

**A PRIMER ON THE ORGANIZATION FOR THE HARMONIZATION OF
BUSINESS LAWS IN AFRICA (OHADA)**

Organized by the American Society of International Law (ASIL) in partnership with the
Institut International de Droit d'Expression et d'Inspiration Françaises (IDEF)

With the support of the Association for Unification of Law in Africa (UNIDA)

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REPORT BY

RENAUD BEAUCHARD

Attorney at Law
Rule of law Consultant

Member of the "*Institut International de Droit d'Expression et d'Inspirations Françaises*" (IDEF)

HENRY SAINT DAHL, ESQ.

President of the Inter-American Bar Association

Member of the "*Institut International de Droit d'Expression et d'Inspirations Françaises*" (IDEF)

JIMMY KODO

LL.D; Assistant Professor, University of Paris-Est Creteil, France.
Trainee Attorney at Paris' Bar

Member of the "*Institut International de Droit d'Expression et d'Inspirations Françaises*" (IDEF)
Coauthor of *IDEF's annotated Code of OHADA* jimmykodo@gmail.com

An international conference entitled “*A Primer on the Organization for the Harmonization of Business Laws in Africa (OHADA)*” was held on October 13th, 2010 at the headquarters of the American Society of International Law (ASIL) in Washington, District of Columbia, USA.

The event was organized by the American Society of International Law and the *Institut International de Droit d’Expression et d’Inspiration Françaises* (IDEF) with the support of the Association for the Unification of Law in Africa (UNIDA).

32 persons attended, including:

- five attorneys from the Bar Associations of Washington DC and New York;
- two members of the World Bank in DC, of whom one is a senior justice reform specialist;
- a member of the *US Federal Trade Commission*;
- two law professors from the universities of Howard and Gorges Washington;
- two members of companies investing in the OHADA area of Africa;
- a retired member of the *US Treasury*;
- Americans, French, and African students from various American universities.

Africa was represented by an attorney member of the Bar Associations of New York and Kinshasa (Democratic Republic of Congo), and the Dean of the Law School of the University of Addis-Ababa (Ethiopia).

Jean-Alain Penda, lecturer at the University of Basel, (Switzerland) represented UNIDA.

Renaud Beauchard and Henry Saint Dahl represented IDEF from the USA and Jimmy Kodo from France.

After some introductory remarks on ASIL and IDEF, Renaud Beauchard (chairing the conference) introduced the event and the four panelists.

Washington DC Bar lawyer **Peter Hansen** was the first panelist. His presentation was entitled “*The Value of OHADA as a Tool for Attracting Foreign Direct Investment*”.

Hansen said he first encountered OHADA circa 1999-2000. He had praised that new legislative initiative in Africa, but remained very doubtful as to whether it was serious. However he emphasized that he had witnessed the OHADA taking root and becoming well entrenched and noted that OHADA was consolidating further.

For Hansen, OHADA is not a mere compilation of local French but rather a modern legislation that brings its countries within the zone of the global *lex mercatoria*. To some extent, the establishment of OHADA turned traditional elements of both legal systems of Member States upside down. However, this was a necessary step for attracting global investment. It is reassuring for investors to find the same legal environment in many countries, with a supranational court ensuring its coherence.

When it comes to applicable law, the uniform legislation improves legal certainty and

provides easily recognizable rules regarding arbitration. By significantly reducing research time and unpredictability of rules that are no longer scattered, OHADA law, which is compiled in a Code, promotes certainty. Henceforth, “Senegal can be much more easily compared with Colombia or Vietnam” for example and this fosters business decisions based on merits rather than fears or prejudice.

Hansen did mention however, that OHADA could be seen as a partial, if very useful solution, as long as it does not cover the whole field of the commercial spectrum. Real estate law, for example, is not covered, and this can affect investors.

Other limiting factors for OHADA are the common law/civil law divide and the fact that reform must be by treaty rather than legislation.

Despite the limits mentioned above, OHADA is a massive leap forward in terms of coverage and if this legislation develops for 10 or 20 more years, investors will take it for granted.

Hansen ended his speech by quoting a new report issued in July 2010 by the World Bank (World Bank, “*Investing Across Borders 2010*”, online: (<http://iab.worldbank.org/>) in which OHADA appears to have a much heavier impact on arbitration rankings.

Jimmy Kodo presented an “*Insight on the Application of the Legislation of the Organization for the Harmonization of Business Laws in Africa by African judges*”. After an overview of OHADA statutes currently enforceable, Kodo displayed statistical charts supporting the assertion that since its entry into force OHADA is a modern legislation in action, not just another set of laws in books.

A key moment of Kodo’s speech was the presentation of the two main online resources on OHADA law, namely websites of UNIDA (www.ohada.com), the most comprehensive source providing integral texts of the Uniform Acts of OHADA and cases applying them) and *IDEF’S Annotated Code of OHADA* (<http://www.institut-idef.org/-Code-OHADA-annotate-.html>).

Kodo explained the concept of “Comparative precedent” (“*Jurisprudences compares*”) and why it was needed, after which he performed a live demonstration of the use of the annotated code for research online, with instant translation of the selected page into English.

Before he introduced Henry Saint Dahl, Kodo made four concluding remarks:

1)- OHADA presents the value of a written law: there is no reason to be apprehensive toward written law. Written statutes can lead to reasoned decisions on the same issues that are dealt with by common law judges.

2)- OHADA law is a modern legislation, in tune with the current world’ realities. From this point of view, OHADA must not be viewed as just another set of written rules such as the Napoleon (Civil) Code of 1804. Rather, evidenced case studies¹ suggests that a written legislation such as OHADA is not a rigid and fossilized set of rules, but a legislation that can be adapted by judges to the specific legal issues they have to resolve in by their decisions. To some extent, OHADA law is a flexible legislation, which can be interpreted in compliance

¹ See Martin Lamoureux et Barthélemy Mercadal, “Comparaison d’une application de la Common Law à travers la jurisprudence ghanéenne relative aux contrats avec la jurisprudence française correspondante”, *Revue Juridique et Politique des États Francophones*, (Paris: Juris Africa, n°3, July-September 2009), pp. 561-605. The study suggests that despite differences of regime, Common Law and Civil Law systems have in many cases common grounds when it comes to the implementation of rules governing contracts.

with concrete realities by judges.

3)- The civil law influence does not exist only in the OHADA system. It can also be seen in many common law jurisdictions, such as the United Kingdom and South Africa, through *Domat* and *Pothier*.

4)- Finally, IDEF is willing to assist common lawyers in grasping the substance of OHADA law with cases applying this legislation, but also selected cases from common law countries and some other foreign jurisdictions.

Using eight US cases selected from corporate law disputes, **Henry Saint Dahl** showed that the Uniform Act on commercial companies OHADA and the US corporate law have many similarities. Therefore, there is no reason for American investors to be scared by OHADA law. The same applies, generally speaking, to those investors from other Common Law countries or to lawyers assisting investors in their decision-making.

Susan L. Karamanian, (Associate, Dean, International and Comparative Legal Studies of the Georges Washington University) presented an American perspective on OHADA. She first indicated that written law is not an exclusivity of civil law countries only, since there are written Codes in the United States of America, such as the *Uniform Commercial Code*.

Some of the major concerns of OHADA from an American perspective are the fact that Uniform Acts are enacted by the Council of Ministers rather than national legislative bodies of the Members States; the repealing force of the Uniform Acts on the basis of article 10 of the Treaty and the absence of a Uniform Act on contracts. An American lawyer would wonder how a common law practitioner would react toward the absence of a harmonized law on contracts.

The reluctance of some national Supreme Courts toward the jurisdiction of the Common Court of Justice and Arbitration (CCJA) of OHADA is another concern.

Karamanian ended her speech by mentioning the recent research of prominent OHADA scholars such as Claire Moore Dickerson (professor at Tulane University Law School, Louisiana, USA) and Professor Salvatore Mancuso (who just released a regional report on OHADA law), and indicating that OHADA law is currently taught at the University of Addis-Ababa in Ethiopia.

Another key moment of the conference was the questions and answers session.

The first question was about whether there are specific arrangements for enforcement of arbitral awards in the OHADA system. The final and conclusive authority (*res judicata*) of arbitral awards as provided by article 25 of the Treaty on OHADA and article 23 of the Uniform Act on Arbitration were explained.

Another attendee raised a contradiction between the will of harmonization of business law and the repealing force of the Uniform Acts upon national laws. This provided the opportunity to explain the repealing force as provided for in article 10 of the Treaty and to mention that the CCJA clarified this issue in one of the first advisory opinions it gave after its establishment: only matters governed by OHADA are subject to repeal. Therefore, preexisting

and or future national rules can coexist with the Uniform Acts as long as national rules do not contradict the Uniform Acts.

Another attendant questioned the relevance of similarities between OHADA and Common Law. Before Henry Saint Dahl addressed that question, **Zachée Pouga Tinhaga**, (a LLM student at Wayne State University School of Law, Detroit, Michigan, USA- with a thorough knowledge of both OHADA and US laws) mentioned the existence of OHADA texts on the website of “Westlaw” and surprisingly asserted that OHADA offers a much better protection of business than some US laws in various areas.

Professor Karamanian gave new impetus to the topic by saying that OHADA is not just civil law, since it draws inspiration from other sources than civil law.

A lawyer from Cameroon highlighted the limitations of *de novo review* of cases by the CCJA: many litigation cases are stripped of relevant facts before reaching the CCJA, for the few that reach the supranational Court. In the same vein, another attendee asked the significance of *de novo* review of facts by the CCJA, which has been clarified by the panelists.

Some of the other questions raised include:

- What are the relations between OHADA and the World Bank’ “*Doing Business*” reports?
- To what extent can OHADA claim to have reached its goals?
- Why would Member States of the *Southern African Development Community* (SADC) be interested in adhering to OHADA?
- Why are OHADA texts not translated into Arabic language?

Jean-Alain Penda played a substantial part in the questions and answers part of the conference, especially for questions to which answers could not be given because of lack of time.

Debates continued informally after the end of the conference and the panelist received more questions by email, to which they replied.

Each attendant left the conference with flyers presenting IDEF and the IDEF’s Annotated Code of OHADA. Other outstanding publications on OHADA were introduced to the audience, such as Joseph Issa-Sayegh, *Répertoire quinquennal de l’OHADA 2000-2005*, *Unified Business Law for Africa: Common Law Perspectives on OHADA*, edited by C. M. Dickerson. London: GMB Publishing, 2009, *Penant* (a law review specialized in OHADA), *OHADA, Traité et Actes uniformes commentés et annotés*, edited by J. Issa-Sayegh, P. G. Pougue, et al. (3rd ed. Brussels: Bruylant, 2008, commonly called “Green Code of OHADA” and the booklet “*Comprendre l’Organisation pour l’Harmonisation en Afrique du Droit des Affaires*” (by Alhousseini Mouloul).

At the end of the conference, Jimmy Kodo was invited by Professor **Marsha Echols** (Director, The World Food Law Institute Howard University School of Law, Washington, DC, USA) to speak about the Uniform Act on Commercial Companies before her students on October 14th 2010. Twelve students attended such conference, showing great interest.

The foundations of a possible cooperation between IDEF and Howard University for future events on OHADA have been laid and more details will be provided in due time.

IDEF and the panelists are thankful to the American Society of International Law and the Association for Unification of Law in Africa (UNIDA) for this event.

Washington, DC, October 15th 2010.