

# Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)

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A few years ago, African contribution of the world trade was only around 2%. The investors, except those who are exploiting natural resources, never want to dare dispensing their fund in Africa. The reason of this situation was very simple. The majority of investors denounce the juridical insecurity and also the political preponderance across the African continent. With human and natural resources abundant, Africa is regarded as a continent equipped with a great potential of development. The years of independences in Africa saw being born in many States, of the organizations trying to solve these difficulties and to reinforce their capacities by the constitution of international organizations acting in all the fields. But it is only in the year 1990; some organizations appeared in the continent and knew of real rise thanks to the liberal and democratic economic policies. This article wishes to present an assessment of seventeen years implementation of the African Harmonization of Business Law Treaty of 1993. Firstly, it will describe the system from an institutional point of view and hence from a normative point of view. Secondly, during the course of this essay, there will be a focus on analysis of OHADA's laws, its system and its potential impact. In addition, the article will concentrate on OHADA's appropriateness in the business sector and necessary guarantees it must offer for a successful investment partnership with foreign investment.

*Keywords:* Investment Law; Harmonization Business Law; OHADA; Regional Integration; African Development

## Introduction

A few years ago, African contribution of the world trade was only around 2%. The investors, except those who are exploiting natural resources, never want to dare dispensing their fund in Africa. The reason of this situation was very simple. The majority of investors denounce the juridical insecurity and also the political preponderance across the African continent. It is this cocktail of dysfunctional attributes which is partly at the origin of the economic development delay of the African continent.

It is certainly as a remedy for this plight that the "Organization for the Harmonization of Business Law in Africa" (OHADA) was created. This structure set up in 1995 gathers fourteen African countries of Central and the Western Africa. Firstly, it constitutes a security tool for the investments in the countries concerned. But one notes so far, surely due to a lack of an adapted communication system, that the work of the OHADA organization and the results reached by this structure are insufficiently acknowledged. The evidence confirming this being the simple fact that, investors continue to consider as one of their investment priorities.

For a few years now, a quasi unanimous awakening has struck the African diaspora. It is a fact that the step which consists in requesting Western government aids is not only unfruitful but is very detrimental to pride the dignity of Africa and the African people. It is more and more a question of weaving bonds of business between amongst already in partially developed centres of Western dominance, and even Asian finance and Africa. It is in the wake of this knowledge that it is necessary for us to consider the following: "The Treaty of the Har-

monization Business Law in Africa and Investment Opportunities in Africa".

The study will proceed as follows. The first part introduces our work. In the second part, we present the system of OHADA Treaty from an institutional point of view and hence from a normative point of view, the third part analyzes OHADA's laws, its system and its potential impact. The forth section presents the various obstacles and challenges faced by investors in Africa. In the section five, we underline the establishment of laws and rule of the investment policy under the framework of the Treaty of Harmonizing Business Law in Africa to improve, increase and protect foreign investment in order to promote investment in Africa area. Finally, the section six concludes the work.

## The Treaty of OHADA and Its Institutions

### The OHADA's Treaty

The Organization for the Harmonization of Business Law in Africa was initiated and made up by sixteen countries of the Zone Franc and was created by the treaty relating to the Harmonization in Africa of Business laws. Initially fourteen African countries signed the treaty, with two countries subsequently adhering to the treaty (Comoros and Guinea) and a third the Democratic Republic of Congo which adhesion is completely on 2012. However the Treaty is open to all States, whether or not they are members of the African Unity. "The OHADA laws retain the strong French flavour of their predecessors" (Mamadou, 2003). This is to say, as mentioned in my introduction, that

recent economic scholars have asserted that the French legal system may be less favourable to investment than the common law system.

This Treaty entrusts the production of the business laws at an organization called Organization for Harmonization in Africa of Business Laws (OHADA), and which came into effect since July 1995. The will of the sixteen Contracting States, already seventeen with Democratic Republic of Congo's adhesion, is to achieve progress in the way of African unity and to establish a wave of confidence and to thus create a new development pole in Africa. Since 1963, the Ministers for justice of the French-speaking countries were desired the harmonization of their laws since the legal insecurity had followed the moments of independence. Then, the harmonization appeared necessary following the report of the deceleration of the investments. Apart from this report, the standardization of the business laws aims to improve the legal environment generally and will allow the provision of simple and powerful legal texts to restore a climate of confidence. The laws of OHADA are certainly new but already reassuring. The objective of the OHADA is clearly the reinforcement of the legal and judicial safety of the right of the businesses.

OHADA equipped its various Member States with a modern legislation concerning business laws and hence facilitated investments; this will allow in the long run, the economic integration anticipated by the continent.

### **The Institutions of the OHADA Organization**

To see their business law reinforced, the Member States of OHADA set up the bodies charged to promote the correct operation and the best legal framework within the space of OHADA (Martor, Pilkington, Sellers, & Thouvenot, 2004). It acts through the General Secretaryship and the Council of Ministers of the OHADA organization. On the organic level, these two institutions contribute together to the legal security in the OHADA area but, the executive and legislative body was incarnated by the Council of Ministers. It occupies a dominating place and is the support of political decisions of OHADA having important competences. In the same way, these States set up rules called "uniform Acts" charged to govern the standardized business law.

### **The Council of Ministers**

The organisation lawmakers took on Africa's specificity to create this supranational structure which is called the Council of Ministers. It is the supreme decisional body of OHADA. Under article 27 of the Treaty, the legislative organ of OHADA is the Council of Ministers comprising the Ministers of Finance and Justice of each Member State, and whose presidency rotates on an annual basis. The Council of Ministers has two functions or duties: administrative and regulation duties on one hand and of the legislative duties on the other hand. In its administrative and regulation duties performance, the decisions of the Council can have a general range, such as the arbitration tuition's decision<sup>1</sup>. And its legislative functions concern mainly the "Uniform Acts"<sup>2</sup> whose procedure of adoption is described in articles 6 and following of the Treaty.

<sup>1</sup>See Decision n°004/99/CM dated March, 12th 1999 for approbation of decision n°004/99/CCJA of February 3rd, 1999 regarding arbitration fee.

<sup>2</sup>The "Uniform Acts" are associated to the European concept of payment and are the acts of general interest obligation in all its elements and directly applicable in any Contracting States.

### **The Permanent Secretariat**

The Permanent Secretariat is the administrative body of OHADA organisation which is autonomous from the Member States or other regional organizations. The functions of the Permanent Secretariat are purely administrative, auxiliary and consist mainly in assisting the Council of Ministers in the execution of its legislative functions. It is charged to prepare the Uniform Acts projects; to present them to the Member States for examination and remarks, and to seek the opinion of the Common Court of Justice and Arbitration before their adoption. It publishes the Uniform Acts in the OHADA Official Journal after their adoption<sup>3</sup>. This procedure makes them opposable in the Member States without another formality.

### **The Common Court of Justice and Arbitration**

The Common Court of Justice and Arbitration (CCJA) is one of the most successful regional legal harmonization efforts on African continent. Unlike the other continental regional integration groups, OHADA does not seek to conform national law to an overarching treaty and successive regulations and directives which allow national legislature some leeway. The Treaty of OHADA awards the interpretive function to the Common Court of Justice and Arbitration which is a very important and innovate institution. The CCJA is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national system. This court has two principal roles with respect to the business laws adopted under OHADA (Issa-Sayeh, 2002). It offers a forum for international arbitrage and serves as the court of last resort for judgments rendered and arbitrations instituted within Members States.

### **The Higher Regional School of Magistrate (ERSUMA)**

The "Ecole Régionale Supérieure de la Magistrature" (ERSUMA) Higher Regional School for Magistrates, another structure established and designed to educate the legal professionals of the OHADA territory. It reinforces norms as it imparts substantive legal knowledge. The OHADA organization publishes cases and provides legal texts. Before the advent of OHADA, lawyers and even judges could remain ignorant of the status of entire bodies of law, including the bankruptcy-law regime.

### **OHADA's Laws Pragmatic Reach and Enforcement**

OHADA law may be balanced and sophisticated, and it may be particularly suited to encourage both foreign and domestic investment; however, it will not be effective unless it is enforced. There are two aspects to this problem of enforcement. The threshold assumption of OHADA's founders is that a harmonized, modern system of business laws will enhance the territory's economic development, in part by making the region attractive to foreign investment. For these purposes "harmonization" is no flimsy concept: the process creates truly uniform business laws throughout the OHADA territory. Even if there is enforceability, a variation from state to state will weaken the nations' ability to define their own norms, and to then impose them on foreign investors. If each member state of OHADA can interpret the laws at the national level, the effort to attract

<sup>3</sup>Article 9 of the OHADA Treaty.

foreign investment can become a race to the bottom. Before broaching the question of the OHADA laws enforcement, we will look first at the interpretation through OHADA supranational structures.

### OHADA Uniform Acts Interpretation

One of the major obstacles to investment in Africa is the lack of legal and judicial security. OHADA set itself the ambitious objective of giving to African states a modern and uniform business law. To attract investors into Africa by establishing a modern and uniform business law, the legislative organ of OHADA adopted uniform laws known as Uniform Acts after their unanimous vote, come into force and are directly applicable into each member state, and overrule any conflicting provision of Member State's national law, be it previous or subsequent. The simple adoption of uniform laws is a relinquishment of sovereignty contemplated by the OHADA treaty: a law that OHADA adopts is automatically and immediately an internal law of each of OHADA's member-states<sup>4</sup>. Accept a uniform interpretation and enforcement represents another significant step in the same direction. At this point, it is worth to consider why national elites would have allowed the OHADA project to exist at all. The first reason is that the political leaders in the region really did understand OHADA to be pro-development and had been deeply worried by the economic downturn of the early 1990s. It may also be that the elites recognized that the OHADA laws' nuanced balancing act protects the elites. Elites may typically be majority holders in domestic investments, but we have seen that they tend to have minority positions when foreign investors are involved (Lavelle, 2001). A neutral law can protect their holdings in both circumstances.

The other reason why the national elites, including the national governments, accepted the relinquishment of sovereign authority is almost certain because of the manner in which the OHADA drafters structured the new regime and it is the triumph of structure and procedure, deployed in the service of substance. OHADA is not just a system of uniform laws; it is a unified legal system designed to protect and enhance the pro-investment qualities of the OHADA laws. It accomplishes this by erecting an entire legislative and judicial structure that formulates and interprets the OHADA laws, and prepares them for enforcement.

### Enforcement

The OHADA Treaty and its Uniform Acts are judicial instruments, which create favourable conditions and environment for economic development within the OHADA contracting state. Therefore, there is no doubt that OHADA is helping member states to move towards a sound legal framework, effectively enforced for good economic development.

No matter how elegantly it is drafted, a statute is only as effective as its enforcement. The OHADA laws' uniformity throughout the territory is protected by the CCJA's authority to interpret. Execution of judgments, on the other hand, inevitably requires an interface between the OHADA regime and national judicial system. Once a court has rendered its judgment under

<sup>4</sup>OHADA Treaty, Article. 10 (explicitly stating that the uniform acts adopted pursuant to the treaty are directly and mandatorily applicable in the member-states). The CCJA has explicitly ruled that the OHADA Treaty abrogates national laws that contrary to, and even merely identical with, the OHADA laws.

OHADA laws, the nation's bailiff has to levy, and quarrels about the execution of the judgment end up in national courts.

The Uniform Act on Recovery Procedures offers better protection through harmonized enforcement procedures against debtors even if practical issues have arisen: endless appeals from debtors for instance. Also, the possibility of automatic set-off of debts between State owned entities and commercial operators can be considered as significant improvements even if sovereignty restrictions may limit the enforcement of such regulations. The recovery of an unquestionable debt due for immediate payment may be secured through the injunction to pay procedure.

It is important to appreciate that, with every step taken; the OHADA system becomes more fully woven into the commercial fabric of the region, and thus more difficult to reverse. This in turn means that long-term benefits may still be reaped; it does not mean that no short-term benefits are available.

### Impact of OHADA's Organisation

With almost twenty years of practice, OHADA has not only offered a soft and immediate benefit but also providing the "hard" benefit of judgments rendered and executed in a predictable and transparent manner. OHADA laws relating to creation and management of corporations are vastly clearer than the pre-existing law. Some OHADA judgments are of course executed, and some legal professionals do focus on corporate governance in the context of OHADA. OHADA adopted a uniform corporate law that appears finely balanced between foreign and domestic interests. It retains simplicity and formalism compatible with an evolving legal infrastructure. It is consistent with concerns explored by law and finance theory and the endowment theory.

On the procedural way, OHADA is designed to avoid existing authoritarian structures, while on the substantive side, it has established a structure to protect private property and enhance incentives for capital formation.

### Opportunities and Challenges for Investment

We cannot deny that Africa faces wars, famines and natural man-made disasters, but it also has high rises, stock markets, and a lot of resources. We challenge the stereotypes and prove that Africa cannot be so easily defined.

The profitability of investments is, of course, of prime interest to foreign investors. The least known fact about FDI in Africa is that the profitability of foreign affiliates of Transnational Corporations (TNCs) in Africa has been high and that in recent years it has been consistently higher than in most other host regions of the world. It should be noted in this context that investors perceive, rightly or wrongly, Africa in general as a risky place to invest and that there are some factors, such as the difficulty of reversing investment decisions as a result of weak capital markets, that increase the risk for foreign companies of investing in the continent (Collier & Gunning, 1999). However, there is no systematic evidence that FDI in Africa in general is associated with more risks than FDI in other developing regions.

### Legal Factors of the Company's Success

When a legal system is unreliable, the "shadow of the law" is

faint to non-existent. In such an environment, corporate governance still may have meaning, as may the larger principle, corporate social responsibility. However, the meaning of these terms, and even our understanding of the business organization will be based on social reality. And the OHADA regime included eight uniform acts which under the treaty automatically become part of each member-state's internal law (Issa-Sayegh, Pougoué, & Sawdago, 2002)<sup>5</sup>. Sometimes laws are enforced because of formal legal structures, and sometimes because they conform to existing norms. They will also sometimes be ignored because they are incompatible with social norms. Society defines the organization's corporate social responsibility. In the North where developed nations predominate, they have forgotten this reality; they would do well to follow the example of the South and its developing economies, and reanalyse what it is that society wants of our business institutions (Dickerson, 2005).

The corporation law theories and those development economics indicated that any corrective measure must be to protect the private property and encourage capital formation whatever the economic regime adopted by the political body. Private ordering must be as reliable as possible within the shadow of whatever political regime exists.

The corporate law must provide a clearly understanding of the corporate social responsibility. This conception incorporates the behaviour that its community expects of corporations. Regarding Africa, the business law must clearly identify the type of the corporate governance which is appropriated for the continent. The corporate law has received a great deal of attention in recent years both in Europe and the United States; so it is essentially the implementation of the applicable principle of "corporate social responsibility" for company's success which is to generate maximum profits legally possible for its shareholders (Friedman, 1970).

The OHADA corporate law's keeping of the norm of "corporate interest" thus is the first indication of the balance that the OHADA legislators sought. Specifically, they opted for a concept responsive to local expectations, but one that already includes some guidelines. A foreign investor might prefer shareholder primacy, depending on applicable factors. The local government that includes not only elites that might invest, but also voters who may be employees of the enterprise, might well prefer the stakeholder approach (Llewellyn & Hoebel 1967).

### Investment Risk in Africa

Risk is the potential that a chosen action or activity will lead to a loss. A common definition for investment risk is deviation from an expected outcome. It is well known that investors make decisions based on a function that includes the rate of return and the risk of any investment choice: the higher the risk, the higher the required rate of return. Each investment carries its own particular risk-return ratios. However, in Africa, a number of environmental factors, external to the individual investment, tend to raise the risk, and thus, for any given rate of return, reduce the rate of investment. There are too many investment risks in Africa as everywhere over the world but two major

risks involving legal factors.

Concerning the lack of policy transparency, it is not easy to accurately identify the specific aspects of corporate policy because of the political regime changes in most sub-Saharan African countries and also regional policy. The consequence of the lack of transparency in economic policy in a country is the increases in transaction costs due to strict regulation while reducing the incentives for foreign investment. In Africa, the situation is one of concern and needs to be contained. The lack of transparency makes the conditions and the assessment of the debts very difficult. It also increases the risk that funds will not be used as intended and might be cases of illegitimate debt in the future. The lack of a favorable investment climate also contributed to the low FDI trend observed in the region as no formal environment. In the past, domestic investment policies were not conducive to the attraction of FDI.

Most African countries have a high protectionism policy. The low integration of Africa into the global economy as well as the high degree of barriers to trade and foreign investment have also been identified as a constraint to boosting Foreign Direct Investment (FDI) in the region. The relationship between openness and FDI flows to Africa must be very positive and suitable to the continent. There are also other factors that contribute to the low FDI flows to the region such as the high dependence on commodities, the intensification of competition due to globalization which has made an already bad situation worse in Africa because globalization has led to an increase in competition for FDI among developing countries. The Weak law enforcement stemming from corruption and the lack of a credible mechanism for the protection of property rights are possible deterrents to FDI in the region. Foreign investors always prefer to make investments in countries with an effective legal and judicial system to guarantee the security of their investments. Investors can choose globally where to put their money and countries shouldn't make it too difficult for foreign investors if they want to get a benefit from that money. Sometimes, the African governments stifle investment by their regulatory policy whereas companies can only invest in big projects in countries where there is certainty and security for their profits and operations.

### The Investment Protection under the Framework of the Treaty of Harmonizing Business Law in Africa

The Policy Framework for Investment is intended to assist governments to create an environment that attracts domestic and foreign investment, taking into account the broader interests of the communities in which investors operate. The Framework helps countries to develop a sound investment environment by fostering an informed process of policy formulation and implementation across government agencies. Based on best practices drawn from OECD<sup>6</sup> and non-OECD experiences, it proposes a set of practical policy considerations in ten inter-related areas that, beyond stable macroeconomic conditions, contribute to such an investment environment. Governments can consider these policy considerations in country self-evaluation and for reform implementation, in regional co-operation and peer reviews and in multilateral discussions.

A checklist of questions in each of the following ten policy areas is included in the Framework: 1) investment policy; 2)

<sup>6</sup>OECD is Organisation for Economic Co-operation and Development

<sup>5</sup>They cover the following disciplines (in order of adoption): company law and economic interest groupings; general commercial law; law of security interests and other encumbrances; simplified recovery procedure and methods of execution of judgments; bankruptcy and insolvency law; arbitration law; accounting law; law on transport of goods by road.

investment promotion and facilitation; 3) trade policy; 4) competition policy; 5) tax policy; 6) corporate governance; 7) promoting responsible business conduct; 8) human resource development; 9) infrastructure and financial sector development; and 10) public governance. The Framework also provides explanatory background material on these various issues.

OHADA offers modern business laws that are transparent and accessible, and are in a setting that maximizes the predictability of their enforcement. While implementation is not yet perfect, OHADA has already demonstrably increased transparency and predictability within its territory. This is significant to business people within the OHADA member-states, of course, but also to foreign investors in and foreign traders with business people in the OHADA territory. For this reason, businesses in Europe and North America, and importantly elsewhere on the African continent, need to know about these laws, uniform across more than 150 million people - 225 million after the DRC completes its adhesion to the treaty.

The OHADA laws articulated purpose is to facilitate investment in general and foreign investment in particular. "OHADA may materially change the investment climate in West Africa. If successful, it offers a model for development in other parts of the developing world" (Dickerson, 2005) the need for the promotion of and adoption of harmonized Business Laws in the region cannot be over-emphasized.

The OHADA Treaty and laws offer a unique model for the harmonization of business laws as a starting point for the harmonization of other laws within the ECOWAS states. The OHADA Initiative has created a body of harmonized business laws in its member-states, which have, in consequence facilitated business transactions to a large extent.

Within an overarching strategy for improving the investment environment, investment promotion and facilitation can help to increase both domestic and foreign investment and to enhance their contribution to national economic development. Success in promoting investment requires a careful calculation of how to employ resources most effectively and how to organize investment promotion activities within the government so that the overriding goal of economic development through improvements in the investment climate remains at the forefront of policymaking.

Such as a part of development strategy, investment promotion and facilitation can help attract new investors and retain existing ones, especially in smaller, more remote markets or in those countries with a recent history of macroeconomic and political instability. Effective investment promotion highlights profitable investment opportunities, by identifying local partners and by providing a positive image of the economy. Promotion should not be seen as a substitute for more general policy reforms or try to camouflage underlying weaknesses in the investment climate.

### **OHADA's Challenge: The Future Adhesion of Common Law Countries**

The Organization for Harmonization of African Business Laws was established by a Treaty among African countries mainly within the French-speaking area<sup>7</sup>. It entered into force on July 1995 and belongs to the Franc zone. We know that its objective is the implementation of a modern harmonized legal framework in the area of business laws in order to promote

investment and develop economic growth.

Generally speaking, the current membership hauls from a common tradition except Guinea-Bissau and Equatorial Guinea where Portuguese and Spanish are spoken respectively and the Anglophone provinces of Cameroon. All the OHADA member countries have a civil law tradition, with the only exception of the above mentioned English-speaking provinces of Cameroon, where the common law legal system is adopted.

The legal framework provide through the present Uniform Acts is, in general, based on civil law and has, to a certain extent, borrowed from the French business law even if it does not amount to a mere transplant to the French law, having several substantial differences.

The aim of the OHADA is to go beyond the original membership and have other African countries-that should not be necessarily Francophone countries or States belonging to the civil law legal tradition-joining OHADA. The Treaty indeed opens the doors of the accession to all countries members of the Organization for the African Union and to other non-member States unanimously invited to join OHADA<sup>8</sup>.

The issue of the relationship between OHADA law and the common law is not only theoretical, as it deals only in the perspective of future accessions of countries belonging to common law legal tradition; it has also immediate effects since some of the English-speaking provinces of Cameroon still apply their common law system with the Cameroonian legal framework.

But, let us consider the following quote, "The OHADA laws retain the strong French flavour of their predecessors" (Mamadou, 2003). This is to say as mentioned above that recent economic scholars have asserted that the French legal system may be less favourable to investment than the common law system. This understanding in consistent with traditional theories is comparative law.

### **Comparison between Common Law and Civil Law**

There is a general agreement in considering civil law and common law as two different legal families, and as the two major families of the world due to their geographical extension and historical importance (Zweigert & Kotz, 1993).

In comparative law, there are many situations where the same legal term has different meanings, or where different legal terms have same legal effect. This can often cause confusion to both lawyers and their clients. This condition most often occurs when civil lawyers have to deal with common law or when common law lawyers deal with civil law issues. While there are many issues which are dealt with in the same way by civil law and common law systems, there also remain significant differences between these two legal traditions related to legal structure, classification, fundamental concepts, terminology, etc.

But, today's reality tells us that the cultural and geographic limits that have been historically used to distinguish between these two legal families are not so important anymore.

Civil law and common law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems where some common values about law and democracy, as well as general legal principles both in the area of public, administrative, criminal and private law are shared by the legal traditions belonging to it. Within it a general sub-distinction between common law and civil law still persists, but the major distinctions between them have been greatly diluted

<sup>7</sup>14 of the 17 present member countries are French-speaking countries.

<sup>8</sup>Article 53 of the OHADA Treaty.

in a continuous way between these two legal traditions (Glenn, 1993) that find today its clearest examples in the harmonization initiatives taken at European-and obviously African-level.

### The Place of African Law and Overcoming the Difference

According to the place of African law, we know that the issue of diversity of laws has remained an important obstacle to the African economic development which for a long time has not been taken into proper consideration by the African States.

The diversity of laws in Africa can be examined from three different perspectives: diversity within each country, diversity among the African countries and diversity between African and non-African countries (David, 1982). The legal stratification proper to the African countries is the clear evidence of the differences that may exist within the same country.

In the first hand, the customary laws which have been applied in African countries prior to colonization and are still applied today present large differences among one another, even within a single country.

Secondly, colonization has brought into the African countries different western legal systems imposed upon customary laws and still coexisting with them.

In the third place, after independence the African countries made different choices that increased lack of uniformity within the same country.

The comparative studies have now identified the African legal systems as a legal family with specific peculiarities and different from the order of the world legal system (Mancuso, 2007). The above mentioned legal stratification shows us how the import of western legal systems has given a specific imprint to the legal system of each African State that differentiates it from the others and gives rise to a sub-classification of the legal system of the African countries according to the family to which the legal system of the former parent country belongs (Bamodu, 1994).

Despite of that, even if the African legal system can be assimilated to the one of the respective colonizing continent, it must not be assumed that the legal rules in African countries are the same as the European countries from which they received the legal system.

### Conclusion

The desire to attract investment as well as foreign direct investment has led most developing countries to adopt policies designed to create a favourable investment climate. These policies are legal safeguards that include the stability of the legal conditions under which an investor can operate the quality of the local public administration, the transparency of the system of local regulations and an effective system of dispute settlement.

The case study of OHADA is emblematic in considering the issue of the relationship between civil law and common law legal system at the same time with the present development of protection law.

The debate reflects the needs of the harmonization process behind the idea of OHADA: from one side reinforce the membership with other countries belonging to the French, from the other side to open the doors giving access to other African countries belonging to different legal and cultural experiences.

Some problems have been highlighted studying the way of joining OHADA by African countries adopting a legal system based on the common law.

One question is referred to the principle which: "Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws"<sup>9</sup>. As it may be easily noted, not only the new Uniform Acts automatically repeal any piece of legislation contrary to its content, but also the State cannot enact laws anymore with regard to the subject matter, as this issue falls under the jurisdiction of the OHADA Council of Ministers who has the right to render any eventual municipal law null and void in accordance to the provision of article 10. Moreover, Uniform Acts can only be modified under the conditions provided for their adoption, as the possibility to intervene in such matters at municipal level is completely removed.

Respectively, the Common Court of Justice and Arbitration has clarified that the repealing effect set forth in Article 10 of the OHADA Treaty is referred to abrogation and the prohibition to enact any internal norm of law or regulation present or future having the same object of a rule from an Uniform Act and being contrary to it (Onana Etoundi & Mbock Biomla, 2006).

The OHADA legal framework already contains principles that can be handled with the lens of a common lawyer should bring us to affirm that the problem of the relation between OHADA and common law is considerably less important than the way it is normally presented. Surely the language issue exists, but there's a need of changing Article 42 of the Treaty by the same OHADA members States in view of inserting English, Spanish and Portuguese as languages having the same rank and value of French. And the fact that a proposal with this change has been elaborated shows that there is a will from the same countries to solve the main problem that may prevent the accession of countries belonging to different legal experiences.

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<sup>9</sup>Article 10 of the OHADA Treaty.

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