presented the specific rules applicable to each type of company.

He first recalled some general rules provided for by the uniform act on the commercial company law and the economic interest group. He indicated that the company has a contractual basis created by a memorandum and articles of association and moreover, characterized the pooling of assets and rights with the aim of sharing the profits or benefits from any possible advantages. He then distinguished commercial companies from associations which are non-profit institutions. The object of economic interest is the continuation of activity by its members.

Prof. SANTOS added that the creation of a commercial company is subject to specific formalities, as its articles of association have to be drawn up by a lawyer.

Concerning the specific regime relating to each company, he distinguished between limited and unlimited liability companies. In the first category, he indicated that the OHADA legislator has opted for the simple partnership (SNC) and the sleeping partnership (SCS). These two types of companies are based on individual considerations and have unlimited liability vis-à-vis the partners. The sleeping partnership is characterized by the presence of two types of partners, the active partners who are indefinitely, jointly and severally liable for the companies’ debt the “financial backers” called sleeping partners who are not liable for company debts apart from those within the limit of their contributions.

Regarding limited liability companies, the speaker mentioned the Limited Company and the private limited company. The Limited Liability Company is characterized by the fact the partners are not indefinitely liable for the company’s debt. On the other hand, the rules of the transfer of the partners’ rights are strictly regulated. The OHADA law maker has regulated the agreement between companies and its managers. These agreements must be brought to the notice of the Board of Administration and discussed by the Board members. Certain agreements of this type are even forbidden: these are, for example, the loan agreements to the benefit of the company’s managers.

Finally, Prof. SANTOS indicated that the Public limited company has been strongly regulated by the OHADA law maker. It’s a company which facilitates the circulation of capital mainly characterized by the fact the capital is divided into shares easily transferable.

The discussion following this presentation was very active. It dealt with the correspondence between the types of companies known under OHADA law and companies existing under the Common law.

C. DAY 3 (Thursday 24 May, 2007)

The deliberations of Thursday dealt with:

- The continuation of discussions on the theme ‘Rules and Regulations relating to business operators’ groups (companies, economic interest groupings) under OHADA law and uses in Common Law’, developed the previous day by Prof. SANTOS; and
- Proposals for ‘support initiatives for the harmonization of business law’.

Madam DICKERSON was the moderator for this session. The discussion was followed by the closing ceremony.

I – Continuation of discussions on ‘the Rules and Regulations relating to business operators’ groups (companies, economic interest groups) under OHADA law and uses in Common law. The floor was given to participants (common law lawyers) to present the particular forms of companies existing in their respective systems (Ghana and Nigeria in particular). From the different interventions it emerged that the Ghanaian law has two categories of companies namely:

- the partnerships; and
- companies.

In the Common law system used in Ghana, and Nigeria, the partnership could be compared to a limited liability company under the OHADA system, without a legal personality as is the case of the simple partnership and sleeping partnership under OHADA law.

For companies, they correspond to limited liability companies described yesterday by Prof. SANTOS. There are two categories of companies, namely private companies and public companies. They have quite a large number of shareholders and can be listed on the stock exchange. However, the private company has a smaller number of partners. A partnership or company may have a single partner in certain cases.

The discussions then centered on the formatives for the establishment of companies and procedures adopted before the company comes into being under Ghanaian law and Nigerian law.

The participants made extensive and useful contributions on all these issues.

The participants then discussed the protection mechanisms for the minority within a company as well as the protection of third parties. The participants noted that both in the OHADA Zone and Common law countries, the minority partners can take legal action to defend their interests.

These concerns are taken care of in the OHADA system by an auditor, a management expert the appointment of a provisional administrator and law suit against the managers. Third parties are also protected in the two systems provided they did not contribute to the damage caused to them.

After these exchanges, the participants dealt with the issue of support for the harmonization of business law in the sub-region.

2. Support initiatives for the harmonization of business law

The participants unanimously made suggestions for the dissemination of the OHADA law, the promotion of exchanges between legal practitioners of this zone and common law lawyers. They noted in particular:

- the setting up of follow up committee
- the organization of exchanges between trainers and business law practitioners
- exchange visits of students between the universities of the sub-region,
- the acceptance by Prof. SANTOS and Prof. SOSSA of the creation of an OHADA law OHADA law branch in Lomé and Cotonou for students of common law countries;
- the creation of a network of participants who attended the seminar;
- the formation of a group of volunteers to provide information on the development of commercial companies in the sub-region. Juriscope offered to undertake the dissemination of this information.

The recommendations are attached to this report.

III – CLOSING CEREMONY