

Doing business in the Democratic Republic of Congo after its accession to the OHADA system

I. The issues of the matter

The Democratic Republic of Congo (DRC) has recently acceded to OHADA ("*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*"), which will render OHADA legislation applicable in the DRC in September 2012. This article discusses some implications matters of the Ohada law on the doing business in the DRC. It also discusses the issues for investors in the DRC should consider at an early stage with regard to the compliance of existing commercial companies with OHADA law.

In fact, OHADA has promulgated a number of Uniform Acts which deal with the core area of business law, covering general commercial law, commercial companies and economic interest groupings, security interests in tangible and intangible real and personal assets, simplified procedures for recovery of debt and enforcement measures, insolvency, arbitration, accounting law and carriage of goods by road.

The OHADA treaty also created specific supranational institutions, including the "Cour Commune de Justice et d'Arbitrage" (Common Court of Justice and Arbitration, CCJA) located in Abidjan (Côte d'Ivoire). This Court is vested with judicial powers, and has authority to rule on substantive matters. Its decisions are binding on national courts. It also has advisory powers to ensure the consistent interpretation and uniform implementation of the OHADA legislation. It is the only Supreme Court, which is also an arbitration centre.

II. Enforcement of Ohada Business Law

In principle, the Uniform Acts which, upon a member state's adhesion, are directly applicable in such state. They override any local or national laws, whether promulgated prior or subsequent to such adhesion.

However it should be noted that in view of the matters where uniform acts have been promulgated, Ohada Law should just has implications mainly in some important aspects of the undertakings' life at large, but should not have specific implications in such or such a sector, except where mentioned hereunder.

Before the enforcement of the Uniform Acts, national laws are/were implemented.

After the enforcement of the Uniform Acts, implementation of Ohada Law with few exceptions (some parts of the national laws will remain untouched, while others will partially be maintained), with two types of potential legal risks: those in connection with the companies' operation and activities and external risks. We will discuss on these risks at later stage. □□

Indeed, the salient modifications introduced in the undertakings' legal environment concern mainly: □□

1. **The business organizations themselves:** the new types of companies introduced and the new rules with regard to the operation of some of them;
2. **The undertakings' activities:** □□
 - Their basic instruments: business, commercial lease;
 - The legal rules governing their debts: in the field of commercial sales and trade middlemen contracts; and as to the collection of these debts: the securities related thereto and the general rules for debt collection, normally as well as when the debtor has become insolvent.
3. And finally **the rules governing the settlement of disputes relating to business activities** (introduction of arbitration)

III. Potential legal risks of the enforcement of the Uniform Acts

As mentioned previously, the implementation of Ohada Law with few exceptions raises two types of potential legal risks respectively, those in connection with the companies' operation and activities and the external risks. □□

3.1. The potential risks in connection with companies' operation and activities □□

Are concerned the risks in connection with the legal value: □□

- **of companies' articles of association** □
- **of the documents used in the framework of the companies' activities.**

° **Articles of association:** □□ Harmonization with Ohada Law necessary

- ⇒ **Existing companies or** □ **Drafting of articles of association complying with Ohada standards**

⇒ **New companies.**

◦ **Leases:** Harmonization with Ohada Law when renewed and/or Drafting of new leases complying with Ohada standards.

◦ **Securities:** Harmonization with Ohada Law when renewed and/or Drafting of new instruments complying with Ohada standards.

◦ **Sales:** Harmonization with Ohada Law when renewed and/or Drafting of new sales agreements complying with Ohada standards.

◦ **Trade middlemen contracts:** Harmonization with Ohada Law when renewed and/or Drafting of new trade middlemen contracts complying with Ohada standards.

3.2. External risks

Risks of starting business relations with business organisations not incorporated in compliance with Ohada Law with subsequent implications with regard to their commitments.

4. The implementation of the OHADA law on companies in the DRC: what solutions?

The Ohada law creates two forms of companies, the *société à responsabilité limitée* or SARL (limited liability company), and the *société anonyme* or SA (joint stock company).

Subject to certain limitations, parties are free to create different categories of shares with diverse voting and dividend rights, and enjoy a certain measure of freedom in determining how management of the company is to be performed.

The OHADA Companies Act provides that there will be a transitional period of two years from the date that it comes into force during which time entities are to amend or redraft their articles of association to harmonise them with the OHADA Companies Act.¹

The previous laws will continue to apply to companies which have not yet conformed to the OHADA Companies Act during this period.

¹ In practice, it should be noted that from 12 September 2014, any provision of the articles of association of any company that have not been modified so as to render them compliant with AUSGIE will be considered as inapplicable and will be replaced by the relevant AUSGIE provisions.

Entities created after the OHADA Companies Act comes into force in September 2012 however will be created in accordance with OHADA law. This means that two sets of company law legislation will coexist for approximately two years: the OHADA and old DRC Companies Acts which may lead to some confusion: the notion of a SARL in the DRC for example is similar to the SA in OHADA law which is a public limited company. On the other hand the notion of a SPRL is akin to an SARL in OHADA law which is a private limited company. Enterprises will further need to bring their accounting systems in line with OHADA principles and prepare and file annual financial statements in a proper manner as set out in the OHADA Accounting Systems Act².

Currently in the DRC, most companies chose to be incorporated as a *société privée à responsabilité limitée* (or SPRL).³ As a consequence of the implementation of the OHADA law, DRC companies will be required to bring their constitutional documents (*statuts*) into line with the rules governing the relevant corresponding OHADA type of company. This implies in theory that a company established as a SPRL would opt for the OHADA SARL form, which provides for the most comparable and similar regime.⁴

5. Any conclusion at this stage?

Just to emphasize that the DRC's adhesion to OHADA will render the nine "Uniform Acts" regulating some aspects of business law (*inter alia* commercial law, company law, securities interests, accounting) "directly applicable and binding" in the DRC. As a last resort, disputes concerning the application or the interpretation of the Uniform Acts will be submitted to the Common Court of Justice and Arbitration in Abidjan (Ivory Coast), thus providing an appeal level in last resort with this Court instead of DRC's supreme court.

Concerning mines, Article 3 of the Uniform Act relating to general commercial law includes the exploitation of mines as a commercial act, thus rendering commercial courts competent for commercial disputes relating to mining.

² This statute will also enter into force in September 2012

³ Décret du Roi-Souverain du 27 février 1887 relatif aux Sociétés Commerciales

⁴ However, it may be advisable for certain businesses that are incorporated "by default" as SPRLs to take one step further by ultimately converting into an OHADA SA (the typical open capital company), which is in practice likely to be the most suitable form to conduct their business.

