

The DRC completes its accession to OHADA: what will change and when?

The Minister of Justice and Vice Minister of Foreign Affairs of the Democratic Republic of Congo (the "**DRC**") submitted on 13 July 2012 the instruments of adhesion to the OHADA Treaty in Senegal, the official depositary State. By doing so the DRC has finalised its accession process to OHADA which had begun in February 2004 and was authorised by law on 11 February 2010. The DRC is now the 17th African State in which OHADA law will be applicable. Within sixty days from 13 July 2012, OHADA law will be directly applicable in the DRC, except for specific transitional periods provided under certain Uniform Acts, in particular for existing DRC companies. The effective application of OHADA law in the DRC will bring significant immediate improvements to a number of fields of DRC business law which were often outdated such as for instance corporate law, security interests, recognition and enforcement of foreign arbitral awards. The changes brought by OHADA will have a more dramatic impact in the DRC than elsewhere in the OHADA region. This is because the DRC followed often outdated Belgian statutes whereas OHADA is closer to modern French law.

What is OHADA?

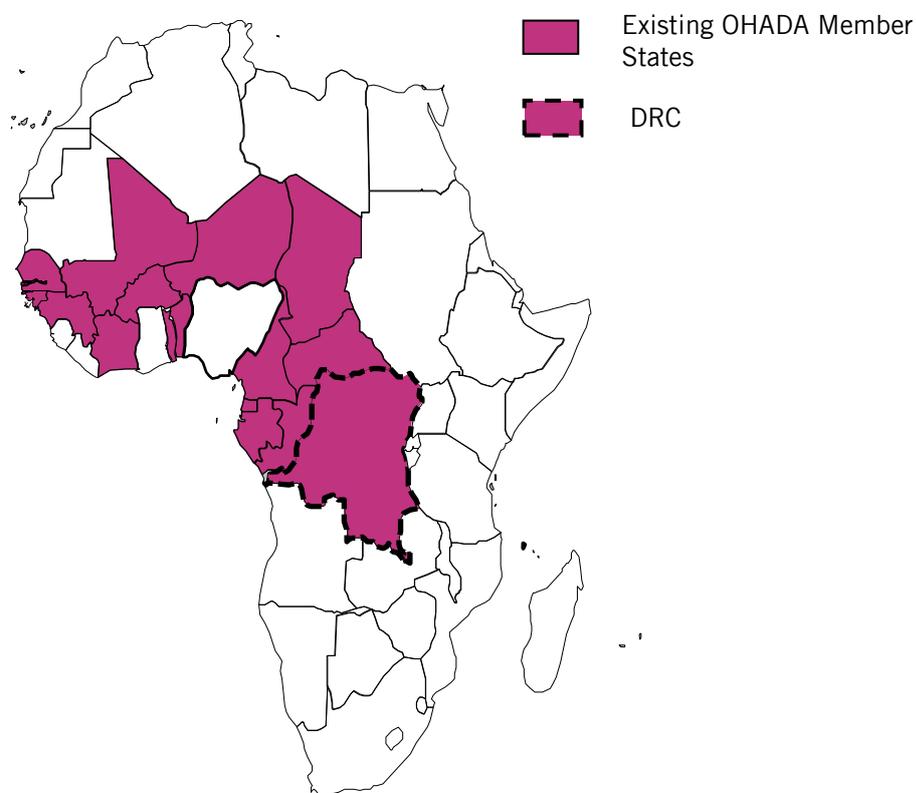
OHADA stands for "Organisation pour l'harmonisation en Afrique du droit des Affaires" (Organisation for Harmonisation of Business Law in Africa) and now gathers 17 Member States of West and Central Africa almost all being francophone (except for the Republic of Guinea-Bissau) and using the "CFA Franc" currency (except for the Republic of Guinea and now the DRC). OHADA provides for a uniform system of business law directly applicable in its Member States through "Uniform Acts" which have been largely inspired by French law as it was in the late 1990's (when the initial Uniform Acts were adopted). There are currently 9 Uniform Acts, namely: (1) the Uniform Act on Commercial Companies and Economic Interest Group, (2) the Uniform Act on Commercial Law, (3) the Uniform Act on Security Interests, (4) the Uniform Act on Bankruptcy, (5) the Uniform Act on Debt Recovery and Enforcement, (6) the Uniform Act on Arbitration, (7) the Uniform Act organising and harmonising Accounting Systems, (8) the Uniform Act relating to the Transportation of Goods by Road, and (9) the Uniform Act governing Cooperative Credit Banks.

Contents

What is OHADA?	1
When will OHADA be effective in the DRC?	2
Examples of Significant Changes	3
Improvement of Corporate Law and available corporate structures - the end of the Congolese SPRL and SARL	3
An up-to-date Security Interest Regime – the end of the dispossession requirement for movable assets	3
Improvements in Enforcing Foreign Arbitral Awards and alternative dispute resolution	4
Outlook	5

The Common Court of Justice and Arbitration (“**CCJA**”) ensures the uniform implementation of OHADA legislation, acting as a regional supreme court in relation to the interpretation of Uniform Acts (for which local courts retain the first levels of jurisdiction) and also giving specific opinions. The CCJA also acts as an arbitration centre (see below).

OHADA is engaged in a reform process of the Uniform Acts. Revised Uniform Acts on Security Interests and Commercial Law have recently been adopted and Uniform Acts on Commercial Companies and Economic Interest Group and on Insolvency are in the process of being revised with the active involvement of a number of international institutions such as the World Bank.



When will OHADA be effective in the DRC?

According to the provisions of the OHADA Treaty relating to the adhesion of a new country (article 53), the Uniform Acts will be directly applicable within sixty days from the date the instruments of adhesion are submitted. On 12 September 2012, all Uniform Acts will therefore be directly applicable and binding in the DRC without any specific formalities, superseding any conflicting provision of national law.

With respect to existing situations, the following transitional provisions provided under the Uniform Acts are to be noted:

- existing companies will have two years from 12 September 2012 to comply with OHADA law (Uniform Act relating to General Commercial Law article 1; Uniform Act on Commercial Companies and Economic Interest Group article 908);
- security interests, transportation contracts, and insolvency proceedings will remain governed by the existing legislation in place at the time they were granted, entered into or opened (Uniform Act on Security article 227, Uniform Act relating to the transportation of goods by road article 30 and Uniform Act on Bankruptcy article 257).

Examples of Significant Changes

Improvement of Corporate Law and available corporate structures - the end of the Congolese SPRL and SARL

Application of the OHADA Uniform Act on Companies and Economic Interest Group (“**AUSCG**”) will result in many improvements, in particular with respect to available corporate structures. One of the most salient improvements is that it will now be permitted to incorporate a company with a single shareholder.

Two main structures prevailed under DRC corporate law: the *Société Privée à Responsabilité Limitée* (“**SPRL**”) and the *Société par Actions à Responsabilité Limitée* (“**SARL**”). Despite having the same name as the OHADA SARL, the DRC SARL had more similarities with the OHADA *Société Anonyme* (“**SA**”). Although the SARL was the only DRC company allowing the implementation of a board of directors, it was rarely used as still requiring a presidential authorisation for its creation (by reference to an ancient Belgian law provision requiring the King’s approval). This is why the DRC SPRL, equivalent to the OHADA SARL, was most commonly used in practice. Whilst the applicable legislation did not provide for a management structure with a board of directors (but one or various managers), similar structures were implemented in practice through “councils of management” (*conseils de gérance*). This was for instance often the case in the context of joint ventures involving State-owned entities as shareholder, in particular in the mining sector. As noted above, existing DRC companies will have two years to conform with OHADA.

Among the other notable improvements, the AUSCG provides for relatively detailed regime applicable in many important areas of corporate law, such as corporate governance and rights of minority shareholders.

An up-to-date Security Interest Regime – the end of the dispossession requirement for movable assets

A modernised security regime will now be available in the DRC given the recent reform of the Uniform Act on Security (“**UAS**”). As indicated above, the UAS will not apply to security granted prior to 12 September 2012 but only to any security granted after said date. Among the major changes, it is worth mentioning the ability to use a security agent to hold and enforce security and the creation of new structures for creating security over assets such as

assignments of receivables and a specific regime for security over bank accounts. Another major improvement of the reform of the UAS is the ability to enforce security by way of contractual foreclosure, without the requirement for a court order. For further details on the UAS reform please see our previous [article on security regimes in Africa](#).

Application of the UAS will also significantly improve the way to take security over movable assets. The previous DRC regime required dispossession, that is to say the transfer of possession to the relevant asset to the creditor or a third party agent. This requirement will be replaced with a registration of the pledge with a national register, the *Registre du Commerce et du Cr dit Mobilier* (the “**RCCM**”). Another significant improvement should benefit the so-called “pledge over the business” (*gage sur fonds de commerce*), a subdued form of floating charge. While this security did exist in the DRC, foreign creditors were not eligible as beneficiaries of pledges over business, and as a result a practice had been developed under which local banks were acting as security agent upon authorisation by the Central Bank of Congo. This will not be required anymore.

The practical impact of the reform over certain specific regimes not expressly excluded from the scope of the OHADA Uniform Act on security will remain to be seen, for instance with respect to mortgages over mining exploitation permits governed by the DRC Mining Code.

Improvements in Enforcing Foreign Arbitral Awards and alternative dispute resolution

The application of the Uniform Act on Arbitration (“**UAA**”) is undoubtedly also a significant step both as regards the recognition and enforcement of arbitral awards in the DRC and the available means for alternative dispute resolution through the specific OHADA Arbitration regime.

It should be recalled that the DRC is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the “**New York Convention**”). Application of the UAA in the DRC will bring major comfort to foreign investors as it will trigger the application of a regime that is equivalent to that of the New York Convention and in fact even more favourable. The UAA provides that foreign arbitral awards rendered on the basis of rules that are different from those provided for in the Uniform Act on Arbitration (that are governed by a specific regime) shall be recognised as binding in Member States in accordance with the terms of applicable international conventions (such as the New York Convention) and, if there are none, on the basis of the provisions of the UAA (article 34). The grounds for resisting the enforcement of an arbitral award under the UAA are drafted even more restrictively than those contained in the New York Convention (article 31).

Another significant improvement is the availability of the specific arbitration regime provided by the UAA under the supervision of the CCJA. CCJA rules of arbitration are close to those of the International Chamber of Commerce (prior to the recent reform) and it is to be noted that the President of the CCJA

is the authority in charge of granting exequatur of the awards, which are directly enforceable within the Member States.

Outlook

The effective adhesion of the DRC to OHADA is undoubtedly a significant step that demonstrates the attractiveness of OHADA and will enhance the attractiveness of DRC's legal environment.

It is to be noted that the practical implementation of the reform might result in bigger challenges than for the accession of most of the existing Member States whose legislation was largely inherited from French law. Another challenge that will be faced relates to the effective application of the provisions of the Uniform Acts, including in particular at the level of the relevant corporate registries. This is a difficulty that a number of OHADA Member States are still facing, for instance in the context of the registration of security under the regime of the reform on security interest.

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