

BUSINESS IN WEST AND CENTRAL AFRICA: The Legal Framework

An Introduction to the Laws of the OHADA



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Introduction

The Organisation for the Harmonization of Business Law in Africa ("OHADA") was established in 1993 to increase legal certainty and facilitate foreign investment across West and Central Africa through the harmonisation of business laws.

By now, the OHADA has adopted as many as ten uniform acts, and is widely acknowledged as driver of important reforms in the region. However, as the OHADA rules are essentially based on civil law concepts and largely influenced by French law, they are still relatively unknown in English-speaking countries. The aim of the present publication is to change this, and to provide interested parties and investors from around the world with an overview over the legal framework for projects and investments in West and Central Africa.

With offices in Johannesburg, Cairo and Casablanca as well as close collaborations with correspondent law firms all across the continent, Baker & McKenzie has been present in Africa for more than 30 years, and was recently identified by Acritas as "the firm most used for high value work in Africa". Together with our global network, we accompany clients in projects all across the continent, helping them to navigate the challenges that investments or collaborations in areas such as energy, raw material extraction, infrastructure and IT / telecommunication may present.

We are, therefore, delighted to be able to build on our practical insight and experience to contribute with the present publication to the better understanding of the legal framework in the OHADA states. The tribute for launching this publication goes to three long-standing experts of the OHADA system, Paul Bayzelon, Secretary General of the Association for the Unification of Law in Africa ("UNIDA") and treasurer of *ACP Legal Association*, Denis Lesueur, Vice-President of *ACP Legal Association*, and Thorsten Vogl, Vice-President of SWISSCHAM AFRICA, who approached us in view of presenting the OHADA system to an English-speaking audience. Our thanks also go to all of the participating authors, law clerks and assistants of Baker & McKenzie Zurich, in particular Nadja Al Kanawati, Basil Kirby and Gabriela Etterlin.

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Foreword

In the early 1990s several, predominantly French-speaking countries in West and Central Africa joined forces at the initiative of the Senegalese government in an effort to combat the prevailing legal uncertainty in their territories. The heads of government of these countries then reached out to Kéba MBAYE, former president of the Senegalese Supreme Court and, at that time, Vice-President of the International Court of Justice in The Hague, mandating him with the detailed assessment of the status quo and the development of concrete proposals for the improvement of the investment climate.

Judge Kéba MBAYE fulfilled this mandate and proposed, based on his survey, the cross-boarder harmonisation of commercial law in order to create an attractive investment climate. The government leaders supported his proposal, so that on 17 October 1993, 15 states signed the Treaty establishing the Organisation for the Harmonisation of Business Law in Africa (OHADA) in Port Louis (Mauritius). This historical milestone marked the creation of a uniform legal framework for commercial activities within the contracting states. Simultaneously, a common court was created to ensure the consistent interpretation of the uniform law. Since then, the OHADA organisation has been further strengthened by the Conference of Heads of State and Government in Québec on 17 October 2008.

Today, over 20 years after the signing of the Treaty in Port Louis, the OHADA project is rightly considered an unprecedented success story. Following the accession of the Democratic Republic of the Congo, a large, important African country, in September 2012, 17 countries with a total population of 250 million have to this day adopted the OHADA system. The law of the OHADA is taught at university, and in some cases even at secondary school, in all contracting states. Highly respected international universities increasingly address the OHADA Project; The universities of Paris 13 and Paris 2, for instance, already offer a joint degree called "*Juriste OHADA*", which finds widespread interest. This development clearly illustrates how the unified commercial law turned into a pillar of hope for the fostering of close ties between the participating countries and for the further development of the continent. The contribution which was made by the OHADA regarding the unity of the African continent is, in fact, significant, especially in light of the diversity of the participating states involving not only several French-speaking countries but also the English-speaking part of Cameroon, as well as Guinea-Bissau and Equatorial Guinea, where Portuguese and Spanish are spoken.

In this context, I am delighted to see that the law firm Baker & McKenzie Zurich has now taken the initiative to present the legal framework of the OHADA to an English-speaking audience. The meanwhile deceased judge Kéba MBAYE attached great importance to the inclusive, pan-African approach of the OHADA. The continuing implementation of this approach presupposes that the harmonised law is not only commented and distributed French, but also in all other three languages used in the OHADA zone, namely in English, Spanish and Portuguese.

I shall like to conclude these introductory thoughts by expressing my gratitude to Anne-Catherine Hahn and her colleagues at Baker & McKenzie Zurich for their competent analysis and presentation of the legal framework of the OHADA, and for their contribution to the further dissemination of the OHADA project. Only if economic operators worldwide are aware of the valuable contribution that the uniform law has already made and will continue to make to legal certainty in our countries, will the OHADA be able to fulfil its intended purpose fostering the further development of our continent.

Judge Seydou BA

President of the Association pour l'Unification du Droit en Afrique (UNIDA / www.ohada.com)
Former president of the Common Court to the OHADA (CCJA OHADA)

Legal Harmonisation in the OHADA Zone – An Introduction

Dr. iur. Anne-Catherine Hahn, LL.M.



I. What is the OHADA?

The OHADA (*“Organisation pour l’harmonisation en Afrique du droit des affaires”*) is an international organisation which was established in 1993 by 14 states in West and Central Africa.¹ The founding states, in the majority former French colonies already united by two monetary unions,² include Benin, Burkina Faso, the Ivory Coast, Gabon, Guinea-Bissau, Cameroon, the Comoros, Mali, Niger, the Republic of Congo³, Senegal, Chad, Togo and the Central African Republic. Since then, Equatorial Guinea, Guinea and the Democratic Republic of Congo⁴ have joined the OHADA, bringing the number of member states up to 17.



The main objective of the OHADA project was and is to improve the legal and economic framework for investments in the member states by adopting modern commercial law rules. Apart from the English speaking part of Cameroon, all OHADA countries are civil law countries, where the French *Code civil* and *Code de commerce* applied prior to independence. Thereafter, French-inspired statutory rules lost in importance because they were no longer updated and not consistently applied.

The OHADA seeks to remedy the situation by introducing modern, transnational rules for commercial transactions, in the form of so-called uniform acts (*“Actes uniformes”*). The rules adopted are inspired by internationally recognized legal concepts, and are easily accessible to domestic and foreign parties thanks to their availability on the internet. Although the acts are written in French, they are increasingly accompanied by English and in some cases also by Spanish and Portuguese translations.

Apart from the harmonisation of substantive rules and regulations, the OHADA has – in addition to its internal institutions – established a Common Court of Justice and Arbitration (*“Cour Commune de Justice et d’Arbitrage”*), which is in charge of ensuring a consistent interpretation of the harmonised rules. The decisions of the CCJA are also available online.

¹ Cf. the Treaty on the Harmonisation of Business Law in Africa, as amended on October 17, 2008. For a detailed account of the development and status of legal integration in the OHADA zone cf. MOULOUL.

² These monetary unions are based on a monetary cooperation with France centered around the “CFA-franc” (*Franc de communauté financière d’Afrique*), one of which (UEMOA) covers West Africa (Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal and Togo) and the other (CEMAC) Central Africa (Cameroon, the Central African Republic, the Republic of Congo, Gabon, Equatorial Guinea and Chad). While the CFA-Franc was initially pegged to the French franc, its conversion rate is today fixed to the Euro, with France guaranteeing the free convertibility of the CFA-Franc.

³ Previously, Congo-Brazzaville.

⁴ Previously, the Republic Zaire.

II. The functioning of the OHADA



The OHADA is an international organisation having its seat in Yaoundé (Cameroon). Its most important institutions are the **Council of Ministers** ("*Conseil des Ministres*"), the **Permanent Secretary** ("*Secrétariat Permanent*"), and the **Common Court of Justice and Arbitration** ("*Cour Commune de Justice et d'Arbitrage*", CCJA), as well as, since a 2008 amendment of the OHADA Treaty, the **Conference of Heads of States and of Governments** ("*Conférence des Chefs d'Etat et de Gouvernement*"). An important contribution to the continuous development of the judiciary in the OHADA member states is also made by the **Higher Regional Training School** ("*École régionale supérieure de la magistrature*", ERSUMA).

The Council of Ministers (Arts. 27-30 of the OHADA Treaty)

The OHADA Council of Ministers consists of the ministers of finance and justice of each member state. It performs administrative, regulatory and legislative functions. Its most important duty, though, is the enactment of uniform acts with the support of the Permanent Secretariat.

The Permanent Secretary (Arts. 33 and 40 of the OHADA Treaty)

The Permanent Secretary, which is based in Cameroon, is the OHADA's executive organ. Its main task is the substantial preparation of the sessions of the Council of Ministers, the compilation of the annual business law harmonisation programme and the preparation of preliminary legislative drafts, which are submitted for the Council of Ministers' approval.

Conference of Heads of States and Governments (Art. 27 of the OHADA Treaty)

Since the 2008 revision of the OHADA Treaty, the Conference of Heads of States and Governments is held upon request of the President of the OHADA or of one third of the member states. Pursuant to

Art. 27 of the Treaty, the conference can decide on any issue in connection with the OHADA Treaty. The Conference of Heads of State and Government used this competence, for example, to establish the perspectives and goals of the entire organisation as well as of the individual institutions.

The Common Court of Justice and Arbitration (Arts. 31-39 of the OHADA Treaty)

The Common Court of Justice and Arbitration ("CCJA"), which is based in Abidjan (Ivory Coast), consists of 13 judges elected by the Council of Ministers for a maximum term of seven years. Lawyers, judges and law professors from the member states are eligible to become judges, provided that they have at least 15 years of professional experience. In order to ensure the independence of the Court, the judges are not allowed to engage in other political or administrative activities. Any additional gainful occupations have to be permitted in advance by the Court.

The CCJA has a dual function. On the one hand, it is a supranational court similar to the European Court of Justice. In this role, it acts as appellate instance for decisions by the courts of the member states and is responsible for ensuring the consistent interpretation and application of the OHADA Treaty and the various uniform acts throughout the member states. The CCJA's decisions are not open to appeal and are enforceable in all member states. On the other hand, the CCJA also serves as an arbitral institution, overseeing arbitration proceedings which take place in accordance with its own arbitration rules. Practice has shown that the CCJA has gained significant importance in both roles and has now evolved into a respected institution throughout the OHADA zone.⁵

The Higher Regional Training School for Magistrates (ERSUMA, Articles 41-42 of OHADA Treaty)

The Higher Regional Training School for Magistrates ("*École Régionale Supérieure de la Magistrature*") is based in Benin, and acts under the supervision of the Permanent Secretary. The ERSUMA's duty is to train jurists (judges, lawyers, notaries) on the OHADA law in order to ensure a high level of judicial education.

⁵ Cf. ONYEMA (2008).

III. Scope of Legal Harmonisation

The OHADA intends to harmonise the business laws of the member states with respect to both international and domestic transactions. Pursuant to Art. 10 of the OHADA Treaty, the uniform rules of the OHADA take precedence over national law. As has been held by the Common Court of Justice and Arbitration, national laws remain formally in force and continue to apply to matters not covered by the OHADA rules, but only to the extent that they are not in conflict with the harmonised law.⁶

The OHADA legislative powers are defined in Art. 2 of the OHADA Treaty: the OHADA may adopt uniform acts in the fields of corporate and commercial law, debt enforcement, bankruptcies, employment law, sales transactions, transportation contracts, financial transactions as well as arbitration. The inclusion of other fields of law requires an unanimous resolution of the Council of Ministers. By virtue of the OHADA Treaty, general criminal law, the organisation of the judiciary as well as commercial and social policies are, however, excluded from the OHADA's legislative powers.

Uniform Acts adopted so far:

1998:	Uniform Act on General Commercial Law
1998:	Uniform Act Relating to Commercial Companies
1998:	Uniform Act on Security Interests (revised in 2010)
1998:	Uniform Act on Organising Simplified Recovery Procedures and Enforcement Measures
1999:	Uniform Act on Organising Bankruptcy Proceedings for the Discharge of Liabilities
1999:	Uniform Act on Arbitration
2001:	Uniform Act on Organising and Harmonising Accounting Systems of Undertakings Operating in the Member States
2004:	Uniform Act on Contracts for the Carriage of Goods by Road
2010:	Uniform Act on Governing Cooperatives
2010:	Revision of the General Commercial Law and the Uniform Act on Security Interests
2014:	Revision of the Uniform Act Relating to Commercial Companies

As indicated in Arts. 5 to 12 of the OHADA Treaty, the process for the adoption of uniform acts is driven by the Council of Ministers, in combination with the OHADA Permanent Secretary. While the national parliaments are not involved in the legislative process, the draft statutes are submitted to the governments of the member states for consultation. Precisely, the process is carried out as follows:

- 1) the Council of Ministers resolves to adopt a uniform act in a specific field of law;
- 2) the Permanent Secretary appoints an expert group to prepare a draft act;
- 3) national commissions are invited to comment on the draft;
- 4) subsequently, the amended draft is submitted to the Common Court of Justice and Arbitration, who in particular has to determine as to whether it is consistent with the purposes of the OHADA Treaty;
- 5) lastly, a final draft is prepared by the Permanent Secretary and thereafter submitted to the Council of Ministers for adoption. The Council of Ministers has to unanimously approve the final draft in order for it to come into force.

IV. Taking Stock of the Legal Harmonisation Reached

Doing business in West and Central Africa can be challenging for foreign parties. As in other emerging markets, the informal sector and oral agreements play an important role in everyday life. Transactions made in this context are, at least in the general perception of the parties involved, not governed by written laws, but rather dominated by principles of customary law and pragmatic considerations.⁷ In many of the OHADA countries, indigenous customary rules exist additionally, alongside principles of Shari'a law and remnants of colonial law.⁸

In light of this background, it is hardly surprising that the OHADA uniform acts targeting the facilitation of cross-border business, which were introduced at the initiative of governments, have not entirely replaced existing rules and principles applied at local level. This is all the more true as national courts and authorities continue to function locally, given that

⁶ Avis I No. 002/99/EP of 13 October 1999, Juriscope.org, ohada.com/jurisprudence.html J-02-02; CCJA Decision No. 012/2002 of 18 April 2002, *Affaire Société Elf-Oil Côte d'Ivoire (devenue TOTAL FINAELF) c. Société cotacom*, Juriscope.org, ohada.com/jurisprudence.html J-02-65.

⁷ Cf. FONTAINE, pp. 50-64; KODO, p. 21.
⁸ Cf. PENDA MATIPÉ.

their organisation is excluded from the legislative mandate of the OHADA.

This having been said, the OHADA has, through its legal harmonisation project and the establishment of supranational institutions, significantly increased the pace of reform in West and Central Africa and made it easier for both international and local firms to do business in this part of the world. 17 countries in West and Central Africa now have widely harmonised business laws, which are taught at universities throughout Africa, applied by national courts under the ultimate supervision of the Common Court of Justice and Arbitration and discussed in legal doctrine throughout and beyond the area.

From a substantive point of view, the OHADA rules are largely based on civil law rules and concepts, with a strong influence of French law. International instruments, such as the 1980 UN Convention on Contracts for the International Sale of Goods, the 1956 Convention on Contracts for the International Carriage of Goods by Road, or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) were also taken into account. As a result, the rules and concepts used in the OHADA uniform acts, and the underlying legal considerations, are easily understandable for parties from continental Europe. Thanks to the Internet, the harmonised laws are also much more easily accessible than was previously the case for national laws. As a result, commercial transactions in West and Central Africa have become more transparent and more predictable, especially for foreign parties.⁹



Commercial transactions in West and Central Africa have become more transparent and more predictable, especially for foreign parties.



development of uniform business laws in their neighbourhood with great interest. This shows that the OHADA's rules and institutions have become a major point of reference in West and Central Africa. Foreign investors routinely take these rules and institutions into account and refer to them when planning and implementing projects, whereas international organisations such as the World Bank see them as a major driver for change and innovation.

⁹ Cf. ONYEMA (2010).

The political and economic situation in the OHADA-States

lic. iur. Robert Desax, LL.M.



I. „A hopeful continent“

„A hopeful continent“ (The Economist, 2 March 2013): Today, Africa is perceived as a continent of tremendous opportunities that are coming hand in hand with considerable challenges. In May 2000, the same magazine had yet published an article with the headline „Hopeless Africa“. Apparently, the African continent has undergone significant changes in the course of the past ten to twenty years. This is particularly true for the region commonly referred to as sub-Saharan Africa. The countries located in this area demonstrate strong and steady population growth and enjoy flourishing economies, though to a somewhat varying degree: According to 2015's estimates of the International Monetary Fund, the Democratic Republic of the Congo is expected to reach a growth of 9.2%, the Ivory Coast of 7.7% and Chad of 7.6%, while other countries, such as Equatorial Guinea, will, by contrast, suffer a severe slump of more than 15%.

At the same time, many of these countries are the theatre of severe belligerent activities and social upheavals. The Ivory Coast, the Democratic Republic of the Congo, Mali as well as the Central African Republic were or still are involved in conflicts of distinctive nature in which external forces often play a decisive role. The conflict in the vast eastern Congo, for example, may be the legacy of the Rwandan civil war in the 1990s, but it is, however, widely accepted that raw materials are at the core of this war. The Congo is one of the world's richest countries in terms of raw materials (diamonds, gold, copper, coltan etc.); therefore, various players seek control over resource-rich zones such as the eastern Kivu regions. As a result, the local populations are experiencing the devastating consequences of the presence or rather the actions of the different armed forces. Estimates indicate a number of more than five million deaths since 1998 (though these estimates are partly subject to criticism). These conflicts obviously have a destabilising impact on the economic development and are often referred to as the "Curse of resources". Other countries, such as Mali and the Central African Republic, are beset by ethnic and religious clashes, and there is no end or even return to normality – howsoever this term might be defined – in sight. West Africa, on the other hand, has seen itself confronted with the raging Ebola epidemic in 2014, which has so far been the worst of its kind. According to estimates of the World Health Organization (WHO), the virus has until April 2015 claimed the lives of more than 10,000 people.

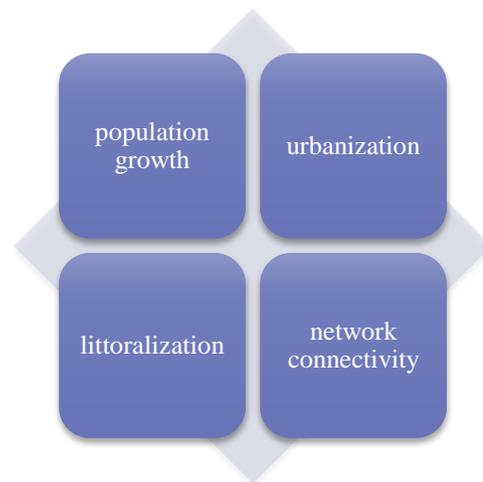
Malaria, the "forgotten disease", moreover, remains the cause of as many as hundreds of thousands of deaths each and every year (According to the WHO, 627,000 people died of the disease in 2012, 90% thereof in the sub-Saharan region).

Most sub-Saharan countries rank among the world's poorest states. According to the World Bank, the gross domestic product (GDP) per capita amounted to less than USD 450 in the Democratic Republic of the Congo, to almost USD 600 in Guinea, to slightly more than USD 1,000 in Senegal and to almost USD 1,400 in the Ivory Coast (in comparison: India: USD 1,500, Algeria: USD 5,500, China: USD 6,000, Brazil: USD 11,300, Italy: USD 35,000, USA: USD 51,000, Germany: USD 44,000, Switzerland: USD 83,000). The population growth, however, continues to increase: Pursuant to the CIA World Factbook, the annual population growth reaches 1.92% in Chad, 1.96% in the Ivory Coast, 2.48% in Senegal, 2.5% in the Democratic Republic of the Congo and 3% in Mali as well as in Burkina Faso (in comparison: India: 1.25%, Brazil: 0.8%, France: 0.45%, China: 0.44%, Germany: - 0.18%). All these populations (just like anywhere else in the world) then migrate towards large cities: The UNO estimates that the metropolitan region of Kinshasa-Brazzaville harbours close to 9 million inhabitants. It is estimated that over 4 million people live in Abidjan, 2.8 million in Dakar and more than 17 million in the record city Lagos. These figures, of course, have to be treated with caution, but they may nevertheless give a general idea of the scale.

I.1. The 4 Megatrends

In his book "Out of the Mountains" (New York, 2013), the author David Kilcullen identifies four global megatrends: population growth, urbanization, littoralisation ("the tendency of populations to cluster on coastlines") and "connectedness" ("increasing connectivity among people"). These trends specifically describe how populations grow and migrate from rural regions towards larger cities, which are then uncontrollably expanding. The populations furthermore tend to cluster around coastal cities or close to large rivers. The last trend is in comparison to the others historically new. People of all classes are increasingly intertwined within these large "urban metabolisms", i.e. cell phones and internet connections are the means of communication leading to the "democratization" of communications

technology, allowing communication, acquisition of know-how and mobilization of people (and money) across long distances and allowing the transmission of large volumes of data. While Kilcullen primarily positions the megatrends in the context of conflict research, he acknowledges that their impact will be far more extensive and will, eventually, influence the entire public and economic life. This in particular applies to the African continent.



There is no doubt that an economically sustainable development imperatively requires a profound stable and predictable environment. In this regard the OHADA substantially contributes to this end by providing for a set of rules governing an economic area that is composed of states which mostly share the same currency (the CFA Franc) and language.¹ Due to these efforts, the economic operators may find it easier to invest in this dynamic region, and, consequently, to foster its economic development.

I.2. The Essentials for Business in sub-Saharan Africa

In order to participate in the strongly growing and evolving business platform of sub-Saharan Africa, businesses will have to address the risks particular to this region. Indeed, albeit the last decades' improvements, many issues that companies have to take into consideration remain. These risks include

¹ According to the World Bank Group publication "Doing Business 2016", almost 30% of the worldwide regulatory reforms were accounted for by countries located in sub-Saharan Africa (cf. p. 35 of the report, available at <http://www.doingbusiness.org/reports/global-reports/doing-business-2016>, last visited on 9 November 2015).

cultural differences, fluid legal regimes that do not entirely adhere to the Rule of Law, corruption issues, poor general and communication infrastructure, unstable political and business environment and political hurdles. Not only will businesses face extensive compliance challenges but will be required to choose and monitor their indispensable local partners correctly from the outset. Some of the firms' main challenges when entering the OHADA zone will thus include:

- i. to assess, quantify and manage the existing risks adequately, including lacking regulation, operational and structural difficulties, unusual uncertainties such as value depreciation and political conflicts – e.g. with the labour force, reputational risks, strict exchange controls, land ownership and/or leasing restrictions, local customs and immigration matters, poor or unavailable information (such as financial accounts lacking credibility or poor public record keeping);
- ii. to choose the adequate experienced local partners, employees and counsels, which will have to be closely monitored and the compliance of which will have to be ensured;
- iii. to assess the local laws and infrastructure required to conduct business profitably and reliably; and
- iv. to plan their entry and exit wisely by diligently identifying the appropriate structure, carefully conducting the required due diligences, adequately preparing the local operations and planning the exit strategy.

General Commercial Law

Dr. iur. Philippe Monnier



I. Introduction

OHADA's main goal is the harmonization of commercial law ("*l'harmonisation du droit des affaires*") within the OHADA-member states.¹ While the OHADA Treaty itself does not contain any explicit legal definition of the term 'commercial law', article 2 of the OHADA Treaty lists the envisaged areas of law as follows:



This list is however not exhaustive and explicitly allows the Council of Ministers to add further areas of law for harmonization. Based on this provision, and in addition to the areas of law already listed in the OHADA Treaty, the Council of Ministers in 2001 granted to the OHADA the power to adopt rules in the fields of competition law, banking law, copyright law, civil corporate law, the law of cooperative associations, contract law and the law of evidence.²

II. Subject matter of the Uniform Act on General Commercial Law

II.1. Introduction

The Uniform Act on General Commercial Law dated December 15, 2010 (*Acte Uniforme révisé portant sur le droit commercial général, "AUDCG"*) entered into force in May 2011 and, from that date on, fully replaced the previous "*Acte Uniforme relatif au droit commercial général*" dated April 17, 1997. Broadly, the AUDCG covers those matters of general commercial law which are not addressed in any of the other uniform acts.

¹ Art. 1 OHADA Treaty.

² Decision of the Council of Ministers Nr. 002/2001/CM; cf. KÉRÉ, 197 et seq.; HAGGE, 27 et seq.

II.2. Material scope

The AUDCG consists of nine books ("*livres*"), each of which contains specific provisions dealing with general commercial law. These provisions govern the status of commercial parties and entrepreneurs (article 2-33), the commercial register and the register of personal property credit (articles 34-72), the national register ("*fichier national*") (articles 73-75), the regional register ("*fichier régional*") (articles 76-78) and the implementation of commercial registers and of personal property credit registers as well as the implementation of electronic national and regional registers (articles 79-100). In addition thereto, the AUDCG also contains uniform rules dealing with the rent of office space and the concept of businesses ("*fonds de commerce*") (articles 101-168), the trade intermediary (articles 169-233) as well as sales law (articles 234-302). Finally, articles 303 to 307 of the AUDCG contain the AUDCG's transitional and final provisions.

II.3. Territorial and personal scope

In terms of territorial and personal scope, the provisions of the AUDCG are applicable to all commercial parties ("*commerçants*")³ whose branch or domicile is situated in the territory of one of the OHADA contracting states (article 1 para. 1). Beyond that, the AUDCG is likewise applicable to persons who have chosen the status of an entrepreneur ("*entreprenant*") voluntarily (article 1 para. 2).⁴ This includes domestic as well as international matters between parties from different OHADA-member states.⁵

III. Status of commercial parties and entrepreneurs

III.1. General remarks

In its first book, the AUDCG governs the status of commercial parties and entrepreneurs. For such commercial parties and entrepreneurs, the AUDCG contains special provisions that deviate from the provisions of general civil law.

³ This applies irrespective of whether or not the commercial party is natural or legal person, a company with state participation or any other business-related interest group (art. 1 para. 1).

⁴ The "*Acte Uniforme relatif au droit commercial général*" is however not applicable in its entirety to entrepreneurs.

⁵ HAGGE, 27 et seq.

III.2. The term commercial party

Under the AUDCG (article 2), a commercial party is defined as someone who professionally engages in **commercial transactions** ("*actes de commerce*"). In this context, the term '*commercial*' is deemed to encompass any act through which a person involves himself or herself in the circulation of goods, through which he or she produces or sells goods or through which he or she provides services with the aim of generating profit. The concept of *commercial transactions* is further specified, in a non-exhaustive manner, in article 3 AUDCG, which states that certain transactions are always qualified as *commercial* due to their nature ("*actes de commerce par nature*"), namely:

- the buying of goods, of movable objects or immovable objects for the purpose of reselling;
- bank, stock, swap, broker, insurance and transit transactions;
- contracts amongst merchants for commercial purposes;
- the commercial exploitation of mines, stone pits and other raw material storages;
- the rent of movable objects;
- processes concerning manufacture, transport and communication;
- actions of trading intermediaries; and
- actions of trade companies.

Furthermore, the term *commercial* also encompasses bills of exchange ("*lettres de change*"), promissory notes ("*billets à ordre*") as well as "*Warrants*" (article 4 AUDCG).

III.3. The term entrepreneur

An *entrepreneur* is defined as an individual entrepreneur, i.e. a natural person operating a civil, commercial, manual or agricultural business and who has, by means an appropriate formal declaration, chosen the status of an entrepreneur.⁶

⁶ art. 30 AUDCG.

III.4. Material provisions

The AUDCG provides special stipulations for commercial parties and entrepreneurs, which deviate from provisions of general civil law. In their transactions, commercial parties are subject to special provisions, such as specific rules on the commercial capacity to act, on the laws of evidence, on statutes of limitations as well as to bookkeeping obligations.⁷ For entrepreneurs, in contrast, the AUDCG only lays down special rules on statutes of limitations and bookkeeping obligations.⁸

IV. Commercial register, register of personal property credit, national and regional register

The second book of the AUDCG contains uniform provisions on commercial registers and registers of personal property credit ("*Registre du commerce et du crédit mobilier, RCCM*"), both of which list information concerning registered commercial parties as well as personal property credit and make this information available to the public.⁹ These respective registers are, in principle, managed separately by the authorities of each jurisdiction, it being understood, however, that the information contained in the local registers is consolidated in a national and regional register at the CCJA ("*Fichier national and régional*"). The national and the regional register are regulated in more detail in the third and fourth book of the AUDCG. Moreover, in its fifth book, the AUDCG regulates the electronic register.

V. The rent of offices and business

The sixth book of the AUDCG sets out rules concerning the rent of office space and concerning the so-called business ("*fonds de commerce*").

V.1. The rent of office space

In its articles 101-134, the AUDCG contains material provisions regarding commercial rent, namely provisions regulating the conclusion and duration of the lease agreement, the obligations of the lessee,

⁷ Cf. the provisions in art. 6-12 AUDCG ("*capacité d'exercer le commerce*"), art. 13-15 AUDCG ("*obligations comptables du commerçant*") and art. 16-29 AUDCG ("*prescription*").

⁸ Cf. the provisions in art. 31-32 AUDCG ("*obligations comptables de l'entrepreneur*") and art. 33 AUDCG ("*prescription*").

⁹ art. 34-72 AUDCG.

the rent, the transfer of the rental relationship, subletting, lease extensions as well as the notice of termination. Aside from this, the AUDCG also includes an explicit list of mandatory provisions.

V.2. Business

Articles 135-168 of the AUDCG regulate the so-called *business* ("*fonds de commerce*"). A *business* is defined as the entirety of movable, physical and non-physical elements, which serve the commercial party to acquire or maintain customers. The concept of *business* always inherently includes customers, a trade name and a firm. Further elements can however also be included, such as facilities, extensions, material, furniture, warehouses, the right to rent, licenses, patents, trademarks, symbols, models and other intellectual property.

The business can either be carried out by its owner or be leased to another commercial party. The AUDCG contains detailed provisions concerning the transfer of a business.

VI. The trade intermediary



The seventh book of the AUDCG addresses the trade intermediary ("*intermédiaires de commerce*"). A *trade intermediary*

is defined as a natural or legal person who regularly and commercially concludes commercial transactions with third parties on behalf of another person (regardless of whether or not this person qualifies as a commercial party). In terms of material provisions, the AUDCG on the one hand contains rules regarding the right to act and the legal effects of the trade intermediary's acts. On the other hand, the AUDCG also regulates the termination of trade intermediary mandates, and sets out special rules concerning commission agents ("*commissionnaire*"), brokers ("*courtier*") and commercial agents ("*agents de commerce*").

Finally, it can be noted that the AUDCG only regulates the civil rights and obligations of the parties, but does not discuss compliance requirements for trade intermediaries. In practice, the relevant rules of the investor's home state will generally have to be followed.

Commercial Sales Transactions



Dr. iur. Sabine Herzog, LL.M.

I. Overview of Key Provisions of the Commercial Sale

I.1. Preamble

In its 8th book, the AUDCG ("*Acte uniforme portant sur le droit commercial général*") governs the commercial sale ("*vente commerciale*"). A first version of this book within the AUDCG (hereinafter "fAUDCG") entered into force on 1 January 1998,¹ but has, on the occasion of the complete revision of the oAUDCG in 2010, undergone major changes.² Previous shortcomings in the wording of the act (such as formulations leaving room for interpretation and conceptual inconsistencies) have been improved.³ The completely revised AUDCG entered into force in May 2011⁴ and fully replaced the fAUDCG.⁵

The rules on the commercial sale are essentially based on the concept of the Vienna Convention (CISG)⁶, but are complemented with some ideas emerging from the French civil code. Yet the commercial sale provides for regulations in areas exempt from the CISG (such as the limitation period and the transfer of ownership).⁷

The provisions of the AUDCG regarding the commercial sale regulate the sales contract among commercial parties having their place of business in a contracting state of the OHADA and includes regulations on the conclusion of sales contracts, the rights and obligations of the contracting parties, as well as the consequences triggered by breaches of contract. Apart from the commercial sale, the AUDCG furthermore governs other types of contracts, such as e.g. the commercial lease or the agency contract. The present chapter however exclusively addresses the commercial sale.

¹ Art. 289 oAUDCG; see also HAGGE, p. 35 and SANTOS, p. 237.

² <http://www.ohada.org/actes-uniformes.html> (last visited on 11 November 2015).

³ SANTOS, pp. 237 et seq.

⁴ JO OHADA No. 23 of 15 February 2011; regarding the date of entry into force, cf. Art. 307 of the revised AUDCG; <http://www.juriscope.org/programme-ohada/traites-actes-ohada.htm> (last visited on 3 November 2015).

⁵ Art. 306 AUDCG.

⁶ United Nations Convention on Contracts for the International Sale of Goods (<http://www.cisg.law.pace.edu/cisg/text/treaty.html>, last visited on 3 November 2015); HAGGE, p. 167.

⁷ HAGGE, p. 167; SANTOS, p. 237.

I.1. Scope of the Rules on the Commercial Sale, Arts. 234 et seqq.

I.1.1. Territorial and personal scope of application

According to Art. 1 para. 1 AUDCG, every merchant whose place of business or registered office is situated on the territory of one of the contracting states to the OHADA is, as a matter of principle, subject to the provisions of the AUDCG. Its application cannot be ruled out.⁸ In territorial terms, the AUDCG, therefore, regularly applies imperatively and directly to the sale of goods between merchants whose place of business is situated on the territory of the same or in two different member states⁹ Moreover, the provisions of the AUDCG are applicable by referral to conflicts of law and by choice of law.¹⁰ Hence, given that only one of the commercial parties would have his place of business in a member state, the provisions would only apply where the parties contractually agree upon its application, or where relevant conflicts of law principles of the *lex fori* call for it.¹¹

In contrast to the CISG, the AUDCG ties its applicability to the contracting parties' status as merchants (Art. 234 para. 1). Consequently, it does not govern commercial transactions between non-commercial parties. A definition of the term "merchant" ("*commerçant*") may be found in Art. 2 AUDCG.



The AUDCG regularly applies imperatively and directly to the sale of goods between merchants whenever both parties have their place of business in the same or in two different member state(s).



I.1.2. Material scope of application

Art. 234 para. 1 AUDCG covers the sales contract ("*contrat de vente*"), including contracts for the supply of goods destined to use in manufacturing or production ("*y compris les contrats de fourniture de marchandises destinées à des activités de fabrica-*

tion ou de production"). While the AUDCG itself does not contain any legal definition of these contracts and, hence, the terms are subject to autonomous interpretation, the definition emerges from the rights and obligations of the seller and the buyer set forth therein.¹² Thereafter, the sales contract is essentially to be understood as a contract by which the seller is bound to transfer ownership of a specified good to the buyer in exchange for the payment of the agreed purchase price.¹³ The sales contract encompasses "*marchandises*" (goods),¹⁴ but the AUDCG here again refrains from defining the term. As in the CISG, "goods" are most likely to be understood as moveable and tangible objects.¹⁵ In this context, the provisions on the commercial sale do not apply to employment contracts, agency contracts, barter agreements or contracts for work and materials.¹⁶ Art. 235 let. b AUDCG, which is virtually identical to Art. 3 para. 2 CISG, specifies the material scope of application with respect to certain mixed contracts. According to this provision, the AUDCG also governs supply contracts including contractual labour or service duties as long as they do not represent the preponderant part of the obligation. However, the AUDCG does not provide for any regulations on agreements for the supply of goods to be manufactured or produced such as the contracts mentioned in Art. 3 para. 1 CISG. The AUDCG does, therefore, not determine to what extent it applies to contracts for the supply of goods to be manufactured or produced.¹⁷

Art. 235 AUDCG also explicitly excludes certain contracts from its material scope of application. The catalogue of excluded contracts is again in line with the provisions of the CISG. Accordingly, contracts such as consumer sales or sales for private purposes (Art. 235 let. a AUDCG) and contracts with focus on the supply of manpower or other services (Art. 235 let. b AUDCG) are not subject to the AUDCG. Art. 236 AUDCG moreover excludes categories of sales which form part of the framework of special legislation.

⁸ HAGGE, p. 64; regarding the relationship between the AUDCG and the Vienna Convention, see Club OHADA Bukavu, La vente commerciale en droit OHADA: Apports et emprunts, 2011 (<http://www.legavox.fr/blog/club-ohada-bukavu/vente-commerciale-droit-ohada-apports-4922.pdf> (last visited on 3 November 2015)).

⁹ Cf. Art. 234 para. 2 AUDCG; HAGGE, pp. 61, 64, 168.

¹⁰ Art. 234 para. 2.

¹¹ HAGGE, p. 65 et seqq.

¹² HAGGE, p. 49 with further references; POUYOUÉ (Ed.), p. 53 para. 114.

¹³ Club OHADA Bukavu, La vente commerciale en droit OHADA: Apports et emprunts, 2011 (<http://www.legavox.fr/blog/club-ohada-bukavu/vente-commerciale-droit-ohada-apports-4922.pdf>, last visited on 3 November 2015), let. B(1).

¹⁴ Art. 234 para. 1 AUDCG.

¹⁵ HAGGE, p. 55; SIEHR, para. 2.

¹⁶ Regarding parallel provisions in the CISG cf. SIEHR, para. 5 et seqq.

¹⁷ HAGGE, p. 50.

Art. 236 AUDCG, finally, lists certain purchase objects that do not qualify as goods (*marchandises*) for the purpose of the AUDCG, namely in particular securities, financial instruments, ships, aircrafts and electricity.

1.1.3. Temporal / transitional law



The revised AUDCG abrogates the old AUDCG (Art. 306 AUDCG). Hence, as of its entry into force on 15 May 2011, the

new law applies exclusively. It does not provide for any further transitional regulations.

1.2. Conclusion of the Contract

1.2.1. Pre-contractual phase

The newly incorporated Art. 249 AUDCG regulates the pre-contractual phase.¹⁸ Pursuant to Art. 249 AUDCG, the parties are in principle free to enter into or conduct negotiations; they are not bound before reaching an agreement (Art. 249 para. 1 AUDCG). However, if a party is acting in bad faith during the contractual negotiations or ceases the negotiations in bad faith, it may be held liable for the aggrieved party's damages that incurred due to this conduct (Art. 249 para. 2 AUDCG). A party is acting in bad faith if it begins or continues negotiations without the intention of reaching an agreement (Art. 249 para. 3 AUDCG).

1.2.2. The conclusion of the contract

In principle, the commercial sale is not subject to any form requirements (Art. 240 AUDCG), but the conclusion of a contract presupposes offer and acceptance. Detailed regulations regarding the various constellations to conclude contracts (such as the contract concluded in a parties' absence, cf. Art. 244 AUDCG)¹⁹ are contained in Arts. 241 to 249 AUDCG.

¹⁸ POUYOUÉ (Ed.), p. 54 para. 120.

¹⁹ POUYOUÉ (Ed.), p. 53 para. 115.

Pursuant to Art. 241 para. 2 AUDCG, a contractual offer is valid provided that it indicates the goods and determines the quantity and price (or makes such determination possible). Furthermore, the proposal shall indicate the intention of the offeror to be bound in case of acceptance. Said provision is mostly based on Art. 14 para. 1 CISG.²⁰ The AUDCG as well provides for regulations regarding the time limit for acceptance (Art. 246 AUDCG) and the revocation of offers (Art. 242 AUDCG) which both as well find their basis in the CISG (see e.g. Art. 16 para. 2 let. b CISG).

1.3. The Parties' Obligations

1.3.1. The seller's obligations

The seller is bound to deliver the goods "in conformity with the order" ("*conformité des marchandises à la commande*"), including any necessary documents relating to them (Art. 250 AUDCG). Art. 255 AUDCG specifies the conditions under which the goods are considered to be "in conformity with the order", namely where they are delivered in the quantity, quality, specification and packaging agreed upon in the contract.²¹ The new Art. 256 AUDCG furthermore provides that compliance is required at the date of acceptance of the delivery, even if the defects appears later. Hidden defects are, therefore, also covered.²² Finally, the seller must transfer ownership of the sold goods and warrant that they are free from any rights or claims from any third parties (Art. 260 AUDCG).²³

“
Goods are in conformity with the order where they are delivered in the quantity, quality, specification and packaging agreed by contract.
”

²⁰ POUYOUÉ (Ed.), p. 53 para. 116.

²¹ Cf. POUYOUÉ (Ed.), p. 55 para. 122.

²² POUYOUÉ (Ed.), p. 55 para. 123.

²³ For the difference between "*défauts matériels*" and "*juridiques*" cf. LEVOA AWONA, pp. 317 et seq.

1.3.2. The buyer's obligations

The buyer must pay the purchase price and accept the goods (Art. 262 AUDCG). The terms of payment (place, date, method, etc.) and the corresponding obligations of the buyer are further specified in Arts. 263 to 268 AUDCG. Arts. 269 to 274 AUDCG moreover provide for regulations with respect to the modalities of acceptance (such as the inspection and due diligence duties if goods are returned).

Finally, the seller must observe notice periods. In this context, Art. 258 AUDCG determines that open defects must be notified within one month upon the acceptance of the delivery of the goods, while hidden defects must be reported within one year from the time the buyer noticed or ought to have noticed the defect (Art. 259 AUDCG).

1.4. Transfer of Ownership

Unlike the CISG, the AUDCG encompasses regulations regarding the transfer of ownership. As a matter of principle, ownership is assigned upon acceptance of the goods ("*prise de livraison*") by the buyer (Art. 275 AUDCG). By contrast to the oAUDCG, there is only limited possibility to override the rule by deviating contractual agreements²⁴ which, pursuant to Art. 276 of the revised AUDCG, are only permissible where the parties have agreed upon a retention of title clause.²⁵ This approach diverges from the previously applicable law (virtually always of French origin) governing most member states, according to which it is the effective conclusion of the sales contract that conveys ownership to the buyer.

1.5. Transfer of Risk

The transfer of risk is tied to the transfer of ownership (Art. 275 AUDCG). Deviating agreements are not permissible.²⁶

1.6. Rights of the Parties in Case of Non- or Improper Performance

1.6.1. Right of premature termination of the contract

Pursuant to Art. 281 AUDCG, the contract may be terminated where the other party completely or partially fails to fulfil its obligations. As a rule, judicial authorisation is required in this context (Art. 281 para. 1 AUDCG), but where the contractual misconduct reaches a certain severity, the unilateral termination of the contract may be justified even without said judicial authorisation.

1.6.2. Remedies of the buyer

Where it appears that the seller will not be able to fulfil his obligations, the buyer may apply for the postponement of the payment of the purchase price, possibly against the deposit of a partial payment (Art. 282 AUDCG). If the delivered goods do not comply with the contractual specifications, the buyer may demand that the seller – at his own expenses – supplies goods in replacement. The buyer may grant the seller an additional time limit to perform his obligations (Art. 283 AUDCG).

Where the delivered goods do not conform with the agreed quality, the buyer may reduce the price (Art. 288 AUDCG). Moreover, he is allowed to refuse acceptance of early deliveries or excess quantities (Art. 290 AUDCG).

1.6.3. Remedies of the seller

Where a buyer appears insolvent, the seller is entitled to apply to the competent court for authorisation to withhold performance (Art. 285 AUDCG); alternatively, he may grant the buyer another time limit to settle the amounts due (Art. 286 AUDCG).

1.7. Damages

Strict liability applies to damages claims arising out of breach of contract. The aggrieved party is thus entitled to claim damages even if the other party was not at fault. Art. 249 AUDCG however excludes liability where the breach of contract was caused by an act of a third party or by an event of force majeure. The damage includes direct loss (*damnum emergens*) as well as loss of profit (*lucrum cessans*).

In case of late payment, an interest for late payment at the applicable legal interest rate is due. The in-

²⁴ POUYOUÉ (Ed.), p. 55 para. 124.

²⁵ The retention of title rules are set forth in Arts. 72 to 78 of the Acte uniforme du 15 décembre 2010 portant organisation des sûretés (JO OHADA No. 22 of 15 February 2011).

²⁶ POUYOUÉ (Ed.), Encyclopédie du droit OHADA, p. 55 para. 125.

terest on late payment accrues from the date of dispatch of the formal request (Art. 291 AUDCG). If the buyer makes a purchase in replacement, the seller owes damages in the amount of the difference between the agreed price and the price of the replacement purchase, as well as for any further damages incurred (Art. 292 para. 1 AUDCG). Where the contract had to be terminated and the seller was forced to sell the goods to a third party, the buyer owes damages for the difference between the agreed price and the resale price plus any further damages incurred.

Art. 239 AUDCG stipulates a general duty to mitigate loss. Chapter VI furthermore sets forth the consequences of the premature rescission of the contract ("*rupture du contrat*"), namely the modalities of reciprocal restitution.

I.8. Limitation Period

Contrary to the CISG, the AUDCG encompasses provisions on limitation periods. Unless otherwise stipulated in Art. 301 et seqq. AUDCG, the regulations defined in Book I, Chapter IV apply as a matter of principle (Art. 301 para. 1 AUDCG). Book I (Arts. 2 et seqq. AUDCG) in particular lays down the modalities of the calculation of time limits and the interruption ("*interruption*", cf. Art. 20 AUDCG) or suspension ("*suspension*", cf. Art. 22 AUDCG) of the limitation period. Pursuant to Art. 301 para. 2 AUDCG, the limitation period shall by default lapse after two years. Said period applies to actions relating to contractual claims (incl. nullity suit).²⁷

Where the seller has granted a warranty to the buyer, the limitation or forfeiture period set forth in Art. 259 AUDCG starts running from the date the warranty expires (Art. 302 AUDCG). In addition, Art. 259 AUDCG addresses the calculation of time limits with respect to hidden defects.

II. Practical Importance and Implementation Challenges

There are various statistics circulating on the subject concerning the number of decisions the CCJA has reached since its initial constitution on 11 October 2001. According to the Vice-President of the CCJA, the court had, as of 30 June 2010, issued

375 decisions, but only 25 thereof related to the AUDCG,²⁸ of which again probably only a small fraction referred to commercial sales. Other statistics assume that by the end of December 2009 the number of CCJA decisions amounted to 467.²⁹



These figures indicate how limited the importance of the OHADA provisions, in particular with respect to commercial sale, remained so far. This may primarily be attributable to

the challenges the member states are facing with regards to the implementation of the OHADA regulations.³⁰ Notwithstanding that the provisions of the Uniform Act and, therefore, of the AUDCG are directly and imperatively applicable on the territory of the member states, and that they repeal any conflicting prior or subsequent laws and regulations,³¹ the member states fail to consistently observe this basic principle; hence, contradictory provisions frequently remain in force. Moreover, the lack of clear regulations with respect to the choice of law, particularly in the context of conflicts with constitutional law or other local organizations,³² leads to ambiguous legal relationships and uncertainties. Ultimately, some courts in the member states not only refuse application of the OHADA regulations but also ignore the exclusive cassation competence of the CCJA.³³

Thanks to the AUDCG, the commercial sale now provides for unified regulations for sales contracts amongst merchants on the territory of the OHADA. Especially in light of the lack of relevant case law and of comprehensive legal commentaries, its application nevertheless remains subject to legal uncertainties. Additionally, this set of regulations or the contracts concluded thereunder are not always enforceable. The AUDCG nevertheless establishes an important framework for the future legal development and the increase in legal certainty, which, as a result, substantially contributes to fulfil the business needs.

²⁷ Art. 301 AUDCG.

²⁸ MAÏDAGI, pp. 2 et seq.

²⁹ BEAUCHARD/KODO, p. 17.

³⁰ BEAUCHARD/KODO, p. 16.

³¹ Art. 10 du Traité du 17 octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique.

³² BEAUCHARD/KODO, pp. 25 et seq.

³³ BEAUCHARD/KODO, p. 26.

Securing Claims



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I. General Remarks

The Uniform Act on Security Interests (*Acte uniforme portant sur l'organisation des sûretés du 17 avril 1997*, AUS) was initially adopted in 1997 and has since been replaced by a modified Act (*Acte uniforme du 15 décembre 2010 portant sur l'organisation des sûretés*, AURS). The revision ensued from various legislation amendments in France, which the Act followed to a great extent.¹ The main objective was to add new security investments, enhance the cohesiveness with other uniform acts and improve the efficiency in the creation and enforcement of security rights.²

As most legal systems, the OHADA regime distinguishes between personal securities and real securities. While the first are characterised by the fact that a third party stands in for the claim, providing the creditor with a second debtor ("*sûretés personnelles*", cf. Art. 4 para. 1 and Arts. 12 et seqq. AURS), the latter aim at giving the creditor access to a specific asset which, as an object of property, can be realized if the debtor fails to fulfil his obligation towards the creditor ("*sûretés réelles*", cf. Art. 4 paras. 2 et seqq. AURS). Each type is defined in the AURS. According to the principle of accessoriness, securities in principle depend on the existence of the underlying claim (Art. 2 AURS). If the underlying claim extinguishes, the securities will extinguish with it.

II. Personal Securities ("*sûretés personnelles*")

II.1. Personal Sureties

The AURS differentiates in Art. 12 AURS between two different types of personal sureties: the personal guarantee ("*le cautionnement*", Arts. 13 et seqq. AURS) and the independent guarantee undertakings ("*la garantie autonome*", Arts. 39 et seqq. AURS). A personal guarantee creates an obligation to indemnify the creditor if the main debtor fails to settle the claim when due (Art. 13 AURS). Such an arrangement requires an agreement between the surety grantor and the secured creditor. Under the OHADA regime, the personal guarantee must be made in qualified written form, i.e. it must indicate, in hand writing by the surety grantor,³ the maximum amount of indemnification the surety grantor is willing to provide as security (Art. 14 AURS). The surety can only be invoked by the creditor if and to the extent that the main debtor fails to comply with its obligation.⁴ The creditor must, therefore, formally remind the main debtor to fulfil the outstanding obligation before proceeding against the surety grantor (Art. 23 AURS). The fulfilment or cancellation of the underlying obligation will automatically void the surety (Art. 36 AURS).

¹ Cf. GDANSKI / LAPIERRE.

² GDANSKI / LAPIERRE; ISSA-SAYEGH, pp. 847 et seqq.

³ "(...) ainsi que la mention, écrite de la main de la caution, en toutes lettres et en chiffres, de la somme maximale garantie (...)", Art. 14 para. 1 AURS. Interestingly, an approach flowing from the Senegalese Code of Civil and Commercial Obligations enables illiterate surety grantors to provide a security, requiring the testimony of two witnesses, see Art. 14 para. 2 AURS and ISSA-SAYEGH, p. 861.

⁴ Art. 23 para. 1 AURS; see POUGOUÉ (Ed.), p. 507 para. 55.

II.2. Autonomous Guarantee Undertakings ("*garantie autonome*")

Personal sureties must be distinguished from independent guarantee undertakings. Unlike sureties, autonomous guarantees are independent of the main debt. The creditor is not required to assert his debt against the debtor first, but can rather request payment from the guarantor directly.⁵ An autonomous guarantee undertaking is thus an undertaking in which the guarantor commits to pay a determined sum to the beneficiary upon first request of the latter.⁶ There is no requirement for the beneficiary to be part of the agreement.⁷

Autonomous guarantees must be in writing and contain various elements, including the denomination of the parties, the maximum amount secured and the date or event triggering the guarantee obligation (Art. 41 AURS). Natural persons are not permitted to give an autonomous guarantee (Art. 40 para. 1 AURS). To invoke the guarantee, the creditor must address a written formal request to the guarantor, stating the reasons for which the debtor is in default and including any documents required pursuant to the guarantee. In practice, such undertakings are often provided by banks, in the form of bank guarantees on first demand.



III. Real Securities („*sûretés réelles*")

III.1. Securities Based on 'Moveable' Property ("*sûretés mobilières*")

The OHADA regime recognises different types of securities, which are based on property rights. Art. 50 AURS lists the following sureties based on 'moveable' properties: the right to retention ("*le droit de rétention*"), property retained or given as a guarantee title ("*la propriété retenue ou cédée à titre de garantie*"), the pledge of tangible assets ("*le gage de meubles corporels*"), the pledge of intangible assets ("*le nantissement de meubles incorporels*")

and the privileges ("*les privilèges*"). Arts. 190 et seqq. AURS address sureties based on 'immoveable' property, i.e. the various types of mortgages (conventional, legal or judicial mortgages).⁸ In practice, the most important real security instrument is a pledge allowing the pledgee to request the realisation of an object belonging to the debtor if the latter defaults on his obligations. Pledges can be granted on tangible property (e.g. "*gage de meubles corporels*", Article 92 AURS) as well as on intangible property (e.g. "*nantissement de meubles incorporels*", Article 125 AURS).

If the moveable property is rightfully in possession of the creditor, he is allowed to retain this object irrespective of other existing securities until the debtor has fully repaid his debt ("*droit de rétention*", Art. 67 AURS), provided that there is a causal link

between the pledge and the retained property (cf. Art. 68 AURS). The retention of title ("*réserve de propriété*", see Art. 72 AURS), which can be stipulated in the context of a sales transaction, enables a seller to retain property of the goods subject to the contract until he receives full payment by the buyer. The fiduciary assignment of property rights for security purposes ("*propriété cédée à titre de garantie*", Art. 79 AURS)

is also recognised by the OHADA regime.⁹ This instrument allows to transfer the property of a good (or goods) in order to secure a debt. The statutory provisions address two particular forms of fiduciary assignment of rights in more detail, i.e. the pledge of receivables ("*cession de créances*", Arts. 80 et seqq. AURS) as well as the fiduciary transfer of a sum of money ("*le transfert fiduciaire d'une somme d'argent*", Arts. 87 et seqq. AURS). These instruments are mainly used to secure monetary claims.

Finally, the AURS regulates the pledge of tangible ("*gage de meubles corporels*", Arts. 92 et seqq.) and intangible assets ("*nantissement de meubles incorporels*", Arts. 125 et seqq. AURS). The former gives the creditor obtains the right to be paid preferentially from the proceeds of the sale of the pledged assets in case the debtor fails to repay his

⁵ CROCQ / YONDO / BRIZOUA-BI / LAMBIE / LAISNEY / MARCEAU-COTTE, p. 113.

⁶ Art. 39 para. 1 AURS; ISSA-SAYEGH, p. 847.

⁷ Cf. ISSA-SAYEGH, p. 879.

⁸ See Art. 190 AURS ("*les hypothèques conventionnelles*", "*les hypothèques forcées légales*" and "*les hypothèques forcées judiciaires*"); cf. also ISSA-SAYEGH, pp. 948 et seqq. Mortgages will be addressed further below.

⁹ POUGOUÉ (Ed.), p. 42 N 64.

debt. A pledge over tangible assets can be constituted with or without a transfer of the assets to the creditor or a third party ("*gage avec ou sans dépossession*", cf. Arts 99 et seqq. AURS). Particular provisions govern the pledge of professional equipment and cars ("*gage du matériel professionnel et des véhicules automobiles*", Arts. 118 et seq. AURS) as well as the pledge of stocks, including raw materials or agricultural and industrial products ("*gage de stocks*", Arts. 120 et seqq. AURS). Pledges over intangible assets can cover receivables ("*créances*"), bank accounts ("*compte bancaire*"), share holdings or financial titles ("*droits d'associés (...) et le compte de titres financiers*"), a business ("*fonds de commerce*") or intellectual property rights ("*droits de propriété intellectuelle*", cf. Arts. 126 AURS). Each of these categories is regulated separately in Arts. 125 et seqq. AURS.

Securities based on 'moveable' property can be registered with the Trade and Personal Property Credit Register ("*le Registre du Commerce et du Crédit Mobilier (RCCM)*") upon request of the creditor, the securities trustee or the debtor (Art. 51 para. 1 AURS). The registration helps to make the security effective vis-à-vis third parties by making it opposable to them (Art. 97 para. 1 and Art. 131 AURS).¹⁰

III.2. Securities Based on 'Immovable' Property ('*hypothèques*')

With respect to immovable property, mortgages constitute the most important security instrument. Under the OHADA system, they can be agreed upon or arise as a matter of law. Contractual mortgages ("*hypothèques conventionnelles*", Arts. 203 et seqq. AURS) are thus distinguished from compulsory mortgages ("*hypothèques forcées*", Arts. 209 et seqq. AURS). Compulsory mortgages can again be subdivided into statutory mortgages ("*hypothèques forcées légales*") and court-ordered mortgages ("*hypothèques forcées judiciaires*"). Both contractual and court-ordered mortgages have to be registered in accordance with the law of the country in which the respective property is located, i.e. typically the land register (cf. Art. 195 AURS).

The creation of a contractual mortgage requires an agreement between the owner of the relevant prop-

erty (the debtor or subscriber)¹¹ and the creditor. The person granting the security interest must be legitimately registered as the owner of the property and must effectively have control over said property (Art. 203 para. 1 AURS).¹² Contractual mortgages only become effective (opposable) against third parties upon their registration (Art. 206 AURS).

By contrast, statutory mortgages can be created without the consent of the debtor (Art. 209 AURS). Such statutory mortgages arise under the AURS where the owner sells, exchanges or divides a piece of his land. If the parties do not agree to a contractual mortgage, the (previous) owner may request a statutory mortgage from the competent court against the other party in order to secure the purchase price (Art. 211 AURS). Another category of statutory mortgages is a form of builder's lien, whereby architects and contractors which perform work for the benefit of a landowner may request a statutory mortgage to secure their remuneration (Art. 212 AURS). Judicial mortgages ("*hypothèques judiciaires*"), finally, can only be established by virtue of a court decision which has been requested by a creditor (Art. 213 para. 1 AURS), in particular in order to protect unsecured claims by means of a provisional measure when the performance of the claim is at risk.

IV. Conclusion

The security interests provided for in the AURS are largely aligned with the rules and principles known from civil law jurisdictions. While the statutory regime provides a clear framework for securing credit through personal and real securities, challenges continue to exist at the implementation and enforcement level, in particular also in relation to the functioning of the relevant public registers and the judicial enforcement of security rights.¹³

¹⁰ MARTOR/PILKINGTON/SELLERS/THOUVENOT (2002), p. 195.

¹¹ Cf. ISSA-SAYEGH, p. 952.

¹² Art. 203 para. 1 AURS: "(...) celui qui est titulaire du droit réel immobilier régulièrement inscrit et capable d'en disposer."

¹³ POUYOUÉ (Ed.), p. 382 para. 22.

The Law on Commercial Companies

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I. Introduction

I.1. OHADA Rules and Regulations

The OHADA rules and regulations provide uniform rules for commercial companies and cooperative societies. Commercial companies and cooperative societies are governed by two mutually independent OHADA laws: the Uniform Act relating to Commercial Companies and Economic Interest Groups (*Acte uniforme relatif au droit des sociétés commerciales et du groupement d'intérêt économique "AUSCGIE"*), on the one hand, and the Uniform Act relating to Cooperative Societies (*Acte Uniforme relatif au droit des sociétés coopératives "AUSC"*), on the other hand. The following remarks are confined to the AUSCGIE and thus to commercial companies.¹



I.2. Substantial Structure of the AUSCGIE

The AUSCGIE governs the different types of companies and their procedures in great detail, sometimes in far more detail than the Swiss Code of Obligations ("**CO**") does with regard to Swiss commercial companies. The advantage of more detailed provisions is that the interested parties can at all times refer to comprehensive rules that are tailored to almost any corporate procedure. If such provisions are mandatory, they have, however, a restrictive effect on the personal autonomy to have certain corporate procedures organized differently.

The AUSCGIE is divided into four parts: the general corporate principles and procedures are set forth in part 1 on general provisions governing commercial companies. These general provisions contain the typical corporate provisions applying across all types of enterprises, such as provisions on formation, articles of association, company name, object, registered office, capital, bodies of the company and restructurings.

In part 2, special provisions relating to the different forms of commercial companies are established. The general principles and procedures introduced in part 1 are specified for each type of company. Thus, in order to understand a specific corporate procedure, the special provisions must be consulted first. If a specific rule is missing or incomplete in part 2, then the general provisions of part 1 apply.

¹ The AUSCGIE was recently revised (entry into force: 5 May 2014); the current version of the AUSCGIE applies to all companies formed in a contracting state after the date of its entry into force, Art. 907 AUSCGIE; companies formed prior to the date of its entry into force are, however, also subject to the AUSCGIE, but with a transition period of two years from its entry into force to harmonize their articles of association with the new provisions, Arts. 908 et seqq. AUSCGIE; cf. KROTOFF et al., pp. 1 et seq.

Finally, part 3 contains the penal provisions relating to any violation of the general and special provisions and part 4 the final and transitional provisions.

II. Definition of Commercial Company

A commercial company is pursuant to Art. 4 AUSCGIE the union, by contract, of two or more persons for the purpose of achieving joint objectives by using joint assets that may consist of cash, tangible goods or labour. Profits and losses are generally borne by the partners.

This union by contract is – other than under Swiss law – to be limited in time from the outset and the duration must not exceed 99 years.² Subsequent extensions are, however, possible.³

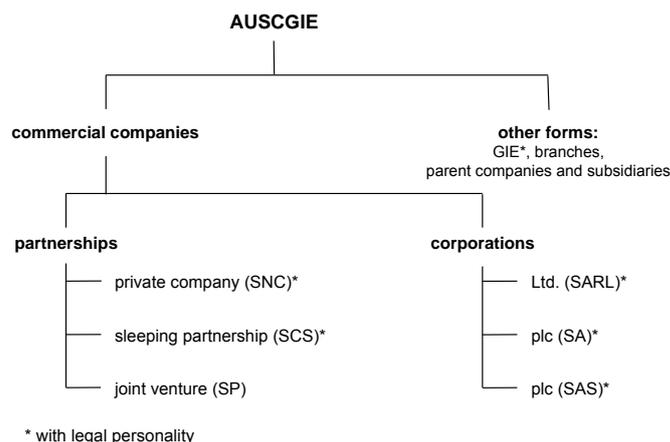
Except for joint ventures (SP) (cf. below), all commercial companies have legal personality with effect from the date of registration in the Trade and Personal Property Credit Register (*Registre du commerce et du crédit mobilier RCCM*).⁴

III. Numerus clausus of Recognized Legal Forms

As under Swiss company law, there is a *numerus clausus* of recognized legal forms in the AUSCGIE as well, which is very similar to the one under Swiss law. Commercial companies, the commercial nature of which is pursuant to Art. 6 AUSCGIE determined by their form or object, may be divided into **partnerships** and **corporations**.⁵ In the following sections, we will first provide a schematic overview of these companies (III.1) and then discuss each legal form individually (III.2 to III.4).

III.1. Schematic Overview

This is a schematic overview of the legal forms that the AUSCGIE provides:



III.2. Partnerships

With regard to partnerships, it is the personality of the partners that is of primary importance, rather than the capital contributed by them.⁶ The partners generally have unlimited personal liability.⁷ Furthermore, upon the death of a partner, partnerships cease to exist or are to be dissolved, unless the articles of association expressly provide otherwise.⁸ The AUSCGIE recognizes the following types of partnerships:

- The private company (*société au nom collectif (SNC)*)⁹ is a company similar to a Swiss general partnership (*Kollektivgesellschaft*),¹⁰ where the partners are without limitation jointly and severally liable for the company's debts with their personal assets.¹¹ The partners may be prosecuted 60 days after the company received a notice of default, at the earliest.¹² This legal form will subsequently be referred to as "**private company (SNC)**".
- The sleeping partnership (*société en commandite simple (SCS)*)¹³ is a company similar to a Swiss limited partnership (*Kommanditgesellschaft*)¹⁴, where one or more partners are without limitation jointly and severally liable for the company's debts with their personal assets, the so-called **active partners** (*associés commandités*), and where one or more partners are only

² Art. 28 AUSCGIE.

³ Art. 32 AUSCGIE.

⁴ Arts. 97 et seq. AUSCGIE; MARTOR/PILKINGTON/SELLERS/THOUVENOT, p. 94.

⁵ MARTOR/PILKINGTON/SELLERS/THOUVENOT, p. 101.

⁶ DIÈYE, p. 14.

⁷ MARTOR/PILKINGTON/SELLERS/THOUVENOT, Le droit uniforme africain des affaires issu de l'OHADA, p. 101.

⁸ Art. 290 AUSCGIE; Art. 308 para. 1 AUSCGIE; Art. 290 in conjunction with Art. 862 AUSCGIE.

⁹ Art. 270 et seqq. AUSCGIE.

¹⁰ Cf. Art. 552 et seqq. CO.

¹¹ Art. 270 AUSCGIE.

¹² Art. 271 AUSCGIE.

¹³ Art. 293 et seqq. AUSCGIE.

¹⁴ Cf. Art. 594 et seqq. CO.

liable for the company's debts up to the limit of their shares (*Kommanditsumme*), the so-called **sleeping partners** (*associés commanditaires* or *associés en commandite*).¹⁵ Thus, active partners are liable to the same extent as the partners of a private company.¹⁶ Unless the articles of association expressly provide otherwise, the death of an active partner, unlike the death of a sleeping partner, results in the dissolution of the company.¹⁷ This legal form will subsequently be referred to as "**sleeping partnership (SCS)**".

- The joint venture (*société en participation (SP)*) is a company similar to a Swiss simple partnership (*einfache Gesellschaft*)¹⁸, which has no legal personality and is not subject to publication.¹⁹ The partners have the same rights and obligations as the partners of a private company.²⁰ This legal form will subsequently be referred to as "**joint venture (SP)**".
- The de facto partnership (*société créée de fait* or *société de fait*) is a company without legal personality in which the partners act as such but have not entered into a partnership agreement with each other.²¹ Any interested party may petition the court to recognize such a de facto partnership. If a de facto partnership is recognized by the court, the provisions governing private companies (SNC) apply to the partners.²² This legal form will not be further discussed below.

III.3. Corporations

With regard to corporations, the capital contributed to the company is of primary importance. The partners are generally not liable with their own private assets.²³ The AUSCGIE recognizes the following types of corporations:

- The private limited company (*société à responsabilité limitée (SARL)*) is a company similar to the Swiss limited liability company (*Ge-*

sellschaft mit beschränkter Haftung (GmbH))²⁴, in which the members are only liable up to the limit of their contributions.²⁵ The rights of the members are represented by company shares (*parts sociales*).²⁶ This legal form will subsequently be referred to as "**Ltd. (SARL)**".

- The public limited company (*société anonyme (SA)*) is a company similar to a Swiss company limited by shares (*Aktiengesellschaft (AG)*), in which the partners, the **shareholders**, are only liable up to the limit of their contribution.²⁷ The rights of the shareholders are represented by shares (*actions*).²⁸ This legal form will subsequently be referred to as "**plc (SA)**".
- The simplified joint-stock company (*société par actions simplifiée (SAS)*) is a simplified plc (SA), which was introduced in the revised AUSCGIE of 2014.²⁹ This legal form will subsequently be referred to as "**plc (SAS)**".

III.4. Other Company Structures

The AUSCGIE, moreover, contains further corporate provisions, such as those on branches (*succursales*)³⁰, parent company and subsidiary (*société mère et filiale*)³¹, and economic interest groups (*groupement d'intérêt économique (GIE)*).³² The latter is not a commercial company but rather a temporary union of economic interests with legal personality that is closest in structure to a Swiss association (*Verein*)³³ with an economic object. It is not mandatory for such associations to have a registered capital and the members are without limitation jointly and severally liable for the company's debts.³⁴ This legal form will not be further discussed below.

¹⁵ Art. 293 AUSCGIE.

¹⁶ Art. 271 in conjunction with Art. 293-1 AUSCGIE; DIÈYE, p. 14; MARTOR/PILKINGTON/SELLERS/THOUVENOT, *Le droit uniforme africain des affaires* issu de l'OHADA, p. 149.

¹⁷ Art. 308 para. 1 AUSCGIE.

¹⁸ Cf. Art. 530 et seqq. CO.

¹⁹ Art. 854 et seq. AUSCGIE.

²⁰ Art. 856 AUSCGIE.

²¹ Art. 864 AUSCGIE.

²² Art. 868 AUSCGIE.

²³ MARTOR/PILKINGTON/SELLERS/THOUVENOT, p. 101.

²⁴ Cf. Arts. 772 et seqq. CO.

²⁵ Arts. 309 et seqq. AUSCGIE.

²⁶ Art. 384 AUSCGIE.

²⁷ Arts. 385 et seqq. AUSCGIE.

²⁸ Art. 385 AUSCGIE.

²⁹ Arts. 853-1 et seqq. AUSCGIE.

³⁰ Arts. 116 et seqq. AUSCGIE.

³¹ Arts. 179 et seq. AUSCGIE.

³² Arts. 869 et seqq. AUSCGIE.

³³ Cf. Arts. 60 et seqq. Swiss Civil Code (CC).

³⁴ Art. 869 AUSCGIE; Art. 873 AUSCGIE; MARTOR/PILKINGTON/SELLERS/THOUVENOT, p. 152 et seqq.

IV. Formation and Establishment of a Commercial Company

IV.1. Founder

Any natural person or legal entity may act as founder of a commercial company.³⁵ Partnerships must be formed by at least two persons.³⁶ The subsequent ownership of all shares by a single partner may be tolerated; however, the partnership will then upon request of an interested party be liquidated.³⁷ Corporations, on the other hand, may be formed by a single person alone.³⁸

IV.2. Articles of Association

In the formation agreement, the so-called articles of association, the founder(s) express their intent to form a commercial company.³⁹

It is mandatory to determine the form and name of the company, its object, registered office, duration, the company capital and the number and nominal value of the shares in the articles of association. Moreover, the contributions, the identity of the contributors and the shares obtained for each contribution must be disclosed in the articles of association. Any special benefits granted and the identity of the beneficiaries must be disclosed as well. Finally, provisions on the distribution of profits, the constitution of reserves and the organization of the company must be included in the articles of association.⁴⁰

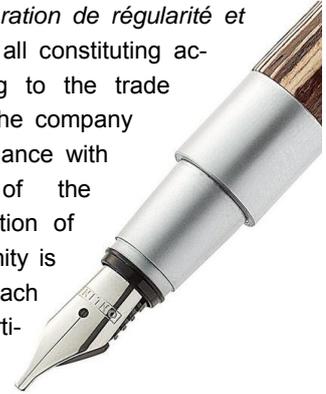
The articles of association must be in the form of a public deed executed by a notary public or of any other equivalent instrument acceptable under national law. Subsequent amendments of the articles of association must be in the same form.⁴¹

The commercial company is formed internally among the partners by adopting the written articles of association. For third parties, the commercial company only exists once it is registered with the trade register. Likewise, the company only has legal

personality once it is registered with the trade register.⁴²

IV.3. Declaration of Regularity and Conformity

In addition to the articles of association, the founders must issue a written declaration of regularity and conformity (*déclaration de régularité et de conformité*) listing all constituting actions, thus confirming to the trade register reliably that the company was formed in compliance with the requirements of the AUSCGIE. A declaration of regularity and conformity is also required for each amendment of the articles of association.⁴³



IV.4. Registration

With the exception of joint ventures (SP), all other commercial companies must be registered with the Trade and Personal Property Credit Register (*registre du commerce et du crédit immobilier; RCCM*)⁴⁴ in order to gain legal personality.⁴⁵ As long as a commercial company subject to registration is not registered with the trade register, it is by law deemed to be a joint venture (SP).⁴⁶

IV.5. Publication

Each newly formed company must within 15 days from its registration with the trade register be published in the national gazette provided for this purpose.⁴⁷



³⁵ Art. 7 AUSCGIE.

³⁶ Art. 4 AUSCGIE; cf. regarding the exclusion of minors and spouses Arts. 8 et seq. AUSCGIE in respect of partnerships under certain circumstances; regarding the reasons for exclusion in respect of corporations Art. 7 AUSCGIE; cf. DIÈYE, p. 14.

³⁷ Art. 60 AUSCGIE.

³⁸ Arts. 309, 385 and 853-1 AUSCGIE.

³⁹ Art. 4 AUSCGIE; Art. 12 AUSCGIE; cf. DIÈYE, pp. 67 et seqq.

⁴⁰ Art. 13 AUSCGIE.

⁴¹ Art. 10 AUSCGIE.

⁴² Arts. 97 et seq. AUSCGIE, DIÈYE, p. 72; MARTOR/PILKINGTON/SELLERS/THOUVENOT, p. 94.

⁴³ Arts. 73 et seqq. AUSCGIE.

⁴⁴ Art. 97 AUSCGIE; Art. 854 AUSCGIE.

⁴⁵ DIÈYE, p. 72; Art. 98 AUSCGIE.

⁴⁶ Art. 114 AUSCGIE; DIÈYE, p. 73.

⁴⁷ Art. 261 AUSCGIE.

V. Registered Capital and Shares

With the exception of the joint venture (SP), all commercial companies have a registered capital (*capital social*),⁴⁸ which is divided into company shares (*parts sociales*) or, in the case of the plc (SA), into shares (*actions*) with a nominal value.⁴⁹ In simple terms, each partner of the company has to make a contribution (*apport*) and in return obtains shares of such company.⁵⁰

The scope of the rights and obligations of each partner generally depends on their contributions. The articles of association may omit this rule; however, provisions attributing the entire profits or, vice-versa, the entire losses to one single partner are void.⁵¹

Company shares are generally transferable.⁵² It is, however, only possible to securitize or issue negotiable instruments for shares of a plc (SA) or a plc (SAS).⁵³

V.1. Minimum Capital

The amount of the registered capital can be freely determined.⁵⁴ A minimum capital is not required for partnerships, given that in this legal form liability is not limited to the company's assets but the partners are without limitation jointly and severally liable with their private assets as well.⁵⁵ On the other hand, a minimum capital is required for the Ltd. (SARL) and the plc (SA), but surprisingly not for the plc (SAS)⁵⁶:

- A minimum capital of CFA 1,000,000⁵⁷ is required for the Ltd. (SARL) (corresponding to approx. CHF 1,550).
- A minimum capital of CFA 10,000,000⁵⁸ is required for the plc (SA) (corresponding to approx. CHF 15,500).

⁴⁸ Art. 273 AUSCGIE; Art. 273 in conjunction with Art. 293-1 AUSCGIE; Art. 387 AUSCGIE.

⁴⁹ Art. 273 AUSCGIE; Art. 293 AUSCGIE; Art. 309 AUSCGIE; Art. 385 AUSCGIE.

⁵⁰ Arts. 37 et seq. AUSCGIE.

⁵¹ Art. 54 AUSCGIE.

⁵² Art. 57 AUSCGIE; with regard to partnerships, the transfer generally requires the consent of all partners, cf. Art. 274 AUSCGIE; Art. 296 AUSCGIE.

⁵³ Art. 58 AUSCGIE.

⁵⁴ Art. 65 AUSCGIE.

⁵⁵ Cf. above III.2.

⁵⁶ Art. 853-5 AUSCGIE.

⁵⁷ Art. 311 AUSCGIE.

⁵⁸ Art. 387 AUSCGIE.

V.2. Minimum Nominal Value

The registered capital of commercial companies is divided into company shares with a nominal value. The nominal value can generally be freely determined.⁵⁹ Just as under Swiss company law, an exception only applies to the Ltd. (SARL): there the nominal value of the company shares must be at least CFA 5,000 (corresponding to approx. CHF 7.75).⁶⁰

V.3. Capital Contributions

Each partner must in return for his or her shares of the commercial company make a contribution (*apport*)⁶¹, which may generally be made in cash (*apport en numéraire*), in kind (*apport en nature*) or as a supply of labour (*apport en industrie*).⁶² Whereas a contribution as a supply of labour is prohibited in the case of the plc (SA)⁶³, it is expressly permitted for the plc (SAS). The shares issued for that purpose are, however, not transferable and they do not have a nominal value.⁶⁴

Payment of the unpaid contribution must, as a matter of principle, be effected in full (*réalisation / libération*). Partial payment is only permitted if expressly provided for in the AUSCGIE⁶⁵, which is the case for corporations, but only with regard to contributions in cash.⁶⁶

- With regard to the Ltd. (SARL) it is possible to pay up only 50% of the nominal value of the subscribed shares.⁶⁷ The unpaid capital must be paid in full within two years of registration.⁶⁸
- With regard to the plc (SA) and the plc (SAS) it is possible to pay up only 25% of the nominal value of the subscribed shares.⁶⁹ The unpaid capital must be paid in full within two years of registration.⁷⁰

⁵⁹ Art. 273 AUSCGIE; Art. 387 para. 2 AUSCGIE; Art. 853-5 para. 1 AUSCGIE.

⁶⁰ Art. 311 AUSCGIE; the minimum nominal value for a Swiss GmbH is, however, CHF 100, Art. 774 para. 1 CO.

⁶¹ Art. 38 AUSCGIE.

⁶² Art. 37 AUSCGIE; Art. 40 AUSCGIE; cf. similar basic provision applying to Swiss simple partnerships in Art. 530 CO.

⁶³ Art. 50-1 para. 2 AUSCGIE.

⁶⁴ Art. 853-5 para. 2 AUSCGIE.

⁶⁵ Art. 41 para. 2 AUSCGIE.

⁶⁶ Art. 45 para. 2 AUSCGIE.

⁶⁷ Art. 311-1 para. 2 AUSCGIE.

⁶⁸ Art. 311-1 para. 3 AUSCGIE.

⁶⁹ Art. 389 para. 1 AUSCGIE; Art. 853-3 in conjunction with Art. 389 para. 1 AUSCGIE.

⁷⁰ Art. 389 para. 2 AUSCGIE; Art. 853-3 in conjunction with Art. 389 para. 2 AUSCGIE.

V.3.1. Contribution in cash

Contributions in cash are effected by transferring the ownership of cash to the company.⁷¹ With regard to corporations, the cash funds must, similar to Swiss law, be deposited with a bank and this deposit is to be confirmed by a certifying officer.⁷² Interestingly, the plc (SA) and the plc (SAS) are also permitted to make a deposit with the certifying officer.⁷³



Pursuant to the AUSCGIE, a contribution in cash may also be effected by setting the outstanding amount off against a cash claim against the commercial company. Such payment by set-off is also permitted within the scope of a capital increase.⁷⁴

V.3.2. Contribution in kind

Contributions in kind may comprise ownership rights as well as rights of use.⁷⁵ Full payment is effected if the respective right of the commercial company has been transferred and the physical object underlying such right has been made available to the commercial company.⁷⁶ Corporations are subject to more extensive protective rules: among other things, the object that is to be contributed must be evaluated. The object as well as its value are (analogously to Swiss law)⁷⁷ to be disclosed in the articles of association.⁷⁸ In the case of the Ltd. (SARL), the evaluation must be reviewed by an independent auditor (*commissaire aux apports*) if the value of the object as stated in the articles of association exceeds CFA 5,000,000 (corresponding to approx. CHF 7,750).⁷⁹ In case of the plc (SA) and the plc (SAS), however, the evaluation must always be reviewed by an independent auditor.⁸⁰

V.3.3. Contribution as supply of labour

Payment as supply of labour occurs by actually rendering services to the commercial company.⁸¹ The owed services and the modalities of rendering them as well the company shares given in return are to be disclosed in the articles of association.⁸²

Company shares allocated to labour do not have a nominal value and thus do not reflect the registered capital.⁸³ Nevertheless, these company shares confer membership rights and financial rights. However, they may not entitle to more than 25% of the voting rights and 25% of the financial rights of the commercial company.⁸⁴

VI. Rights and Obligations of Partners

The **rights** of the partners are both of a **financial nature** (right to profits, dividends, liquidation proceeds) and of a **non-financial nature** (participation, control and protection rights). The rights of the partners are generally the same for partnerships and corporations.

The differences are to be found among the **obligations** of the partners. Whereas with regard to partnerships the focus is on the personality of the partners (i.e. particularly their personal capability and creditability), for corporations the capital contributions of the partners are more important.⁸⁵ Accordingly, in partnerships the obligations of the partners are more of a personal nature, whereas in corporations they are more capital-related. This is evident from the fact that the partners of a partnership have to act as managers if the articles of association do not provide otherwise.⁸⁶ Also, except for the sleeping partners of sleeping partnerships (SCS), the partners of partnerships are liable for the debts of the company.⁸⁷ Sleeping partners and members of corporations, however, are only liable up to the limit of their contribution.⁸⁸

⁷¹ Art. 41 para. 2 AUSCGIE; Art. 42 AUSCGIE.

⁷² Art. 313 AUSCGIE; cf. Art. 633 CO (AG) and Art. 633 in conjunction with Art. 777c para. 2 CO (Swiss GmbH).

⁷³ Art. 393 para. 1 AUSCGIE; Art. 394 AUSCGIE.

⁷⁴ Art. 44 AUSCGIE; different in Swiss company law, where a set-off is possible and permitted even upon formation, cf. Art. 635 sec. 2 CO.

⁷⁵ Arts. 46 et seq. AUSCGIE.

⁷⁶ Art. 45 AUSCGIE.

⁷⁷ Art. 628 para. 1 CO.

⁷⁸ Art. 312 para. 1 AUSCGIE; Art. 400 para. 1 AUSCGIE; Art. 400 para. 1 in conjunction with Art. 853-3 AUSCGIE.

⁷⁹ Art. 312 para. 2 AUSCGIE.

⁸⁰ Art. 400 para. 2 AUSCGIE; Art. 400 para. 2 in conjunction with Art. 853-3 AUSCGIE.

⁸¹ Art. 50-1 AUSCGIE.

⁸² Art. 50-2 para. 2 AUSCGIE.

⁸³ Arts. 50-3 et seq. AUSCGIE.

⁸⁴ Art. 50-3 paras. 2 und 3 AUSCGIE.

⁸⁵ POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, p. 509.

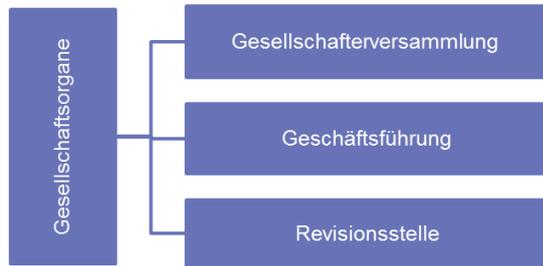
⁸⁶ Art. 276 para. 4 AUSCGIE; Art. 298 AUSCGIE

⁸⁷ Cf. above III.2.

⁸⁸ Cf. above III.2.

VII. Bodies of the company

As under Swiss law, there are in principle three bodies of the company:



VII.1. General Meeting

The general meeting (*assemblée générale*) is the meeting of the partners. The partners exercise their corporate right of participation at the ordinary or extraordinary general meeting.⁸⁹ Given that the general meeting is the forum for the exercise of this right, each partner is entitled to attend.⁹⁰

The voting rights of the partners are generally determined based on their equity stake. The quorum required is defined in the articles of association,⁹¹ unless the AUSCGIE provides for a mandatory quorum.⁹² To the extent that the partners or their representatives are present, joint decisions are taken at the general meeting (*en assemblée générale*) or by correspondence (*par consultation écrite*).⁹³ If the partners are not physically present, votes are held by telephone conference, video conference or by other audio-visual means of communication (*visioconférence et autres moyens de télécommunication permettant leur identification*).⁹⁴ Moreover, resolutions may also be passed by correspondence (*vote par correspondance*) without a meeting.⁹⁵

⁸⁹ Art. 132 AUSCGIE.

⁹⁰ Art. 125 AUSCGIE; cf. on proxy voting Art. 126 AUSCGIE; on voting rights of usufruct owners and co-owners Arts. 127 et seq. AUSCGIE.

⁹¹ Thus explicitly for private companies (SNC) and sleeping partnerships (SCS) Arts. 285 and Art. 302 AUSCGIE.

⁹² e.g. Art. 349 AUSCGIE, Art. 405 para. 2 AUSCGIE and Art. 554 para. 1 AUSCGIE.

⁹³ Art. 133 AUSCGIE.

⁹⁴ Art. 133-2 AUSCGIE.

⁹⁵ Art. 133-1 AUSCGIE.

VII.2. Management

The managing partners (*dirigeants sociaux*) form the supreme executive body of the company.⁹⁶ They may on behalf of the company perform all legal acts associated with the object of the company.⁹⁷ This power may be restricted by provisions in the articles of association to that effect (e.g. requirement of approval of the general meeting for certain transactions).⁹⁸ However, such restrictions do not affect third parties acting in good faith.⁹⁹ Moreover, the company is bound vis-à-vis third parties who act in good faith by actions of the managing partners that are unrelated to the object of the company.¹⁰⁰

As Swiss law, the AUSCGIE thus implicitly differentiates between **powers of representation**, on the one hand, i.e. the authorization of the managing partners within the company to act, and the **actual authority**, on the other hand, i.e. the ability to perform acts committing the company. The powers of representation relate to the level of "being allowed to", whereas the actual authority relates to the level of "being able to". For a third party acting in good faith, only the actual authority determines whether the company was legally bound or not.¹⁰¹

VII.2.1. Composition

In principle, each company must have at least one manager.¹⁰² The management is appointed by the general meeting and the managers may be named in the articles of association.¹⁰³

Partnerships may appoint natural persons or legal entities as members of the management.¹⁰⁴ In the absence a resolution or a provision in the articles of association to that effect, all partners of partnerships and the active partners of sleeping partnerships (SCS) are deemed to be managers.¹⁰⁵ Only the active partners of sleeping partnerships (SCS)

⁹⁶ Art. 121 AUSCGIE.

⁹⁷ Cf. POUYOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, p. 423.

⁹⁸ Art. 123 AUSCGIE; MARTOR/PILKINGTON/SELLERS/ THOUVENOT, p. 94.

⁹⁹ Art. 121 AUSCGIE.

¹⁰⁰ Art. 122 AUSCGIE.

¹⁰¹ Art. 121 AUSCGIE.

¹⁰² Art. 276 para. 2 AUSCGIE; Art. 298 AUSCGIE; Art. 323 AUSCGIE; Art. 419 AUSCGIE; Art. 495 AUSCGIE; Art. 853-8 AUSCGIE.

¹⁰³ Art. 276 para. 2 AUSCGIE; Art. 298 AUSCGIE; Art. 323 AUSCGIE; Art. 419 AUSCGIE; Art. 495 AUSCGIE.

¹⁰⁴ Art. 276 para. 2 AUSCGIE; Art. 298 AUSCGIE.

¹⁰⁵ Art. 276 para. 4 AUSCGIE; Art. 298 AUSCGIE.

can be appointed as managers.¹⁰⁶ Sleeping partners are not entitled to act as managers.¹⁰⁷

However, certain restrictions apply to **corporations** with regard to the above basic rules. For example, only natural persons can act as managers of an Ltd. (SARL).¹⁰⁸ In contrast, legal entities may also be entrusted with the management of a plc (SA) if the company does not have more than three shareholders.¹⁰⁹ Otherwise, it is mandatory for the management to be entrusted to a board of directors consisting of at least three and not more than twelve members.¹¹⁰ Based on the management structure that must be defined in the articles of association, the AUSCGIE distinguishes between a plc (SA) with a board of directors (*la société anonyme avec conseil d'administration*)¹¹¹ and a plc (SA) with a managing director (*la société anonyme avec administrateur général*).¹¹² These rules do, however, not apply to the plc (SAS),¹¹³ where the organization of the management may be freely determined in the articles of association.¹¹⁴

VII.2.2. Term of office

Partnerships and the Ltd. (SARL) are free to determine the term of office of the managers. In the case of the Ltd. (SARL), managers are appointed for a term of four years if the articles of association do not provide otherwise.¹¹⁵ Re-election is possible.¹¹⁶



The plc (SA) and the plc (SAS) distinguish between original members of the board of directors or members that are named in the articles of association, on the one hand, and members who are after the formation of the company elected by the ordinary general meeting, on the other hand. The original members and the members named in the articles of association may be appointed for a term of maxi-

mum two years. Any subsequent members or members not named in the articles of association may be appointed for a term not exceeding six years.¹¹⁷ Re-election is possible in both cases.¹¹⁸

VII.2.3. Remuneration

The remuneration for the management is determined by the general meeting, both in the case of partnerships and of corporations.¹¹⁹ In the event of the plc (SA), however, the board of directors determines how to allocate the total remuneration resolved by the general meeting to the different members.¹²⁰

VII.2.4. Removal and withdrawal

In partnerships only the removal of managers is regulated but not their withdrawal. According to doctrine and case law, however, the provisions governing the removal of managers may largely be applied analogously to their withdrawal.¹²¹ Both the removal and withdrawal of a manager may occur at any time. The general meeting is responsible for removal.¹²² However, the removal of a partner from the management results in the dissolution of the company, unless the articles of association provide otherwise or the general meeting unanimously resolves otherwise.¹²³ Removal without good cause may result in damage claims.¹²⁴

In corporations, the general meeting may also at any time remove members of the management.¹²⁵ Each partner of an Ltd. (SARL) may, moreover, petition the court to remove a manager for good cause.¹²⁶ As with partnerships, the unjustified removal of a manager may with regard to an Ltd. (SARL) or a plc (SA) with a managing director (*la société anonyme avec administrateur général*), but not a plc (SA) with a board of directors (*la société*

¹⁰⁶ Art. 298 AUSCGIE.

¹⁰⁷ Art. 299 AUSCGIE; in case of violations, the managing sleeping partner is subject to the same unlimited joint and several liability as an active partner, cf. Art. 300 AUSCGIE; also under Swiss law, cf. Art. 603 CO.

¹⁰⁸ Art. 323 AUSCGIE.

¹⁰⁹ Arts. 424 and 494 AUSCGIE.

¹¹⁰ Art. 416 AUSCGIE.

¹¹¹ Arts. 415 et seqq. AUSCGIE.

¹¹² Arts. 414 and 494 et seqq. AUSCGIE.

¹¹³ Art. 853-3 AUSCGIE.

¹¹⁴ Art. 853-7 et seqq. AUSCGIE.

¹¹⁵ Art. 324 AUSCGIE.

¹¹⁶ Art. 324 AUSCGIE.

¹¹⁷ Art. 420 AUSCGIE; Art. 496 AUSCGIE.

¹¹⁸ Art. 424 para. 2 AUSCGIE; Art. 496 AUSCGIE.

¹¹⁹ Art. 278 AUSCGIE; Art. 325 AUSCGIE; Art. 431 para. 1 AUSCGIE; Art. 501 AUSCGIE.

¹²⁰ Art. 431 para. 2 AUSCGIE.

¹²¹ With references to case law LEFEBVRE, Commentary on Art. 282, p. 1075.

¹²² Art. 279 AUSCGIE.

¹²³ Art. 279 para. 2 AUSCGIE

¹²⁴ Art. 281 AUSCGIE. A provision in the articles of association according to which a removed manager is even entitled to damages if removed for good cause is permitted to the extent that the respective amount does not keep the partners from exercising their right to remove a manager, LEFEBVRE, Commentary on Art. 279, p. 1074.

¹²⁵ Art. 326 AUSCGIE; Art. 433 para. 2 AUSCGIE; Art. 509 para. 1 AUSCGIE.

¹²⁶ Art. 326 para. 3 AUSCGIE.

anonyme avec conseil d'administration) result in damage claims.¹²⁷

As regards corporations, the AUSCGIE only contains explicit provisions on withdrawal (*démission*) for the Ltd. (SARL): it is at all times possible to withdraw, but a withdrawal without good cause may result in damage claims.¹²⁸ Members of the board of directors of the plc (SA) and the plc (SAS) are, however, also entitled to withdraw.¹²⁹

VII.3. Auditor



The auditor (*commissaire aux comptes*) as the third body of the company is provided for in the AUSCGIE for all

commercial companies with the exception of the joint venture (SP). The auditor must be independent and is in all commercial companies elected by the general meeting.¹³⁰ It is mandatory for the plc (SA) to appoint an auditor.¹³¹ All other legal forms are free to choose an auditor, unless the company has in two consecutive business years reached or exceeded two of the following:¹³²

- balance sheet total of CFA 125,000,000 (corresponding to approx. CHF 193,750);
- turnover of CFA 250,000,000 (corresponding to approx. CHF 387,500);
- annual average of at least 50 or more full-time employees.

Even if these thresholds are not reached, the plc (SAS) has to nominate an auditor if it controls a commercial company that reaches or exceeds two of the above thresholds in two consecutive years.¹³³

¹²⁷ Art. 326 para. 2 AUSCGIE; Art. 509 para. 2 AUSCGIE.

¹²⁸ Art. 327 AUSCGIE.

¹²⁹ Art. 124 mentions "*cessation des fonctions*" of members of the management, which, in the opinion of the authors, also includes the withdrawal of members of the management.

¹³⁰ Art. 289-1 in conjunction with Art. 378 AUSCGIE; Art. 289-1 in conjunction with Art. 378 in conjunction with Art 293-1 AUSCGIE; Art. 378 AUSCGIE; Art. 376 AUSCGIE; Art. 697 AUSCGIE; 703 AUSCGIE; Art. 853-13 AUSCGIE. Art. 694 AUSCGIE.

¹³¹ Art. 289-1 AUSCGIE; Art. 289-1 AUSCGIE in conjunction with Art. 293-1 AUSCGIE; Art. 376 AUSCGIE; Art. 853-13 AUSCGIE.

¹³² Art. 853-13 para. 5 AUSCGIE.

The term of office of the auditor of the Ltd. (SARL) is three years.¹³⁴ The term of office of the originally appointed auditor and the auditor named in the articles of association of the plc (SA) and the plc (SAS) is two years.¹³⁵ Any subsequent auditor or auditor not provided for in the articles of association can, however, be appointed for a term of six years.¹³⁶

VIII. Responsibilities

The responsibilities are not regulated in one chapter of the AUSCGIE but in a number of places. The most important types of actions based on liability of the AUSCGIE are discussed below.

VIII.1. Founders' Liability

The founders' liability is provided for in the general provisions of the AUSCGIE and applies to all commercial companies.¹³⁷ Any interested party may petition the court to order the proper formation of the company if mandatory provisions are missing in



Founders and members of the management are jointly and severally liable for defective formation.

the articles of association or if a formality for the formation of the company prescribed by law is not fulfilled.¹³⁸ The founders and the members of the management are jointly and severally liable for such **defective formation**.¹³⁹ However, unlike the term suggests, the provisions regarding founders' liability apply to subsequent amendments of the articles of association as well.¹⁴⁰



The time limit both for claims for proper formation of the company and for claims based on liability expires three years after registration of the formation or publication of the amendment of the articles of association.¹⁴¹

¹³⁴ Art. 379 AUSCGIE.

¹³⁵ Art. 704 para. 1 AUSCGIE.

¹³⁶ Art. 704 para. 2 AUSCGIE.

¹³⁷ Cf. Art. 75 et seqq. AUSCGIE.

¹³⁸ Art. 75 AUSCGIE.

¹³⁹ Art. 78 AUSCGIE.

¹⁴⁰ Art. 76 AUSCGIE.

¹⁴¹ Art. 77 AUSCGIE; Art. 80 AUSCGIE.

VIII.2. Liability of Majority or Minority Partners for Abusing their Position

Remarkably, the AUSCGIE also provides for liability claims against partners who abuse their majority or minority rights. This type of liability is included in the general provisions of the AUSCGIE as well and applies to all commercial companies.¹⁴²

The **liability of the majority partners** is invoked when they pass resolutions exclusively in their own interest, i.e. in contradiction to the interests of the minority partners and without justification of the company's interests. An example given in literature is the systematic allocation of profits to the reserves of the company.¹⁴³

The **liability of the minority partners**, on the other hand, is invoked when the latter prevent resolutions from being passed that are in the company's interest, provided that the company suffers damages as a result. The prime example is the prevention of a capital increase that could save the company from having to declare bankruptcy.¹⁴⁴

VIII.3. Directors' and Officers' Liability

The executive bodies of the company are liable for damages they cause by culpable breach of duty.¹⁴⁵ There are two different categories of actions: **individual actions** (*action individuelle*)¹⁴⁶ and **actions in the interest of the company** (*action sociale*)¹⁴⁷. Both types of action apply to all commercial companies, although, depending on the legal form, there may be certain differences.¹⁴⁸

VIII.3.1. Individual actions

By bringing an individual action, third parties as well as injured partners may sue members of the management for any damage **caused by the latter in breach of their duties**. There must be a causal connection between the **breach of duty** and the damage.¹⁴⁹

¹⁴² Arts. 130 et seq. AUSCGIE.

¹⁴³ POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 130, p. 426.

¹⁴⁴ POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 131, p. 427.

¹⁴⁵ Arts. 161 et seqq. AUSCGIE.

¹⁴⁶ Arts. 161 et seqq. AUSCGIE.

¹⁴⁷ Arts. 165 et seqq. AUSCGIE.

¹⁴⁸ Cf. for Ltd. (SARL) Arts. 330 et seqq. AUSCGIE and for plc (SA) Arts. 740 et seqq. AUSCGIE.

¹⁴⁹ Art. 162 AUSCGIE.

It should, however, be noted that in legal terms the partners are not suffering an actual damage (but only an **indirect damage** not eligible for compensation) if the value of their company shares decreases due to a **direct damage** suffered by the company.¹⁵⁰ In such case, the focus is rather on an action in the interest of the company (cf. below VIII.3.2).¹⁵¹

If several members of the management are liable to compensate a damage, they are in external relationships **jointly and severally** liable. Internally, each member is liable for the part of the damage that they caused themselves.¹⁵²

The time limit for individual actions expires three years after the occurrence of the incident causing the damage or, in the event of cover-up, after the discovery of the offense causing liability.¹⁵³ However, if the incident causing the damage is based on a criminal offence, the time limit only expires after ten years.¹⁵⁴

VIII.3.2. Actions in the interest of the company

Actions in the interest of the company also target the members of the management. They are, however, for compensation in respect of the direct damage suffered by the company to be paid to the company (and not to partners or third parties, as is the case with individual actions).¹⁵⁵

With regard to actions in the interest of the company, the members of the management that are not liable are the proper party that have standing to sue.¹⁵⁶ If they fail to raise a claim on their own initiative, one or several partners may alternatively request that such a claim be raised and after the expiration of a reminder period of 30 days, they may themselves raise a claim on behalf and for the account of the company.¹⁵⁷

¹⁵⁰ Art. 162 AUSCGIE; the same rule applies under Swiss law, cf. BGE 131 III 310.

¹⁵¹ Art. 163 AUSCGIE; Art. 170 AUSCGIE.

¹⁵² Art. 161 para. 1 AUSCGIE.

¹⁵³ Art. 164 para. 2 AUSCGIE; in practice it is disputed which actions fulfil the element of "cover-up", cf. POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 172, p. 438.

¹⁵⁴ Art. 164 AUSCGIE.

¹⁵⁵ Art. 165 para. 1 AUSCGIE.

¹⁵⁶ Art. 166 para. 2 AUSCGIE; actions in the interest of the company brought by members of the management that are not liable are called action *ut universi*, POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 166, p. 438.

¹⁵⁷ Art. 167 AUSCGIE; actions in the interest of the company brought by partners are called action *ut singuli*, POUGOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 167, p. 438; without reminder to the management, the

Moreover, actions in the interest of the company are generally subject to the same provisions as individual actions, in particular with regard to liability requirements and statute of limitation.¹⁵⁸ It is remarkable that the parallel liability of several members of the management to the company is governed by national law – the AUSCGIE, at any rate, does not provide for any joint and several liability.¹⁵⁹

court will dismiss an action *ut singuli*, POUYOUÉ/NGUEBOU-TOUKAM/ANOUKAHA, Commentary on Art. 167, p. 439 and Cour d'Appel de Ouagadougou, Decision No. 40 of 2 May 2003, ohada.com/jurisprudence.html J-04-365 (last visited on 5 November 2015); cf. with regard to special requirements for actions *ut singuli* of the Ltd. (SARL) Art. 331 para. 1 AUSCGIE and of the plc (SA) Art. 741 para. 2 AUSCGIE.

¹⁵⁸ Cf. above VIII.3.1 and Art. 166 AUSCGIE; 170 AUSCGIE.

¹⁵⁹ Art. 165 para. 2 AUSCGIE.

Arbitration in the OHADA States

Dr. iur. Anne-Catherine Hahn, LL.M.



I. Arbitration in the OHADA States

Commercial transactions do not always run smoothly. This is especially true for projects in emerging markets: poor infrastructure alone may delay things in a way foreign parties often do not anticipate; linguistic and cultural differences may lead to misunderstandings, and the regulatory environment often is unpredictable.

In view of such complications, it is crucial to know how potential disputes relating to projects in emerging countries, such as the OHADA countries, may be solved. Due to the political and economic instability in many of the OHADA states, proceedings before local courts are usually not a viable option; rather, it is recommended to use **international arbitral tribunals to solve disputes**.

Traditionally, arbitration did not have a strong foothold in Africa. The OHADA's explicit recognition of arbitration as an accepted means for dispute resolution and its harmonization of the framework for arbitration proceedings in accordance with international standards thus mark an important development, which can only be welcomed.

Concretely, different levels of regulation have to be distinguished in this regard:

- Within the framework of its legislative authority, OHADA passed a harmonized arbitration law, the *Acte uniforme relatif au droit de l'arbitrage* of 11 March 1999 ("AUA"). This harmonized law creates the legal basis for arbitration proceedings in the individual OHADA states and represents the **lex arbitri of the OHADA states** (II). A uniform interpretation of these rules is ensured by the *Cour Commune de Justice et d'Arbitrage* (CCJA) in Abidjan (Ivory Coast) as final appellate body under the AUA.
- Concurrently, the CCJA is also an **arbitral institution**, which, like the International Chamber of Commerce (ICC) in Paris, supports parties in arbitration proceedings pursuant to its own arbitration rules (III).
- Finally, the recognition and enforcement of foreign arbitral awards in the OHADA zone is also addressed in the AUA as well as in international conventions (IV).

II. The Unified *lex arbitri* of the OHADA States

II.1. Applicability

The AUA constitutes the common *lex arbitri* of the OHADA zone and sets forth the legal framework for conducting arbitration proceedings in OHADA member states.

The AUA provisions apply to all arbitrations seated in an OHADA member state, regardless of whether the arbitral proceedings are international or domestic (cf. Art. 1 AUA). National arbitration laws are only applicable to the extent they do not conflict with the provisions of the AUA.¹

¹ It is, however, debatable how far reaching the priority of the OHADA rules are, respectively if and when gaps of the AUA may be filled by national law, cf. MEYER (2014), p. 183, with further references.

II.2. Conducting Arbitration Proceedings in the OHADA States

The provisions of the AUA largely follow the UNCITRAL Model Law, especially with respect to the liberal form requirements for arbitration clauses (Art. 3 AUA), the severability of the arbitration clause from the rest of the contract (Art. 4 AUA), the concept of competence-competence (Art. 11 AUA), and also with respect to the power of the arbitral tribunal to autonomously determine the procedural rules, subject to the equal treatment of the parties and their right to be heard (Arts. 9 and 14 AUA).

All these provisions intend to **strengthen the position of the arbitral tribunal** and limit the involvement of national courts as far as possible. In view of the fact that arbitral proceedings have, in many African jurisdictions, traditionally been subject to similarly broad appellate reviews as national court proceedings, this is a remarkable development.²

Pursuant to the **principle of competence-competence**, national courts, pursuant to Art. 11 AUA, must let arbitral tribunals rule on their own jurisdiction: if a claim, which is the subject of an arbitration clause, is made pending in a national court, that court has to decline jurisdiction in accordance with Art. 13 para. 2 AUA, unless the arbitration clause is evidently void. Unfortunately, national case law on the handling of such jurisdictional conflicts remains scarce and rather disparate in spite of the efforts of the Common Court of Justice and Arbitration to harmonize approaches across member states.

Unlike most other modern arbitration laws, the AUA sets in Art. 12 a **time limit to the mandate of the arbitrators**: unless otherwise agreed in the arbitration clause, the arbitrators must render their award within six months after taking on the mandate. This deadline may be extended with the parties' consent or by order of the competent *juge d'appui* in the relevant OHADA member state. However, if the deadline is not extended, the jurisdiction of the arbitral tribunal expires auto-

“
The arbitrators must render their award within six months after taking on the mandate.
”

² Cf. MEYER (2010), pp. 467 et seq.

matically, with the consequence that an award rendered after this date will be null and void. Considering that very few proceedings can be completed in six months, and that respondents typically have multiple possibilities to delay matters, this ambitious time limit constitutes a significant risk in practice.

II.3. Court Review of Arbitral Awards

The requirements for the annulment of arbitral awards are defined in Arts. 25 and 26 AUA.

“
This in practice can mean that different standards are applied from country to country.
”

Applications for annulment are reviewed at first instance by the national courts at the seat of the arbitral tribunal. This in practice can mean that different standards are applied from country to country, especially with regard to the public policy annulment ground, for which no uniform practice has developed so far.³ In fact, published decisions seem to indicate that this annulment ground is often invoked in situations which, from a European perspective, would not reach the public policy threshold, as they concern the appraisal of facts,⁴ which should in principle not be reviewed on appeal according to modern arbitration practice.

According to Art. 26 AUA, arbitral awards may also be annulled if they were rendered without reasoning. Some courts have used this provision to review the substance of arbitral awards, which again seems difficult to reconcile with the prohibition of a "*révision au fond*" prescribed by modern arbitration laws. It must, however, also be pointed out that decisions by national courts in annulment proceedings may still be challenged before the Common Court of Justice and Arbitration, which has in many cases adopted an arbitration-friendly stance and which tends to interpret annulment grounds more narrowly than national courts.⁵

³ Cf. hereto MEYER (2014), pp. 175 et seq., with further references.

⁴ Cf. e.g. CCJA Decisions No. 028/2007 and 029/2007 of 19 July 2007, ohada.com/jurisprudence.html J-09-104 (last visited on 3 November 2015); see also MEYER (2014), pp. 176 et seq.; and generally KENFACK DOUJANI, pp. 3 et seq.

⁵ Cf. MEYER (2010), pp. 467 et seqq.

II.4. Recognition and Enforcement of Arbitral Awards in the OHADA States

Arts. 30 et seqq. AUA deal with the recognition and enforcement of awards rendered by arbitral tribunals in one OHADA state in another OHADA member state.

The enforcement requires an "exequatur declaration", which can be obtained from the courts at the seat of the arbitration. The only prerequisite is the presentation of the original arbitral award, together with the arbitration agreement, including a French translation. The exequatur declaration may only be denied if the enforcement of the award would clearly violate international public policy (Art. 31 para. 3 AUA). If the first instance court refuses to issue the exequatur declaration, an appeal may be filed with the CCJA (Art. 32 para. 1 AUA). However, it must also be pointed out that the procedure for obtaining the exequatur declaration continues to be governed by local laws, and that the same applies to the enforcement measures available at the place where assets may be located.

III. The CCJA's Arbitration Rules

III.1. Foreign Arbitral Institutions

As harmonized *lex arbitri*, the AUA defines the general legal framework for arbitration proceedings in the OHADA states. By contrast, it does not prescribe in detail the organisation of the arbitration proceedings, which is generally determined by the arbitral tribunal in collaboration with the parties (Art. 14 AUA).

Frequently, the rules of procedure are defined by reference to a set of **institutional arbitration rules** which the parties choose already when agreeing on the arbitration clause. Alternatively, the procedural rules may be defined ad hoc; however, this option is generally not recommended as there are significantly greater risks of uncertainty and delay if no institution is involved for the oversight of the proceedings.

Choosing institutional arbitration rules, such as the ICC Arbitration Rules or the Swiss Rules of International Arbitration, in fact means that an independent arbitral institution will oversee the formal aspects of the arbitration and in particular also assist with the constitution of the arbitral tribunal. In practice, disputes in connection with projects in the OHADA states are often resolved in accordance with the

ICC Arbitration Rules.⁶ As an alternative, the OHADA member states have adopted their own institutional rules, which are presented hereafter.

III.2. Proceedings under the Auspices of the CCJA



With the **Règlement d'arbitrage de la Cour Commune de Justice et d'Arbitrage de l'OHADA** ("CCJA Arbitration Rules"), the OHADA has adopted its own institutional arbitra-

tion rules. Under these Rules, the Common Court of Justice and Arbitration fulfils the function of an arbitral institution akin to the International Chamber of Commerce, and supports parties in conducting arbitral proceedings in the OHADA zone.

The CCJA Arbitration Rules apply only **based on an agreement** by the parties, either because the underlying contract contains an arbitration clause in this sense, or because the parties agree on a CCJA arbitration after the dispute has arisen. The possibility to conduct proceedings under the CCJA Arbitration Rules is, however, limited to situations in which at least one of the parties has its domicile or ordinary residence in an OHADA member state, or in which the project's place of performance is located in an OHADA member state (cf. Art. 2 para. 1 CCJA Arbitration Rules).

The CCJA Arbitration Rules differ from other institutional rules in another important aspect: they not only regulate the proceedings as such but also contain the **legal framework** for the arbitration, in particular regarding enforcement. Where arbitration proceedings are conducted under the auspices of the CCJA, the AUA is, therefore, generally not applicable.⁷

⁶ According to the ICC statistics for 2013, 8.2% of all new cases included African parties, cf. 2013 Statistical Report, in: ICC International Court of Arbitration Bulletin Vol. 25, No. 1, pp. 5 et seqq. The participation of African parties has also increased in arbitration proceedings under the auspices of the London Court of International Arbitration (LCIA): 4.8% in 2013, compared to 3.5% in 2012, cf. Registrar's report 2013, available at: <http://www.lcia.org/LCIA/reports.aspx> (last visited on 3 November 2015).

⁷ Cf. CCJA Decision No. 45 of 17 July 2008, ohada.com/jurisprudence.html J-09-83 (last visited on 3 November 2015).

This in particular means that the grounds for annulment of an arbitral award as well as the conditions for enforcement in other OHADA member states are directly regulated by the CCJA Arbitration Rules (Article 29-33), and not by the AUA. The CCJA, i.e. the same body, which acts as the arbitral institution under the CCJA Arbitration Rules, then has jurisdiction over setting aside **applications**, as well as for the **granting of exequatur declarations**. This concentration of competencies within the CCJA is certainly useful for the creation of precedents and the building up of know-how on arbitration-related matters; however, the double role which the CCJA plays in relation to proceedings under the CCJA Arbitration Rules also means that such proceedings may be distinctly different from what foreign parties may be used to based on experiences made with other institutional rules.

This having been said, the choice of the CCJA Arbitration Rules may be attractive if it is expected that the resulting award may have to be enforced in another OHADA member state. Awards rendered under the CCJA Arbitration Rules have also been enforced in third countries, where they are treated as international arbitral awards and enforced according to the treaties or domestic rules applicable at the place of enforcement.⁸

IV. Recognition and Enforcement of Foreign Arbitral Awards

IV.1. Choice of the Seat of Arbitration Outside the OHADA States

Thanks to the adoption of a modern *lex arbitri* based on the UNCITRAL Model Law and of the CCJA Arbitration Rules, the conditions for conducting arbitral proceedings in OHADA states have clearly improved. Nevertheless, for international



projects involving foreign parties, **proceedings in established arbitration jurisdictions** outside the OHADA states, like Zurich, Geneva, Paris or London, will generally still be the first choice. The choice of such places of arbitration in fact has the benefit that the legal framework has been clarified thanks to a long-standing practice, that both the local courts and the local lawyers are familiar with such proceedings, and that the courts exercise restraint in reviewing arbitral awards.

IV.2. Applicable Law or Treaties

The recognition and enforcement of foreign arbitral awards in the OHADA states is, on the one hand, based on **Art. 34 AUA** and, on the other hand, on the **1985 Convention on the Recognition and Enforcement of Foreign Arbitral Awards** ("New York Convention" or "NY Convention").

Member States of the New York Convention:

- ❖ Benin
- ❖ Burkina Faso
- ❖ Gabon
- ❖ Central African Republic
- ❖ Guinea
- ❖ Ivory Coast
- ❖ Mali
- ❖ Cameroon
- ❖ Niger
- ❖ Senegal
- ❖ Democratic Republic of the Congo

Art. 34 AUA stipulates that foreign arbitral awards may, in principle, be enforced according to the same rules as awards from OHADA states. This means that recognition and enforcement in the OHADA states may in principle only be denied if there is an public policy violation (Art. 31 para. 3 AUA). The formal requirements for enforcement are fulfilled if the application is accompanied by the original arbitral award and the arbitration agreement in French (Art. 31 paras. 1 and 2 AUA).

⁸ Cf. from a French perspective Cour d'appel de Paris, 1re Ch. C., dated 31 January 2008, *Revue trimestrielle de droit et de jurisprudence des affaires*, 2009, p. 101, with notes by MOTTE-SURANITI.

It is, however, unclear if this provision is applicable if the arbitral award to be enforced originates from a member state of the NY Convention. The NY Convention, which is now applicable in over 150 jurisdictions, is generally understood to only establish a minimum standard: more favourable international treaties are explicitly reserved in Art. 7(1) NY Convention. Therefore, the majority of commentators assume that a party wishing to enforce an arbitral award in an OHADA member state, which is simultaneously also a contracting party to the NY Convention, may alternatively rely on the NY Convention or Article 31 AUA. There is, however, no established practice on this issue.⁹

IV.3. Practical Aspects Regarding Enforcement of Foreign Arbitral Awards

Generally it is to be noted that enforcement of foreign arbitral awards in OHADA states may, in spite of the favourable legal framework, bear substantial practical difficulties.

Particularly illustrative in this regard is the case of the Democratic Republic of the Congo, which in 2013 ratified the NY Convention as 150th contractual party, but which in a number of ongoing matters continues to oppose the enforcement of foreign arbitral awards rendered against the state. The DRC also made a reservation for disputes regarding mining rights and claims in connection with immovable assets, and generally requires reciprocity for enforcement. As this example shows, there are still challenges to the enforcement of arbitral awards in the OHADA zone, in spite of the advancements made under OHADA.

V. Conclusion: Arbitration with Parties from OHADA States

The AUA and the CCJA Arbitration Rules came into force in 1999. Since then, acceptance of arbitration in the French-speaking African nations has substantially increased due to OHADA's efforts. The CCJA supports this development through its arbitration-friendly jurisprudence, in particular when reviewing arbitral awards. Until 2010, 37 arbitration proceedings were conducted under the CCJA Arbitration Rules according to a statistic kept by the CCJA.¹⁰

Consolidated numbers regarding the recognition and enforcement of foreign arbitral awards in the OHADA states are not available.

At the same time it cannot be denied that the legal framework, consisting, on the one hand, of the AUA and additionally applicable national laws of the individual OHADA member states and, on the other hand, of the CCJA Arbitration Rules, continues to be **complex**.

It is in particular noteworthy that the CCJA Arbitration Rules do not only contain procedural rules but also regulations on annulment and enforcement of arbitral awards, which are rendered under the auspices of the CCJA. This framework differs in various points from the AUA, which applies to arbitration proceedings conducted according to other institutional rules or as an ad hoc proceeding. Additionally, national courts in the OHADA states are, unlike the CCJA, often sceptical of arbitration. Consequently, the risk of complications is still higher than with respect to arbitration proceedings conducted in an established European arbitration jurisdiction.

In view of the resulting uncertainties, foreign investors are generally still well advised to refer potential disputes with partners from the OHADA states to arbitral tribunals in Europe, i.e. in Zurich, Geneva, Paris or London. In drafting relevant arbitration clauses, attention should be paid to defining the applicable law and, where state-owned players are involved, obtaining a waiver of potential immunity from execution. In any event, the setting-up of an appropriate dispute resolution mechanism should be part of the structuring of the overall project.

⁹ Cf. hereto Decision No. 1157 of the Cour d'appel of Abidjan of 19 November 2002, ohada.com/jurisprudence.html J-03-300 (last visited on 3 November 2015), according to which the rules of the AUA are not applicable to the enforcement of a Swiss arbitral award.

¹⁰ Cf. LENDONGO.

Execution and Enforcement of Claims



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I. Overview

Whilst the laws on civil procedure in the OHADA member states continue to be governed by national laws, the OHADA adopted in 1998 a Unified Act on the simplified procedure for the execution and enforcement of claims ("*Acte uniforme portant sur l'organisation des procédures simplifiées de recouvrement et des voies d'exécution*", AUPSRVE). This Act has introduced a common procedure for obtaining enforcement orders for uncontested claims and harmonised the principles of enforcement law.

The interplay between the harmonised enforcement law and national civil procedure rules remains complex, not least due to the fact that the organisation and functioning of the judiciary is also regulated locally. In addition, proceedings at local level can be rather slow and lengthy. For this reason, the Permanent Secretariat has undertaken to reform the existing Unified Act in order to simplify the enforcement and execution of claims, namely with a view to facilitating the granting of credits.¹

II. Simplified Procedure for the Execution of Claims

II.1. Payment Orders

Uncontested monetary claims can be enforced through a payment order system.² This procedure is available for uncontested, quantifiable monetary claims that have become due (Art. 1 AUPSRVE). The creditor has to file a petition for a payment order with the competent court (Art. 5 AUPSRVE). If the petition is rejected by the court, the creditor has to initiate an ordinary procedure to enforce his claim. However, if a payment order is issued, the debtor has the possibility to file an opposition within 15 days (Art. 10 AUPSRVE). If the debtor remains passive, the claim becomes enforceable.

If the debtor files an opposition, the court carries out a conciliation procedure (Art. 12 AUPSRVE). Since the Uniform Act provides no deadline for the conciliation procedure, it might in such a case take considerable time until a payment order is in fact issued.³

If a settlement is reached as a result of the conciliation, the settlement agreement contains an enforcement clause. By contrast, if no settlement can be reached, the competent court decides on the

¹ Cf. SAMB.

² ASSI-ESSO/DIOUF, p. 12.

³ MARTOR/PILKINGTON/SELLERS/THOUVENOT (2009), pp. 253 et seq.

payment obligation. The creditor bears the burden of proof (Art. 13 AUPSRVE). The decision of the court on the opposition can be contested within 30 days (Art. 15 AUPSRVE). If the debtor does not contest the claim or if the court confirms the claim after an unsuccessful conciliation procedure (Art. 16 AUPSRVE), an enforceable payment order will be issued.

II.2. Simplified Procedure for Restitution of Movable Goods

The simplified procedure for restitution of movable goods constitutes an innovation of the AUPSRVE and was not commonly known in the member states of the OHADA before.⁴ The procedure applies to movable goods but not to immovable properties and claims (Art. 19 AUPSRVE).

The procedure is very similar to the procedure for obtaining a payment order. The creditor has to file a petition for restitution of the relevant goods with the competent court. If the petition is rejected, the creditor can contest the rejection in an ordinary procedure (Art. 22 AUPSRVE). However, if the petition is upheld by the competent court, the court issues a decision, ordering the debtor to hand over the object. The debtor then has the possibility to file an opposition within 15 days to contest this order (Art. 26 in conjunction with Art. 10 AUPSRVE); otherwise, the decision becomes enforceable.

If the debtor files an opposition, the court first attempts a conciliation and, premised that the conciliation attempt remains unsuccessful, issues a decision subject to contestation within 30 days (Art. 26 in conjunction with Art. 15 AUPSRVE).

III. Enforcement Procedure

III.1. General Provisions

In situations where debtors do not fulfil their obligations voluntarily, creditors can be granted the right to enforce claims against the assets of such debtors.⁵

The commencement of execution proceedings requires an enforceable order (enforcement order).⁶ According to Art. 33 AUPSRVE, enforceable orders are decisions of national courts, provided that they contain an enforcement clause and are directly

enforceable. The enforceability is tied to the *res judicata* effects of the decision, which occur once the appeal or opposition period has expired. Judgments and arbitral awards of foreign courts are regarded as enforcement orders if a national court has declared them enforceable. Settlement agreements reached in court are enforceable if the judge and the parties have signed them. Moreover, notarial deeds are enforceable if they contain an enforcement clause. Equally enforceable are decisions of other authorities if they have, according to national laws, the same effect as judicial decisions.

“ To ensure an adequate protection of the debtor, AUPSRVE authorises the judge to grant the debtor a grace period of up to one year, despite the existence of an enforcement order. ”

To ensure an adequate protection of the debtor, the AUPSRVE authorises the judge to grant the debtor a grace period ("*délai de grâce*") (Art. 39 AUPSRVE) of up to one year, despite the existence of an enforcement order, so that the situation and needs of the debtor can be taken into consideration.⁷

III.2. Attachment of Movable Goods

The OHADA enforcement provisions are divided into prejudgment attachments ("*saisies conservatoires*") and executory attachments ("*saisies à des fins d'exécution*"). Prejudgment attachments constitute a preliminary measure, which aim at securing a claim through the seizure of assets. Upon application, the competent court issues an attachment order, provided that the claim seems justified and the petitioner proves that its performance is at risk (Art. 54 AUPSRVE). The attachment can cover both tangible and intangible assets.

Executory attachments, on the other hand, aim at forwarding the proceeds of the attachment of the debtor's assets to the creditor or at assigning claims of the debtor to the creditor.⁸ This can be achieved through the attachment and sale of assets ("*saisie-vente*", Art. 91 AUPSRVE), attachment and allocation of claims ("*saisie-attribution des créances*", Art. 153 AUPSRVE), attachment and assignment of claims for remuneration ("*saisie et cession des rémunérations*", Art. 173 AUPSRVE), or through the securing and seizure of movable goods ("*saisie-*

⁴ Assi-Esso/DIOUF, p. 23.

⁵ Assi-Esso/DIOUF, p. 48.

⁶ MARTOR/PILKINGTON/SELLERS/THOUVENOT (2002), p. 232.

⁷ POUYOUÉ (Ed.), p. 73 para. 200.

⁸ Assi-Esso/DIOUF, p. 71.

appréhension et saisie-revendication des biens meubles corporels", Art. 218 AUPSRVE).

III.3. Attachment of Immovable Goods

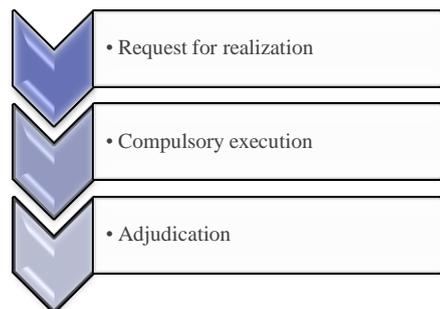
The attachment of immovable goods allows to enforce claims against real estate. To ensure an adequate protection of the debtor, strict formalities and deadlines are foreseen,⁹ which tend to render the procedure lengthy and complicated. The procedure is structured as follows:

In a first step, the power to dispose of the land is transferred to the court ("*mise de l'immeuble sous main de justice*"). A judicial officer ("*huissier*") or an execution agent ("*agent d'exécution*") issues an order for seizure (Art. 254 AUPSRVE), which requests the debtor to either fulfil his obligation to leave the land that is encumbered with a mortgage or to be subjected to expropriation proceedings (Art. 255 AUPSRVE).

The second step constitutes the realization of the land ("*réalisation de l'immeuble*"). The legal representative of the creditor has to issue a specification of the claim to the court, indicating in particular the following points (Art. 266 AUPSRVE):

- certificate title;
- references to the enforcement title, the order and, as the case may be, to court decisions;
- reference to the competent court or notary;
- information about the prosecuting creditor and his legal representative;
- description of the land;
- conditions of the sale;
- offering price (Art. 267 AUPSRVE).

The debtor and the registered creditors are required to take note of the specification (Art. 269 AUPSRVE). The subsequent adjudication ("*adjudication*") is divided into three steps:¹⁰



To launch the realization process, the creditor has to file a request (Art. 280 AUPSRVE). Thereafter, the compulsory execution can take place (Art. 282 AUPSRVE). After completion of the procedure, the competent court issues a decision on the adjudication.

IV. Conclusion

The modernisation of enforcement procedures in the OHADA member states has improved the conditions for creditors, who have to assess and manage the credit risks.¹¹ However, it must be noted that there are still substantial difficulties in the practical handling and application of the unified rules through local courts, for example because competencies are not clearly defined in the national laws or because the judicial proceedings are lengthy. These difficulties are of particular importance for the forced realization of real estate.¹²

Finally, it is important to mention the difficulties related to the execution of claims against state actors. In many cases, state actors will be protected by their immunity from execution, which can often render enforcement attempts illusory. In relation to states and state-controlled companies, it is hence strongly recommended to include an arbitration clause as well as a waiver of immunity in an agreement. Moreover, companies dealing with state actors should clarify as early as at the time of conclusion of the contract whether foreign assets may be available for execution in the event of a dispute.

⁹ Assi-Esso/DIOUF, p. 191.

¹⁰ Assi-Esso/DIOUF, p. 219.

¹¹ POUYOUÉ (Ed.), p. 395 para. 73.

¹² POUYOUÉ (Ed.), p. 395 para. 73; cf. SAMB.

Transportation of Goods under the Uniform Act on Contracts for the Carriage of Goods by Road

Dr. iur. Philippe Monnier



I. Introduction

The *Acte Uniforme relatif aux contrats de transport de marchandises par route* dated 22 March 2003 ("AUCTM") entered into force on 1 January 2004 and sets out general provisions regarding the contract of carriage of goods by road. The provisions of the AUCTM are considerably influenced by the Convention on the Contract for the International Carriage of Goods by Road dated 19 May 1956 ("CMR"), which has been taken up literally to the greatest possible extent in the AUCTM.¹

II. Subject Matter of the AUCTM

II.1. Material Scope

The AUCTM consists of seven chapters ("*chapitres*"), which contain provisions dealing with contracts for the carriage of goods by road. A contract for the carriage of goods by road is defined to encompass any contract with which an individual or legal entity – the carrier – is obliged against payment to transport goods by road and on vehicles from one place to another on behalf of the sender.²

In terms of their material scope, the provisions of the AUCTM regulate the scope of application and definitions (chapter 1, Arts. 1-2 AUCTM), the contract of carriage and the shipping documentation (chapter 2, Arts. 3-6 AUCTM), the execution of the contract of carriage (chapter 3, Arts. 7-15 AUCTM), the liability of the carrier (chapter 4, Arts. 16-23 AUCTM) as well as dispute resolution (chapter 5, Arts. 24-25 AUCTM). Finally, the AUCTM also sets out various provisions (chapter 6, Arts. 28-29 AUCTM) as well as transitional and final regulations (chapter 7, Arts. 30-31 AUCTM).

¹ Despite the similarities between the AUCTM and the CMR, certain material differences exist, in particular regarding the liability of the carrier for the damage of goods.

² Art. 2(b) AUCTM.

II.1. Territorial and Personal Scope

In terms of territorial and personal scope, the provisions of the AUCTM are applicable to contracts concerning the carriage of goods by road if the place of takeover and the place designated for delivery, as specified in the contract, are located either in an OHADA member state or in two different states of which at least one is a member state.³ This applies without regard to the domicile and the citizenship of the parties.⁴ In contrast to the CMR, the AUCTM does not require the existence of an international, meaning a cross-border, contract of carriage.⁵ A contract regarding the carriage of goods by road within an OHADA member state is, hence, subject to the provisions of AUCTM.⁶

II.2. Temporal Scope

The AUCTM is applicable to contracts of carriage that are entered into after the entry into force of the AUCTM on 1 January 2004. Contracts of carriage agreed upon before the entry into force of the AUCTM are subject to the applicable provisions at that time.⁷

III. Contract of Carriage and Carriage Documentation

The second chapter of the AUCTM contains general provisions on the contract of carriage and carriage documentation, in particular on the conclusion of an agreement,⁸ on the consignment note,⁹ on the evidential value of the consignment note¹⁰ and on the customs documents.¹¹ Under the general provisions of the AUCTM, a consignment note is a written document establishing the contract of carriage ("*l'écrit qui constate le contrat de transport de marchandises*").¹² The consignment note indicates – unless the contrary is proven – the

³ Art. 1(1) AUCTM.

⁴ Art. 1(1) AUCTM

⁵ Cf. Art. 1 para. 1 CMR.

⁶ The AUCTM does not contain any conflict-of-laws rules which define the relation of the AUCTM to the otherwise applicable national law or other international sources of law, especially the CMR. This leads in particular to definition issues, if the contractual sender or delivery place lies in a CMR-member state, because the CMR convention is always applicable if these places lie within a CMR state.

⁷ Art. 30 AUCTM.

⁸ Art. 3 AUCTM.

⁹ Art. 4 AUCTM.

¹⁰ Art. 5 AUCTM.

¹¹ Art. 6 AUCTM.

¹² Art. 2(d) AUCTM.

conclusion and content of the contract of carriage and the takeover of the goods by the carrier.¹³ The AUCTM moreover defines the necessary and other contents of the consignment note.¹⁴ Under the provisions of the AUCTM, the sender is in particular obliged to submit to the carrier the documents and information necessary for possible customs declaration.

IV. The Execution of the Contract of Carriage

The third chapter of the AUCTM sets out provisions dealing with the execution of the contract of carriage. These provisions include rules concerning the packaging of the goods,¹⁵ the declaration and responsibilities of the sender,¹⁶ the period of transport,¹⁷ the takeover of the goods,¹⁸ the right of the sender to dispose of the goods during the period of transportation,¹⁹ impediments of transport or delivery,²⁰ the delivery of the goods,²¹ the condition of the goods and an eventual delay in delivery²² as well as the payment of claims under the contract of carriage.²³

V. Liability of the Carrier

The fourth chapter of the AUCTM regulates the liability of the carrier. In principle, the carrier²⁴ is responsible for the delivery of goods and is liable for total or partial loss²⁵ or damage of the goods if the loss or damage arose during transportation, as well as the exceedance²⁶ of the delivery deadline

¹³ Art. 9(1) AUCTM.

¹⁴ Art. 4 AUCTM.

¹⁵ Art. 7 AUCTM.

¹⁶ Art. 8 AUCTM.

¹⁷ Art. 9 AUCTM.

¹⁸ Art. 10 AUCTM.

¹⁹ Art. 11 AUCTM. The sender can e.g. request the carrier to stop the carriage or modify the agreed destination of delivery.

²⁰ Art. 12 AUCTM.

²¹ Art. 13 AUCTM.

²² Art. 14 AUCTM.

²³ Art. 15 AUCTM.

²⁴ The carrier is also liable for auxiliaries (Art. 16(4) AUCTM).

²⁵ The designated authority can consider the goods lost without further substantiation if they have not been delivered within thirty days after expiry of the agreed delivery deadline or, in the absence of such agreement, within sixty days after the takeover of goods by the carrier (Art. 16(3) AUCTM).

²⁶ The delivery deadline is considered exceeded if the goods are not delivered within the agreed deadline or, in the absence of such agreement, within a deadline which can be expected from a careful carrier under the given circumstances (Art. 16 (2) AUCTM).

(Art. 16 AUCTM).²⁷ There are, however, exceptions²⁸ to this liability (Art. 17 AUCTM), for example if the carrier can prove that loss, damage and/or exceedance of the delivery deadline were caused due to the order of an authority, due to inherent deficits of the goods or circumstances that were not avoidable – or the consequences of which were not avertable – by the carrier.²⁹



In any case, the AUCTM also sets out a liability limit³⁰ for claims arising out of loss or damage of goods for the carrier: According to Art. 18 AUCTM, the compensation is generally calculated pursuant to the value of the goods, but may not exceed the amount of 5000 francs CFA³¹ per kilogramm of gross weight. Higher compensations are only possible if a higher value of the goods is indicated in the consignment note or if a particular interest in the delivery is declared (*"déclaration d'intérêt spécial à la livraison"*). For the calculation of the compensation and the value of the goods, the AUCTM has established certain guidelines.³²

The carrier cannot invoke the provisions of the AUCTM which exclude or limit his liability where it is proven that the loss, damage or delayed delivery originate from an act or omission which was intentional or grossly negligent and with the knowledge that the loss, damage or delayed delivery would probably result from this act or omission by the carrier.

²⁷ Art. 16(1) AUCTM.

²⁸ Exclusion of liability is applicable to both contractual and non-contractual claims arising out of loss, damage or delivery delay against the carrier (Art. 20(1) AUCTM).

²⁹ Art. 17(1) AUCTM.

³⁰ Liability limit is applicable to both contractual and non-contractual claims against the carrier arising out of loss, damage or delayed delivery (Art. 20(1) AUCTM).

³¹ For states outside of the CFA-franc-zone, the amounts specified in CFA are converted into national currency (Art. 29 AUCTM). The exchange rates of the day of the verdict, of the arbitral award or the date agreed by the parties are used.

³² Art. 19 AUCTM.

Finally, the third chapter of the AUCTM also regulates the liability in case of transportation of carrier vehicles loaded with goods by other means of transportation (*"transport superposé"*),³³ as well as in case of consecutive transportation of goods by several carriers (*"transport successif"*).³⁴

VI. Legal disputes

The fifth chapter of the AUCTM contains provisions on the settlement of disputes related to contracts of carriage.

First of all, the fifth chapter addresses the recourse right of the carrier towards the other involved carriers.³⁵ In accordance with the relevant provisions, the carrier who has paid a compensation pursuant to the AUCTM can, under normal circumstances, take recourse against the remaining carriers pursuant to the following provisions (although the carriers are able to conclude an alternative agreement):³⁶

- (a) The carrier who has caused the damage has to bear the total amount of the damage, whether or not this damage has already been paid by a different party;
- (b) In case the damage has been caused by two or more carriers, the costs have to be borne depending on each carrier's fault; if it is not possible to determine each level of fault, each carrier has to bear the damage pursuant to their share of profit arising out of the carriage;

³³ In the case of transportation of carrier vehicles loaded with goods by other means of transportation (*"transport superposé"*), the AUCTM is applicable for the entire transportation. However, the liability of the road carrier for loss, damage or delayed delivery, which occur without his fault during the transportation by the other mode of transport, depends on the compulsory provisions which apply to the other mode of transport. Except, of course, where no such regulations exist, in which case the liability of the road carrier is geared to the provisions of the AUCTM.

³⁴ In the case of consecutive transportation of goods by several carriers (*"transport successif"*), each carrier who accepts the goods and the consignment note will be a contracting party (Art. 23(1) AUCTM). In such cases, compensation claims arising out of loss, damage or delayed delivery can only be initiated against the first carrier, the carrier who executed the part of the carriage during which the harmful event occurred or against the last carrier (Art. 23(2) sentence 1 AUCTM). The claim can be brought against several of these carriers, and they are jointly liable (Art. 23(2) sentence 2 AUCTM).

³⁵ Art. 24 AUCTM.

³⁶ If one carrier is insolvent, his share of the compensation which has not yet been paid will be imposed on the other carriers pursuant to their share of profit arising out of the carriage.

- (c) If it cannot be determined on which carrier to impose the responsibility, each carrier has to bear the damage according to their share of profit arising out of the carriage.

Additionally, the AUCTM sets out a statute of limitations for claims arising out of the carriage of goods by road.³⁷ First, these provisions state that all claims arising out of carriages subject to the AUCTM become time-barred after the expiry of one



All claims arising out of carriages subject to the AUCTM become time-barred after the expiry of one year since the delivery date or, in the absence of delivery, since the moment the goods should have been delivered.



year since the delivery date or, in the absence of delivery, since the moment the goods should have been delivered. In case of deceit or equivalent fault, the statute of limitations is three years. Furthermore, the enforcement of a claim under the AUCTM requires that a written complaint is sent to the first or last carrier within 60 days, starting from the delivery date or, in the absence of such delivery, within six months after the takeover of goods.

Finally, the fifth chapter of the AUCTM includes different provisions regarding the jurisdiction and procedure of claims arising out of contracts of carriage. First of all, the AUCTM holds that all disputes arising out of contracts of carriage which are subject to the AUCTM can be brought before an arbitral tribunal.³⁸ Since the AUCTM does not contain further requirements regarding arbitral proceedings, each party remains free to determine the applicable rules of procedure.

The AUCTM also contains fallback provisions for cases in which neither an arbitral tribunal nor a state court has been selected in an international case dealing with the settlement of disputes arising out of contracts of carriage subject to the AUCTM. In such cases, the plaintiff can pursue the matter before a state court on whose territory (a) the defendant party has its habitual residence, its head

office, its branch or its business office which was the intermediary for the conclusion of the contract of carriage; or (b) the place of takeover of the goods or the designated place of delivery.³⁹ If a procedure is pending before a competent court or if such court delivered a judgment, a new action concerning the same cause of action between the same parties cannot be brought before another court unless the judgment of the court where the first action was brought cannot be enforced in the state in which the second action was initiated.⁴⁰ If a judgment⁴¹ of a court of a contracting state is enforceable, it will also be enforceable in all other contracting states as soon as the prescribed formal requirements of the respective state have been complied with, although these formal requirements shall not lead to a review of the merits of the judgment.

VII. Voidness of Deviating Agreements

The provisions of the AUCTM are, with few exceptions listed in Art. 28 AUCTM, mandatory. Agreements which deviate from the mandatory provisions of the AUCTM are void pursuant to Art. 28 AUCTM. Under the AUCTM, the unenforceability of a clause does however not automatically lead to the nullity of all other contractual provisions.

³⁷ Art. 25 AUCTM.
³⁸ Art. 26 AUCTM.

³⁹ Art. 27(1) AUCTM.

⁴⁰ Art. 27(2) AUCTM.

⁴¹ This applies to judgments arising out of contradictory procedures, default judgments and court settlements, but not to merely provisionally enforceable judgments, nor to judgments condemning a plaintiff – whose claim was entirely or partially rejected – to a payment of damages and interests in addition to the procedural costs (Art. 27(4) AUCTM).

Private Equity Investments and the OHADA-States

lic. iur. Rafael Zemp, MBA Insead



I. Introduction

I.1. Investments in Africa

Africa attracts increasing attention from investors. Low returns in the developed countries' bond market and high volatility in the equity market cause investors to head for new shores. Economic growth rates in Africa of more than 5% during the last few years allowed investors to be optimistic.¹ Furthermore, trust in political and macroeconomical stability is increasing, because, throughout the whole continent, most of the economic indicators have improved significantly over the last few years: the debt ratio compared to the gross domestic product (GDP) has dropped from 115% (1990) to 84% (2010); the trade deficit has decreased from -2.7% of the GDP to -1.3%. Even the inflation remained stable at 114% in most of the countries in the 1990's and at 59% from 2000 onwards. Despite regional insecurities, the positive development led to continental European direct investments (FDI) of USD 55 billion in 2010, which is an astronomical figure in comparison with USD 7 billion in 2002.

This **cash inflow** to the African continent also showed impact on the **private equity market**. In the period from 2010 to 2013, private equity investments in the amount of almost USD 7 billion have been undertaken, even though in 2010 overall investments dropped to a much lower level than USD 1 billion. After the financial crisis, the investment activity recovered rather quickly, until a historical record number of USD 3.2 billion was reached in 2013. Considering that in 2002 private equity investments did not yet amount to USD 200 million, the numbers of 2013 are very high, as in the figures for FDI. The numbers of 2014 are still outstanding, but seem to surpass those of 2013.²

These numbers do indicate a growing interest in African private equity projects. This is all the more remarkable when considering that the invested amount of about USD 3 billion in 2013 faced private equity fund assets in a total amount of USD 20 billion, of which about USD 5 billion could not be placed to date (so-called "*Dry Powder*"). Although currently there is a big portion of *Dry Powder* available on the private equity market, the proportion of fund assets compared to targeted investments of 0.75 indicates a demand outstripping supply.³

¹ The IMF forecast even predicts a growth rate in Africa of 5.5% until 2017, which, however, will have to be adjusted to the collapse in the costs of the raw materials.

² E&Y, Private Equity roundup Africa 2013, E&Y Global Private Equity Report, 2014. (Available at: <http://www.ey.com/GL/en/Industries/Private-Equity/Africa-roundup-2013#> (last visited on 5 November 2015)).

³ Estimations of Preqin: <https://www.preqin.com/blog/101/5885/africa-private-equity-managers> (last visited on 5 November 2015).

I.2. Focus of Investment Activities

If we look at the different regions within Africa separately, a different picture emerges. Apart from a few exceptions, investments concentrate on South Africa, Commonwealth countries and North Africa. 60% of the deals (measured by value) take place in Nigeria and South Africa. Only 13% of the deals take place in West Africa (former Nigeria), with most of these projects relating to Ghana. In line with this, 50% of the African private equity funds are located in South Africa.⁴ In relation to the OHADA states, apart from smaller deal reports, there are no further statistics on current investments and realized exits, because only few private equity groups are active in this region. In most cases, the groups involved are small regional funds or global players, who want to be engaged from the start and gain a foothold in the region.

For example, the group Cauris Management, which is located in Togo and in the Ivory Coast, operates a fund with EUR 60 million mainly invested in small businesses in the OHADA states.⁵ The group also has successfully invested in exits from earlier investments in the consumer goods sector. British Actis, an important internationally active group with USD 6 billion under its management, recently increased its investment activities in West Africa. Actis used to be a public organization (Commonwealth Development Corporation), which explains its long term experience in investment management in developing countries. Currently, Actis holds participations in Nigeria and Ghana as well as in the Ivory Coast, Senegal and further OHADA states, mainly in the energy and mining industry.⁶ ECP Private Equity is yet another internationally active PE group, which was running projects within this region, particularly in the Ivory Coast. Further groups like Abraaj Funds from Dubai and Helios Investment Partners, a split off part of the giant TPG Capital, are at present considering the possibility of starting a subsidiary in Abidjan, Ivory Coast. According to some rumours, a further boost in investment can be expected from African pension funds, which could mobilize up to USD 29 billion.

⁴ Avanz Capital, *The Private Equity Climate in Africa: Embracing the Lion* (2012) (available at: <http://www.avanzcapital.com/images/pdf/the-private-equity-climate-in-africa-embracing-the-lion.pdf> (last visited on 5 November 2015)).

⁵ www.caurismanagement.com/investissements-funds.htm (last visited on 5 November 2015).

⁶ Energy investments are mainly made through Globeleq.

II. Hurdles

Despite interesting movements in the private equity field, **low level investment activities in the OHADA states**, compared to other regions in Africa, are a direct **result of the existing difficulties in the private equity sectors of the relevant countries**. Challenges exist on different levels. On the one hand, the economic environment limits foreign direct investments and, on the other hand, there are obstacles which are typical for the industry of private equities.

II.1. General Difficulties

General difficulties exist due to a lack of infrastructure and institutions as well as political uncertainty.

All OHADA states lack of sufficient infrastructure or any infrastructure at all. There are a few exceptions, such as Gabon, which, despite having one of the worldwide worst road systems, has a particularly high penetration of mobile telephony with 1.17 phone connections per inhabitant. Some countries are endowed with harbour and railway infrastructures that are better than the ones of comparable countries. However, those infrastructures facilities are most likely to be private-owned and are, to a wide extent, linked to the use of natural resources, and are thus not to be confused with public infrastructures. With the exception of the Ivory Coast, Chad and Mali, OHADA states perform better in public institutions than in infrastructure. Especially Gabon, despite having a past of long-term dictatorship, is now characterized by a low level of regulation, relative political transparency as well as a low crime rate. Political uncertainties, which many of the OHADA states suffer from, are again a limiting factor for foreign investments and, at the same time, often a reason for weak institutions.

It is statistically proved that the absence of structures has an impact on business activities of private investors. The *Global Competitiveness Report 2012-2013* of the World Economic Forum measures the competitiveness of countries based on a broad range of factors including institutions, infrastructure as well as efficiency and innovation sources, whereas countries are divided into categories. The report shows a rather critical image of the OHADA states. With Gabon as an exception, ranked second last, all states fall into the last category, if taken into account in the ranking at all. Also in the World

is identified with organic (or regional) growth potential, it also must be of a critical size, so that after the investment the added value still corresponds to the expenses. Even if companies with good substance can be found, the hurdle of due diligence may prevent investments. Obscure accounting methods and contingent liabilities that have not been recognized, particularly with regard to tax payments, cause difficulties in determining the company value. Insecurities that result from such situations are discounted, because they are not acceptable for investors in private equity projects (*limited partners*) and are discounted from the company value. However, a discount which is too high may end up being a deal breaker.

Despite strong economic growth in the last few years, this growth is in most of the OHADA states, with Gabon as an exception, based on a fairly low level with an average GDP per capita under USD 1,000. If a company now wants to participate in such a country's local value adding activities, it needs to be able to count on a certain basic income. The situation is different with projects that are not dependent on purchasing power, e.g. the sector of mining. If such an income basis is not the case, the project's possibilities in growing are limited in the first place, especially in the area of consumer goods. Who wants, for example, supply the Central African Republic with Starbucks Coffee Shops, if each coffee shall cost USD 4 and, at the same time, the annual GDP per capita is less than USD 380?⁸ One single coffee per inhabitant per month would then make up 10% of the average yearly income of an average citizen. The issue of basic income has its impact on the whole consumer goods sector. Because property, plant and equipment investments are not distinctly higher (or even lower) in a further developed market, a collocation is usually more promising, unless competitive considerations lead to the breaking of new ground.



⁸ See the statistics of the World Bank 2014. Available at: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (5 November 2015)

However, the biggest hurdle for private equity investments in the OHADA area is still the exit. The typical investment cycle spreads over five years, where at the end, the fund, or also *limited partner*, seeks for liquidity. On less developed OHADA markets, exits over an IPO listed on foreign stock exchanges may only be possible in exceptional cases. Also the possibility of *leveraged buyouts* (LBOs)⁹ is limited to a few individual cases, due to the lack of required debt financing. In the end, only a *trade sale*¹⁰ or a *secondary private equity exit*¹¹ remain realistic exit strategies, especially with regard to multinational groups, which realize their exit strategies through acquisitions. On the missing liquidity of investments follows a discount on investments, or it may even scare potential investors off.



III. Outlook

Given this long list of difficulties, the question arises as to the extent to which a standardisation of law within the OHADA region will lead to improvements of the investment climate in the long term and whether new chances for private equity investments will be created.

Without a doubt, a standardisation of law has its positive impacts. The cross border project provides more stability for private equity investors who see growth potential for a target in different countries. More stability means more foreseeability and, as a consequence, less risk. Accordingly, it is essential to strive for a homogenous jurisdiction. Of particular importance is the reform of corporate law, which came into force in May 2014. The company *Société par actions simplifiée* ("SAS"), which is closely related to the similar company under French law, is very flexible and gives great freedom to founders in

⁹ LBOs means acquisition of a company with small equity investment and big debt ratio. LBOs often happen in the form of MBOs (*Management Buyouts*), whereby the current management buys out the company from the previous owner (in this case a private equity fund) by debt instruments.

¹⁰ *Trade sale* is when a portfolio company is sold to a competing company, a supplier or a buyer (vertical integration).

¹¹ *Secondary private equity exit* is when a portfolio company is sold to a private equity fund or to a fund of funds. See: Secondary buyouts to PE funds: Broadening horizons, how do private equity investors create value? EY / AVCA, p. 7 (available at http://www.avca-africa.org/wp-content/uploads/2014/04/Broadening-horizons-Africa-value-creation-study_FR0124.pdf (last visited on 5 November 2015).

areas that are of interest for the private equity industry, such as recognition of a shareholder's agreement, issuance of convertible instruments and variable share capital as well as the establishment of foreign subsidiaries. These instruments will make the establishment of legal structures and their cross-border application a lot easier. The flexibility of the SAS is a suitable means to take different interest groups, in particular lenders as well as selling and buying shareholders, into consideration in private equity investments and to structure each deal depending on the involved needs.

A standardization of law can only have direct impacts on the investment climate if, at the same time, the **overall legal conditions** improve. It includes the regulatory environment in the area of financial regulation, concessions and the granting of permits, which remained in the competence of the states. In addition, improvements of infrastructure, political stability and other factors are necessary to attract investors.



A standardization of law can only have direct impacts on the investment climate if, at the same time, the overall legal conditions improve.



The responsibility for creating such a framework lies with the public sector, i.e. with the relevant states and multinational organizations. Fortunately, considerable effort has been made recently into that direction, in particular by the IFC¹², the AFDB¹³ and by initiatives of the industrial countries. The IFC, for example, invested USD 182 million in the African banking sector in 2010 in order to achieve a higher penetration quota for bank services within the population. With its infrastructure funds, the IFC also supports the establishment of better infrastructures within Western Africa, in collaboration with local partners. The support of the mobile infrastructure of Celtel (today Zain) in several OHADA states is an example of such a project. Further initiatives originate from ADB. A step into a similar direction is made by private initiatives with a focus on *social impact*, which aim at improving living conditions and the general business framework.

¹² International Finance Corporation, a branch of the World Bank Group.

¹³ African Development Bank Group.

It follows from the above that OHADA states can only be of interest for private equity on a large scale if a holistic positive environment supported by multi-lateral initiatives is established. The relevant question is thus the **time frame** in which OHADA states can become attractive for private equity investors, provided the framework conditions have improved.

The future growth of developing countries cannot be predicted and runs to some extent contrary to the development of industrial countries. For example, the growth rate of most of the OHADA states has been stable during the financial crisis of 2009 and after. At the moment, it remains to be seen what influence volatility of raw material prices will have on the economic growth in these countries.

A comparison with other growing regions, such as Latin America is only possible to a limited extent, yet brings to light certain similarities. The example of Peru illustrates this. In the past, Peru was captured in a state of civil-war-like conditions. Maoist Sendero Luminoso, who wanted to win over the disadvantaged indigenous people, terrorized the countryside in the years of 1980. At the end of the 1980s, socialist head of state Alan Garcia nationalized the banking system in the middle of the ongoing financial crisis, which led to a flight of capital and a hyperinflation of almost 3000% by 1989. The country went through a deep recession where the GDP per capita was as low as USD 720. Despite the following Fujimori dictatorship, which lasted for 10 years, and the still existing great social divide, Peru now – i.e. only 25 years later – has a GDP per capita of USD 7,000. With the help of the World Bank, the IFC and the IADB, the country was able to substantially increase its framework conditions within a few years, so that private equity funds are nowadays fighting over the limited amount of existing targets, which has an upward effect on ratings. This does not only include investments in the mining and energy sector, which are attractive for international conglomerates such as Glencore, Shell and the like, but also consumer goods, financial services, business services and telecom. This boom prompted the Carlyle Group to open a new subsidiary in Lima in 2014. The situation is similar in Columbia, where the guerilla conflict is still ongoing, albeit in a different manifestation. In order to avoid running short in comparison to the Carlyle Group, Advent settled a company in Columbia. Baker & McKenzie also opened a branch in both countries to support investors who want to participate in and profit from future growth on the spot.

Apart from Gabon and Equatorial-Guinea, which are rich in oil, as well as the Ivory Coast and Cameroon, all OHADA states have a GDP per capita which is much lower than the GDP per capita of those Latin American countries that are attractive for private equity. Even though the GDP is not the only criterion for comparability, it can be concluded that most of the OHADA states are far from reaching the threshold which is necessary for private equity. This is all the more so if one considers that institutions in OHADA states are extremely weak, which has never been the case in Latin America (especially not in Colombia). Thus, a comparison remains highly questionable. However, the example of Peru does show that the environment can change within a short period of time. Within 20 years, it is possible to lay a foundation that is attracting foreign direct investment (FDI) and, in particular, private equity investors. This fact is nowadays fostered by investors looking for profitable investment opportunities due to low interest rates and weak economic growth on developed markets.

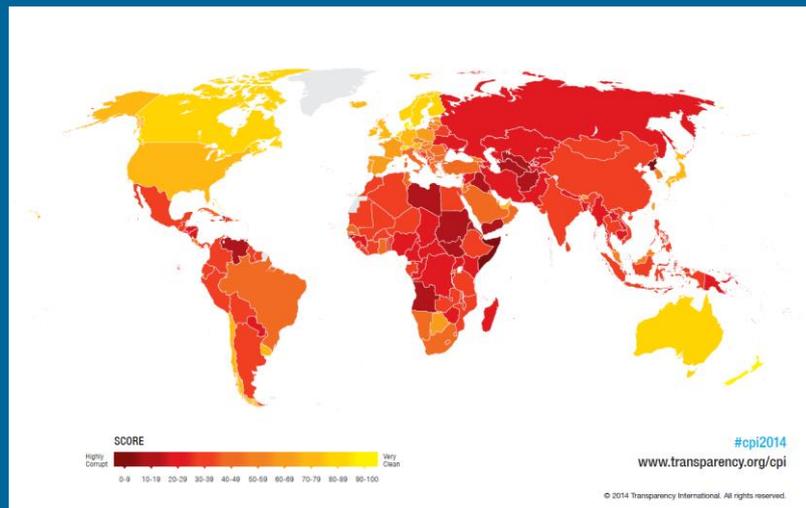
To sum up, private equity cannot yet be seen as a broadly accepted asset class in the OHADA states. This will not change in the near future, as the GDP per capita is far too low and the framework in which private equity can flourish is still missing. Some exceptions can be found in sectors with *social impact* initiatives and support from multinational organizations. The standardization of law process, and in particular the recent corporate law reform, are however an important step in the direction of creating a positive environment for investments. This legal basis must be accompanied by the establishment of stable institutions for law enforcement, banking system, educational opportunities and political stability. Such a positive development will highly depend on the multilateral support and the political will of the relevant countries. If growth were to occur to the described extent, OHADA states could become attractive investment targets within the next 20 years.

Regulatory Risks and Compliance Challenges



Dr. iur. Anne-Catherine Hahn, LL.M.

Most companies looking for growth opportunities in emerging markets at some point experience complications and setbacks. In many cases, these problems are attributable to regulatory and legal uncertainties, as well as resulting liability and reputational risks. The legal systems and regulatory frameworks in emerging markets are often far more complex and less transparent than what investors are used to from their home markets. Competencies of different government authorities are not always clearly delimited, and changes in enforcement practices are difficult to anticipate. Often, close ties exist between economic and political elites. Many businesses are state-controlled, and it can be challenging to obtain competent and reliable advice from authorities and even local partners and counsels. In such circumstances, foreign companies run a high risk of violating local rules, for example in the areas of taxes, social security payments or environmental regulations. This exposes them to sanctions – even if the rules and regulations in question are not systematically enforced in relation to local actors – as well as to bribery and corruption risks.



These challenges which, in one way or the other, exist in all emerging markets, must be given particular attention in West and Central Africa. Many of the countries forming part of the OHADA zone are rich in resources, but have for many years been struggling with internal conflict, weak political institutions and an all too often fragile coexistence of different ethnicities, tribes and religious groups. Economies continue to be largely cash-based, and the informal sector plays a major role.

This climate provides a fertile ground for corrupt behaviour. As results from Transparency International's annual Corruption Perceptions Index, many countries in West and Central Africa score badly when it comes to measuring the perceived level of corruption with respect to government officials and politicians. On a scale ranging from 0 to 100, Guinea-Bissau (index 19, score 161) and Chad (index 22, score 154) show a particularly weak performance. There are, however, significant differences within the OHADA zone. For example, Benin (index 39, score 80) and Burkina Faso (index 38, score 85) do notably better in the perception of economic actors, with scores comparable to those of India or Thailand. Senegal is doing significantly better still, having reached a score of 69 on the Corruption Perceptions Index, which is the same as for Romania, Italy and Greece.

Understanding the compliance challenges associated with doing business in West and Central Africa is crucial for foreign companies, as the payment of bribes can not only entail criminal sanctions at local level, but also in the home jurisdictions of most international companies. Authorities in the US, in Europe and also in Switzerland increasingly investigate and sanction compliance breaches in emerging markets by applying the strict anti-bribery standards of the FCPA, the UK Bribery Act or the Swiss Penal Code. Such investigations not only expose companies to substantial financial consequences, in the form of fines, damages claims and legal costs, but also to lasting reputational harm.

To nevertheless succeed in regions such as West and Central Africa, foreign companies must familiarise themselves in detail with the political, regulatory and cultural framework of the country which they intend to enter. Clarifying regulatory conditions prior to an investment is not sufficient; rather, the regulatory environment needs to be continuously monitored to ensure that companies keep abreast of changes in the applicable rules or the relevant enforcement practices. Monitoring should not be limited to legal issues, but in particular also extend to the political landscape. Projects which are controversial at local level are particularly at risk of creating conflicts – with the potential consequence that participating foreign companies may end up stranded between frontlines. Foreign companies may, for instance, be confronted with intransparent payment requests, or may make themselves vulnerable to extortion and blackmail as a result of relatively minor offenses or breaches of the law.

Special attention must be paid to the choice of local suppliers, distributors and other business partners. Being rooted in the local culture, such partners are often indispensable, as they are familiar with the prevailing rules and standards; however, their approach and conduct may not in all regards comply with the strict standards applicable to international companies. This creates the risk that offenses committed by a local partner may become, or may be perceived to be attributable, to the foreign company. To reduce this risk, local partners must not only be carefully selected, but should also undergo systematic trainings as well as regular and detailed monitoring.

Experience further shows that it is generally advisable not to silently tolerate regulatory uncertainties. International companies, especially larger companies, should be aware that the persistent refusal to

engage in illegal or unethical conduct can in fact contribute to changing the local business climate. This requires an unequivocal commitment to compliant business practices with equally clear internal and external communications. Compliance with strict integrity standards must be endorsed by the company's top management, not only vocally but also in daily operations, and be enforced throughout the organization.

A clear commitment to integrity and compliant conduct, combined with the systematic sanctioning of breaches, is imperative for international companies that decide to operate in what are perceived to be "difficult countries". Such an attitude also helps to proactively clarify regulatory uncertainties, thereby reducing from the outset the risk that relevant rules may not be fully complied with. To implement such an approach, international companies need the assistance of a powerful and trustworthy local management, which must be fully committed to the values and principles of the company, while at the same time having sufficient authority at local level. To be successful in the mid- and long-term, projects and investments in West and Central Africa consequently necessitate a comprehensive risk assessment prior to their commencement as well as a continuous and close involvement of the company's top management.

Index of Abbreviations

ADB	African Development Bank
AFDB	African Development Bank Group
AG	Aktiengesellschaft (public limited company)
Art. / Arts.	Article(s)
AUA	Acte uniforme relatif au droit de l'arbitrage du 11 mars 1999
AUCTM	Acte uniforme relatif aux contrats de transport de marchandise par route
AUDCG	Acte uniforme du 15 décembre 2010 portant sur le droit commercial général
AUPSRVE	Acte uniforme portant sur l'organisation des procédures de recouvrement et des voies d'exécution
AUSCGIE	Acte uniforme relatif au droit des sociétés commerciales et du groupement d'intérêt économique
BGE	Bundesgerichtsentscheid (Decision of the Swiss Federal Tribunal)
CC	Swiss Civil Code
CCJA	Cour Commune de Justice et d'Arbitrage
CEMAC	Communauté Economique et Monétaire de l'Afrique Centrale (Economic and Monetary Community of Central Africa)
cf.	confer (compare)
CFA	Communauté financière d'Afrique
Ch. C.	Chambre de commerce (commercial chamber)
CHF	Swiss franc(s)
CIA	Central Intelligence Agency (United States)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CMR	Convention on the Contracts for the International Carriage of Goods by Road
CO	Swiss Code of Obligations
e.g.	exempli gratia (for example)
E&Y	Ernst & Young
Ed. / ed.	Editor(s) / edition
ERSUMA	Ecole régionale supérieure de la magistrature
et al.	et alii (and others)
etc.	et cetera
et seq(q)	et sequens (and the following)
EU	European Union
EUR	Euro(s)
fAUDCG	former Acte uniforme portant sur le droit commercial général
FCPA	Foreign Corrupt Practices Act of 1977
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GmbH	Gesellschaft mit beschränkter Haftung (private limited company)
i.e.	id est (that is)
IADB	Inter-American Development Bank
ICC	International Chamber of Commerce
IFC	International Finance Corporation
IMF	International Monetary Fund
Incl.	Including
IPO	Initial Public Offering
JO OHADA	Journal officiel OHADA
LCIA	London Court of International Arbitration

let.	letter
LBO	Leveraged Buyout
MBO	Management Buyout
No.	Number
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
p. / pp.	page(s)
para. / paras.	paragraph(s)
PE	Private Equity
RCCM	Registre du commerce et du crédit mobilier
UEMOA	Union Economique et Monétaire Ouest Africaine (Economic Community of West African States)
UK	United Kingdom of Great Britain and Northern Ireland
UN / UNO	United Nations Organisation
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
USD	United States Dollar(s)
Vol.	Volume
WHO	World Health Organization

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