

Revised security regimes in Africa: the OHADA reforms

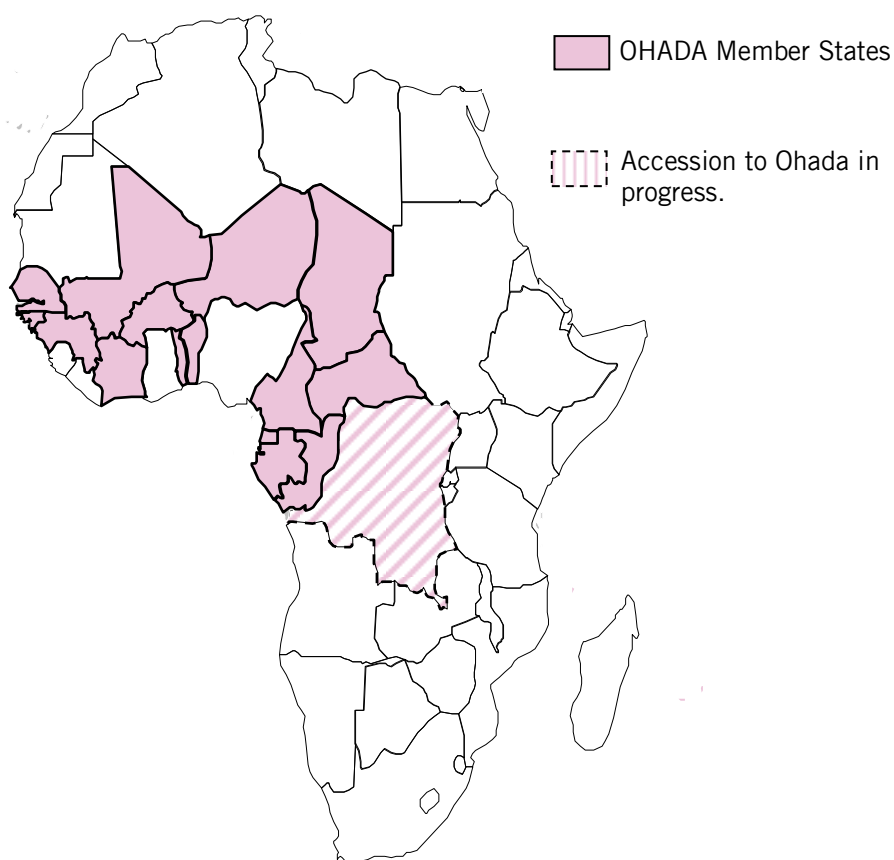
A revised security regime is about to come into force in 16 Sub-Saharan African jurisdictions. The new regime will improve the process of creating and enforcing security generally, but certain major changes are of particular relevance for finance transactions involving those jurisdictions. These include the new ability to use a security agent to hold security and the creation of new structures for creating security over assets such as receivables and bank accounts.

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 gathers 16 Member States of West and Central Africa (with the accession of the Democratic Republic of Congo to occur soon). Almost all of the Member States are francophone and use the “CFA Franc” currency. 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 1990s (when the initial Uniform Acts were adopted). These Uniform Acts concern matters such as corporate law, security, insolvency, arbitration and recognition of foreign courts’ decisions.

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What is the status of the reform?

The Reformed Uniform Act on Security “**R-UAS**” was published in the Official Gazette of OHADA on 15 February 2011 and is due to come into force by 20 May 2011. Security granted prior to the entry into force of the R-UAS will remain governed by the previous regime.

The R-UAS is largely inspired by the current French regime, but amended to include a number of improvements including concepts that make the rules closer to English law.

Improvements in taking and enforcing security

The R-UAS introduces a general regime governing security interests which allows for security to be granted to secure a present or future debt (which will assist in connection with taking security in respect of future/uncommitted facilities). The range of security interests available to creditors has also been extended. The type of security used will now depend on whether the secured assets are tangible or intangible. However, there is still no concept of a

debenture or blanket security interest covering all or most of the assets of a company equivalent to an English floating charge. Security over each type of asset remains subject to specific creation/perfection provisions.

Enforcement procedures will improve with the introduction of the ability of the parties to a security document to agree that upon a payment default, the secured creditor may automatically (i.e. without court order) become the owner of the pledged assets subject to an independent valuation of the asset by a third party expert (save for instruments or assets traded on official markets such as listed securities or commodities, in which case the market price prevailing at the time of enforcement will be used as reference). It is not possible for the parties to agree in the security document that a payment default entitles the secured creditors to effect a direct sale to a third party rather than to become owner. The recognition of the contractual foreclosure offers an alternative to the traditional compulsory sale procedures that often result in inadequate sale prices (notably in case of auction sales).

Introduction of a “true” security agent

The R-UAS allows parties to use a security agent. The security agent must be a credit institution (whether domestic or foreign). It may constitute, register, manage and enforce security interests (including through the initiation of proceedings). The security interests held by the security agent are segregated from its own assets and are not available to its creditors generally if it becomes insolvent. The R-UAS expressly contemplates the potential for changes to the creditors for whom security is held and allows for a substitution of the agent (without any specific formality).

This mechanism will solve certain issues relating to security sharing under the previous regime where, depending on the law governing the finance documentation, separate security had to be granted to each creditor unless a “parallel debt structure” could be used.

The introduction of a security agent is therefore a major development and a point on which the R-UAS has actually gone further than French law where the recently adopted security agent/*fiducie* regime remains to be improved.

New ways to take security over receivables

The creation of a form of assignment by way of security of receivables is another major reform introduced by the R-UAS. The mechanism is similar to the French *Dailly* assignment and is intended to operate as a full transfer of title of the receivables (including continuing and future ones provided they can be sufficiently identified) to the lenders/assignee(s). In principle, notice to the debtor is not required to perfect the assignment, but if payments are to be made directly to the secured creditor, notice must be given to the underlying debtor, otherwise payments may legitimately be made to the assignor. The assignment will cover receivables identified on an assignment form (*bordereau*) delivered to the lender assignee(s). As with the French

mechanism, the transfer of title is effective on the date set out on the assignment.

The assignment of receivables is available only to secure indebtedness provided under a credit facility by “entities lending funds or performing banking operations in their ordinary course of business”. One notable point is that the R-UAS has overcome one of the inefficiencies of the *Dailly* assignment which is only available to licensed institutions. However, as for the French *Dailly* assignment (and on the basis that such security must be granted to secure a credit transaction) the R-UAS would not permit that the assignment be granted to secure bonds, swaps or other derivative transactions.

Cash collateral, pledges over bank accounts

A “fiduciary pledge over cash” has also been created. Under this form of security interest the secured sums are transferred to the secured creditor and deposited in an escrow account opened in its name. As with the assignment above, the intended effect is that upon enforcement the secured creditor would be able to foreclose over the collateral up to the amount of the secured debt. This mechanism is specific to OHADA law (although French case law has conferred a similar effect to pledges over cash).

Although bank accounts could be secured in practice through the pledge of receivables mechanism, a specific pledge regime has now been introduced for taking security over a bank account. The pledge would be binding on the account holder as from its notification to the account bank. The pledge would cover the sums standing to the credit of the account on the date of enforcement, subject to clearing pending transactions (whether credits or debits).

Outlook

The R-UAS is undoubtedly a significant step that demonstrates the willingness of the OHADA Member States to adopt a more creditor-friendly security regime.

In order for the new regime introduced by the R-UAS to be fully successful, certain further steps are needed. The role of the Registry of Commerce, which will be responsible for security registrations will be key as is the need to ensure that the rights of creditors created by the R-UAS are not weakened in the context of insolvency proceedings. This is a point where case law and the (announced) reform of the Uniform Act on insolvency law will play an important role.

It is worth noting that since the R-UAS largely aligns the OHADA security regime with French law, French lawyers will be able to use their experience of French financings when advising on those in OHADA Member States.

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