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Trade: Implications of Mobilizing African Resources for Development Through

Sub theme

Harmonizing of trade laws to enhance intra African trade: The case for the expansion and review of OHADA within the African Union 2063 Agenda.

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ABBREVIATIONS

AMU: Arab Maghreb Union
ARCCJA: Arbitration Rules of the Common Court of Justice and Arbitration
ARICC: Arbitration Rules of International Chamber of Commerce
AUDCG: Uniform Act on General Commercial Law
AUPCAP: Uniform Act for Bankruptcy and Insolvency
AUPSRVE: Uniform Act Organizing Simplified Procedures for Recovery and Enforcement
AUS: Uniform Act on Security Interests
AUSCGIE: Uniform Act on Commercial Companies and Economic Interest Groups (GIEs)
AUTMPR: Uniform Act of Transport of goods by road
CEA: Community of East Africa
CEN-SAD: Community of Sahel-Saharan States
CCJA: Common Court of Justice and Arbitration
COMESA: Common Market for Eastern and Southern Africa
ECCAS: Economic Community of Central Africa States
ECOWAS: Economic Community of West Africa States
ERSUMA: Regional and Superior School of Magistracy
GIEs: Economic Interest Groups
ICSIS: International Center for Settlement of International Disputes
IGAD: Intergovernmental Authority on Development
RCCM: Trade and Credit Register
SADC: Southern African Development Community
SARL: Limited Liability Companies (LLCs)
SA: Anonymous capitalistic Companies
SAS: Simplified joint-stock Companies
UAA: Uniform Act on Arbitration
UAM: Uniform Act on Mediation
UNCITRAL: United Nations Commissions on International Trade Law

INTRODUCTION

The African Union brighting and lively convicted by A guiding Vision of "An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in international arena", enacted the African Union 2063 Agenda.

The seven Aspirations from this Agenda are: 1°) a Prosperous Africa, based on inclusive growth and sustainable development, 2°) **an integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance**, 3°) an Africa of good governance, democracy, respect for human rights, justice and the rule of law, 4°) a Peaceful and Secure Africa; 5°) Africa with a strong cultural identity, common heritage, values and ethics; 6°) an Africa whose development is people driven, relying on the potential offered by people, especially its women and youth and caring for children, 7°) an Africa as a strong, united, resilient and influential global player and partner.

Regarding to the **second Aspiration** about an integrated continent, OHADA is properly one of the most economical integration by the law as it has never be seen in the World.

Historically, the OHADA's Treaty has been founded "*to make further progress on the path of African unity*" and for "*the establishment of an African Economic Community*".

Effectively, OHADA has harmonized for seventeen countries of Africa **issued from three Monetary Unions** (West Africa, Central Africa, Comoros) the following domains: Trade Law, Trade Companies Law, Insolvability, Recovery for creditors, Arbitration, Trade's transport of goods by road, Cooperative companies, Accounting and the latest about Trade's Mediation.

The efficacy of OHADA's system is providing by integrating laws inside its State's members without any process of intern admission. Also, OHADA's greatest achievement was to successfully integrate two different regional economic zones (ECCAS and ECOWAS) within which the integrated market is not at the same level.

However, some critics have been made about OHADA consisting of saying that it has been enacted for foreign investors and do not stimulate intra African trade. The same critics are now made about African Union Agenda 2063 to be unrealistic, and contrary to the free market.

These critics relay skepticism generally attached to African innovations but cannot resist to a strong analysis and to the facts.

Our thesis is that the Review of OHADA demonstrates how it is contributing to the Agenda 2063 by impacting intra African trade (I), but it could be more efficient if it would be expanded in the whole Africa (II).

On the first hand, the OHADA developed by his legislation incentives measures for its State's members to develop an intra African market and OHADA's legislation makes its territory so attractive for African investors like Morocco which will probably enter OHADA in the coming years.

On the other hand, the OHADA could (and have to) be easily expanded to others African countries regarding Business Law, which is universal in his general approach.

I. THE IMPACT OF OHADA ON THE AFRICAN UNION AGENDA's BY HARMONIZING AN INTRA AFRICAN TRADE LAW

The OHADA reform on trade law has impacted intra African trade between its state's parties (A) and intra African trade with *extra parte* African states (B).

A. The Impact of the OHADA trade law on intra African trade between the state's parties

As reported by UN Conference on Trade and development[1], to realize an integrated market, African countries have to encourage the development of private sector (1) and the development of their unexploited economic potential (2).

1. The incentives measures to encourage the development of the private sector

Within the OHADA area, any investor, regardless of his nationality, is not prohibited from engaging himself in a commercial activity.

To this end, it may constitute either a commercial corporation[2] , a cooperative society[3] , ie to practice as an individual trader[4] or to set up as enterprising[5] .

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[1] United Nations Conference on Trade and Development, Trade and Development Board, Sixtieth session Geneva, 16-27 September 2013, Item 6 of the provisional agenda Economic development in Africa, **Intra African trade: unleashing the dynamism of the private sector**, Distr. General June 28, 2013

[2] The OHADA law of commercial companies :

The Company (SNC) . It can be constituted by a single partner. All members of that company are traders and have unlimited liability for their company debts (Article 270 AUSCGIE). The rights are represented by shares.

The Limited Partnership (SCS) . It can be constituted by a single partner. It has two types of partners: the "general partners" who are jointly and severally liable for the debts and the "limited partners" who are responsible for the debts within the limit of their contributions (art. 293 AUSCGIE). The rights are represented by shares.

The Limited Liability Companies (LLC). It can be one-man. The partners are liable for the debts of the amount of their contributions whose rights are represented by shares (Art. 309 AUSCGIE).

The Anonymous Companies (SA). Capital company by excellence, it can be sole proprietorship. The partners are liable for the debts of the amount of their contributions whose rights are represented by shares (Art. 385 AUSCGIE).

The joint stock company (SAS). It can be one-man. Its peculiarity let freedom associates to decide freely in the statutes of the organization and operation of the company under reserve of respect for public order rules of the Uniform Act. Here also the associated only are responsible to their contribution whose rights are represented by shares (art. 853-1 AUSCGIE).

The Company's participation . This company is one in which the partners agree will not be registered in RCCM and will have no legal personality. The partners are therefore undivided and their reports are, unless otherwise agreed, subject to the rules associated CNS (Art. 854 and 856 AUSCGIE).

The company founded in fact . It is characterized when two or more persons act as partners without having formed between themselves a partnership (Art. 864 AUSCGIE).

The Company makes. It is characterized when a company is incorporated in OHADA being assigned to defective formation or when unrecognized by the AUSCGIE company is established (Art. 865 AUSCGIE).

When the existence of a de facto company or established fact is recognized by the Judge, the rules of SNC apply to associates.

[3] **The cooperative society** is an independent group of persons united voluntarily to meet their aspirations and economic, social and cultural needs, through a jointly owned and managed group and where power is exercised democratically and according cooperative principles (Article 4 of the Uniform Act on cooperative societies)

In order to stimulate investment through the creation of companies, the revised Uniform Act on commercial companies and GIEs, which came into force on May 5, 2014, introduced a number of incentives measures such as the possibility of drafting the social status (a), the lowering of the minimum share capital required for LLCs (b), the institution of flexible capital companies (c) and the creation of liaison offices (d).

a. The possibility of drafting social status under private seal

The article 11 of the AUSCGIE now allows the founding partners to draft the social status under private seal[6] rather than in the only authentic form as it was when the first texts were adopted.

In this case, as many originals as necessary are drawn up for the filing of a copy at the head office and the execution of the formalities, with delivery or provision of an original copy to each of the partners.

b. Lighter social capital for the LLCs

The principle is laid down at the Article 65 of the AUDCG which provides that: *"The amount of the share capital* ***is freely determined by the partners***".

The legal exception raised by the same text is that: "*However, this Uniform Act may fix a minimum share capital because of the form or purpose of the company*".

Thus, by exception, the Uniform Act requires a minimum share capital for SARL/LLCs (1 000 000 CFA Francs) and SA (Anonymous Companies) (10 000 000 CFA Francs).

It should be noted, however, that in order to take into account the reality of the constitution of the majority of companies into the form of private limited liability companies, the OHADA legislator has stipulated that the States parties may derogate from the minimum capital requirement for LLCs. Regarding to this provision, some states like Gabon and Cameroon have lowered the minimum capital requirement for LLCs to 100 000 CFA Francs[7].

c. The establishment of flexible capital companies

To facilitate the operation of certain capital companies OHADA's legislation established two companies with lighter rules :

- ► **The Anonymous Society (SA) with deputy**: This corporation allows shareholders whose number is less than or equal to three not to constitute a board of directors but to appoint a head deputy who assumes the functions of administration and management of the company (art. 494 AUSCGIE);
- ► **The Simplified joint stock companies (SAS)**: It has the particularity of leaving the freedom to the partners to decide in the statutes freely of the organization

[4] Is consider as **trader** the person who makes the achievement of commercial acts as an usual profession (art. 2 AUDCG)

[5] The undertaking is an individual entrepreneur, natural person who, upon declaration provided in this Uniform Act, carries a civil professional, commercial, craft or agricultural (art. 30 of the A UDCG)

[6] This possibility results from the revision of the Uniform Act adopted on 30/01/2014 in Ouagadougou. Very quickly, the majority of States Parties took updated their device to make effective the drafting of statutes by private deed. One could cite as an example for LLCs, Benin (Decree No. 2014-220 of 26/03/2014), Burkina Faso (Decree No. 2014-462 of 26 May 2014), Côte d ' Ivory (Ordinance No. 2014-161 of 02/04/2014) or on Togo (Decree No. 2014-119 of 19 May 2014).

[7] The Gabonese law No. 013-2016 of 5 September 2016 on simplifying the creation of an LLC or Cameroonian No. 2016/014 law of 14 December 2016 fixing the minimum share capital and the terms of use the services of the Notary within the creation of an LLC

and the functioning of the company subject to the respect of the rules of public order of the Uniform Act. (853-1 AUSCGIE)

d. The institution of "liaison offices" to promote business development between the countries of the OHADA area

The representative or liaison office is an establishment owned by a company located in one State's party and responsible for linking the company to the market of the State Party in which it is located.

The "liaison office" it's not properly a "*subsidiary establishment*" because it does not have independent legal personality or a branch and does not have management autonomy.

Effectively, it just covers a "*preparatory or auxiliary activity*" compared to that of the company which created it (article 120-1 AUSCGIE).

Through these "liaison offices", a company located in a State A, can without constraints (other than the registration with the RCCM) begin to develop its activities in a State B without having to set up a real establishment.

This provision exists only in OHADA law.

2. The incentive legislation to take care of the unexplored economic potential of intra African Trade

The studies made on African countries pointed that Africa has a great and unexplored economic potential to enhance intra African Trade, such as agriculture and/or the informal sector.

OHADA tried to regulate both the agricultural market (a) and the informal sector (b).

a. Promoting an intra African agricultural market with cooperative companies

As detailed by the UN Conference for Trade and Development[8]: "*Africa has about 27% of the world's arable land that could be exploited to increase agricultural production, yet many African countries import food and agricultural products from other continents. Enter In 2007 and 2011, 37 African countries were net food importers, and 22 were net importers of agricultural raw materials, but only 17% about the total African trade in food and live animals has been on the continent. In addition, Africa exported on average only 21% of its products in the continent* (…)"

How OHADA tried to overcome this bitter finding?

The economies of African countries[9] "*are most based on agricultural export products (coffee, sugar, cocoa, etc.) which are part of increasingly open markets, but often remain controlled by an oligopoly of intermediaries, exerting significant pressure on the prices. This market structure is generally considered unfavourable for small producers, who can only capture a small share of the value created in the sector and have little leeway to improve the social or even environmental impact of their activity*."

To reverse this situation, the actors of value chain affirming the principles of collective solidarity tend to constitute legal form of cooperatives which are estimated to be more than 569,000 with more than one billion people worldwide.

[8] Supra

[9] Emile Blaise Siewe Pougoue. Les Coopératives agricoles au service du développement: quelles contributions ?. Ingénierie Rurale, Agriculture Familiale et Agro-Industrie, Nov 2017, Libreville, Gabon.

The adoption of Uniform Act for the cooperatives has been the solution brought by OHADA to enhance intra African trade.

Looking to the article 4 of the Uniform Act for Cooperatives: "*The cooperative society is an autonomous group of people willingly united to meet their aspirations and common economic, social and cultural needs, through an enterprise whose ownership and management are collective and where power is exercised democratically and in accordance with cooperative principles.*"

The Uniform Act distinguishes two categories of cooperative societies:

The simplified cooperative society, made up of five natural or legal persons minimum. It is managed by a management committee of up to three members. When the number of cooperators is at least 100 or when this threshold is reached in the course of life of the cooperative, the number of members of the management committee may be from three to five;

The cooperative society with board of directors, constituted between at least fifteen natural or legal persons. It is managed by a board of directors composed of at least three members and no more than twelve members.

The Uniform Act lists four levels of organizations of cooperatives: the cooperative society, the union (at least two cooperatives), the federation (at least two unions), the confederation (at least two federations).

To develop more interactions between cooperatives of differents countries, the Uniform Act provide the possibility to develop **cooperative networks of means or objectives**. These Cooperative networks may be formed between organizations not belonging to the same territorial jurisdiction, or between organizations not constituted in the same State Party (Article 161 AUSCOOP)

This last provision is properly a solution to enhance intra African trade market between the states parties.

b. Integrating the informal economy with the status of "entreprenant"

Because the informal sector represents more than 38% of GDP in sub-saharian Africa[10] and much more in certain OHADA's States parties[11], a legislation to reintegrate this ghost economy into the real one was opportune not just for the States but also for the social rights of labours of the informal sector.

This reintegration can also determine real statistics about intra African market, which could grow from 11,3% to 21% in 2011[12].

For these reasons, OHADA developed a status called "entreprenant" which is: "*an individual entrepreneur, a natural person who, by simple declaration provided for in this Uniform Act, engages in a professional civil, commercial, craft or agricultural activity*." (Article 30 AUDCG)

Much more, the "entreprenant" retains his status if the annual turnover generated by his activity for two successive fiscal years does not exceed the thresholds set in the Uniform Act on the Organization and Harmonization of Accounting for Enterprises under the Minimum System of Cash.

[10] UNCTD report, cited *supra*

[11] For example in Benin it represents more than 60 to 70% of its GDP, Impact assessment of the status of the Entreprenant in Benin

[12] UNCTD report, cited *supra*

Thus, the Minimum System of Cash (MSC) is determined by The Uniform Act on Accounting and Financial information (art. 13) which provides that:

"*Eligible entities for the Minimum System of Cash are entities whose annual pre-tax turnover is below the following thresholds:*

- → *sixty (60) million CFA francs or the equivalent in the legal tender in the State Party, for trading entities;*
- → *forty (40) million CFA francs or the equivalent in the legal tender in the State Party, for artisanal and similar entities;*
- → *thirty (30) million CFA francs or the equivalent in the legal tender in the State Party, for service entities."*

As we see the minima are high regarding to the economies in OHADA System to re-integrate a significant number of companies.

Unfortunately, because the text allow each State Party to set "*incentives for the entrepreneur's activity, including tax and social security contributions*" certain States delayed the effectivity of the "entreprenant" status by not takin social and fiscal texts about it.

But if we look at Benin where about 90% of the population works in the informal sector and represents about 60 to 70% of Benin's GDP according to the agency Beninese National Statistics Office (INSAE)[13], the impact of this reform was very opportune.

B. *The impact of* OHADA Trade Law on intra African trade with African countries ex parte at OHADA's Treaty: The case of Morocco

The case of Morocco is a real example of the interest brought by OHADA for attractiveness of his States parties. This attractiveness brings now Morocco to find an admission to the ECOWAS to consolidate its investments.

Two reasons were advanced for this regain of interest, the rules of free competition (1) and recently the guarantees of equitable process offered by investment arbitration (2).

1. Rules of free competition

Morocco signed Bilateral Treaties of Investments with Benin, Burkina Faso, Guinea, Bissau Guinea, Mali, Nigeria, Senegal, Gabon[14]. This is for certainly due to the rules of free competition offered both by ECOWAS and OHADA.

Concerning OHADA, ones of these rules are reported hereafter.

a. Equal treatment for foreign investors

First of all, there is no restriction for a foreign investor, Moroccan for example to be owner of a company inside OHADA's territory. There is no Uniform Acts which clearly distinguished between traders, basing on their nationality.

The whole Uniform Act treating about foreign creditors is the Uniform Act on Bankruptcy (AUPCAP) which provides also measures for equal treatment in a chapter

[13] http://pubdocs.worldbank.org/en/865991473695451829/COMPEL-Benin-protocols.pdf

[14] The New Moroccan Geopolitics in Africa at the time of accession to ECOWAS, REMA, 2018, Directed by Prof. HARAKAT Mohamed, p. 36

dedicated to the recognition of foreign bankruptcy procedures[15] and/or the cooperation with foreign tribunals and foreign creditors.

b. Rules for monetary conversion

Some rules for monetary conversion are also enacted by OHADA. We can find them in the Uniform Act for transports of goods by road (AUTMR).

This Uniform Act provides, in case of liability of the career, a compensation for damage or for total or partial loss of the merchandise calculated according to the value of the goods and "*cannot exceed 5 000 CFA Francs per kilogram of gross weight of the merchandise*"(art. 18 AUTMR)

The article 29 of AUTMR states that: "***For non-CFA States**, the amounts mentioned in Article 18 above shall be converted into the national currency according to the exchange rate on the date of the judgment or arbitration award or at a date agreed to by the parties.*"

This disposition is also in favor of international market of transports by road, by taking consideration with rules for monetary conversion. However, if this rule is only contained in the AUTMR, we think that it could be extended to the others matters ruled by OHADA.

2. The investment arbitration to settle litigations between foreign investors and states

By initiating an OHADA's arbitration of investments, the OHADA subscribed to the "new generation of policies of investments" defined by UNCTAD16.

In analysis, the system offered by OHADA's investment arbitration is more interesting for Morocco (a) than his BTI with others African countries ex parte of OHADA (b)

a. Efficacy of OHADA's arbitration for investors

a.1. Equal treatment

This fundamental principle means that the parties shall be treated equally and each party shall be given full opportunity to present its case (art. 9 UAA).

Even if a party is a foreigner, like Moroccan, if the arbitral tribunal is located inside one of the OHADA's states parties, this principle guaranteed "*equality of arms*" during the arbitral process.

It can be related to prohibitions enacted for the arbitrators to settle cases where their native country is implicated, or to remain independent and impartial to the parties (art. 7 UAA)

a.2. A fast procedure

Many dispositions of the UAA and the implementations of the Common Court of Justice and Arbitration are made to accelerate the procedure in order to give a "fast solution" to the litigation during arbitration.

Some can be listed hereafter:

[15] AUPCAP, Title VII, Chapter II, art. 256 & f.

[16] UNCTAD, World Investment Report 2012: Towards a new generation of investment policies. Publication of the United Nations, New York and Geneva 2012

- Where the arbitration agreement does not set a time limit, the mandate of the arbitral tribunal may not exceed six (06) months from the date on which the last appointed arbitrator accepted his appointment (art. 11 UAA)

- Where the arbitration agreement exists, the state court cannot be competent (art. 12 UAA) and the decision to state about its competence in this case may not exceed fifteen days (art. 13 UAA)

- If the parties fail to agree within thirty (30) days following the notification of the request for arbitration, the arbitrator shall be appointed by the Court (art. 3 of ARCCJA);

- The respondent(s) shall, within thirty (30) days upon receipt of the notification of the request for arbitration from the Secretary General, submit their response to the latter (art. 6 ARCCJA / art. 5 of ARICC);

- Where the respondent has filed a counterclaim with his response, the claimant may file a reply to the counterclaim by way of an additional submission within thirty (30) days from the date of receipt of the Counterclaim (art. 7 of ARCCJA / art. 5 ARICC)

- After it has received the file, the arbitral tribunal shall summon the parties or their duly qualified representative and counsel, to a scoping meeting which shall be held as soon as possible and not later than forty five (45) days from the date of receipt of the file (art. 15 ARCCJA)

a.3. A total independence of the Center of arbitration of the Common Court of Justice and Arbitration and the arbitral tribunal

The reform makes a clear separation between the CCJA and the arbitral tribunal.

The CCJA is not a jurisdiction; it does not settle disputes itself. The Court states as the administration of arbitral proceedings (article 1 ARCCJA)

The role of the Court is perceptible in the constitution of the arbitral tribunal, only in case of discordance of the parties about the appointment of arbitrators (Art. 3 ARCCJA), in case of competence exceptions of the state Court (art. 13 UAA), the seat of arbitration if the arbitration agreement does not regulate it (art. 13 ARCCJA), or for the formal examination of projects of awards (art. 23 ARCCJA).

The arbitral tribunal is the arbitral jurisdiction which states on the litigation and deliver the award. The arbitral tribunal alone is competent to rule on its own jurisdiction, as well as on any issues concerning the existence or validity of the arbitration agreement (art. 13 UAA).

a.4. A large and extensive enforcement of arbitral awards

Under the OHADA Arbitration, the award is subject to enforcement by an exequatur decision issued by the competent jurisdiction in the Member State (art. 30 UAA). If the parties opted for ARCCJA, the exequatur is settle by the CCJA (art. 30 ARCCJA). The recognition and the exequatur can be denied when the award is manifestly contrary to a rule concerning international public policy and The national jurisdiction or the CCJA, seized by a request for recognition or exequatur, shall set a decision within fifteen (15) days from the day of its seizure and if not, the exequatur shall be presumed to have been granted.

Very interesting, under the CCJA Arbitration, any arbitral award have mandatory effect on the parties and **final res judicata effect in the territory of each OHADA's Member's State** to the same extent as judgments made by domestic courts. However, it may be subject to forced enforcement on the territory of any of the Member States (art. 27 ARCCJA).

The recognition of the large res judicata effect offers to the investors the right to enforce the award in the whole seventeen countries members of OHADA's treaty.

b. Limits of investments arbitration signed under BTI between Morocco and African Countries non-members of OHADA: the case of the Morocco-Nigeria BTI of 2016

b.1. Unequal treatment between the parties at litigations

The treaty of 2016[17] distinguished between investor-state disputes (Article 27) and between two States (Article 28).

For the first category, the treaty guarantees **only investors** access to arbitration by the International Center for the Settlement of Investment Disputes (ICSID) or a special tribunal in accordance with Rules of the United Nations Commission on International Trade Law (UNCITRAL) or any other rule.

For the second category, the treaty recommends to "*strive with good faith and mutual cooperation to reach a fair and quick settlement of any dispute arising between them concerning interpretation or execution of this Agreement* (…). *In the event the dispute has not been settled, it may be submitted at the request of either Party to an Arbitral Tribunal composed of three members.*"

In the OHADA's system there is no such distinction, all litigations resulted from investment contracts can be ruled under the Center of arbitration of the CCJA, or other another center of arbitration.

b.2. A complexed preliminary phase of resolution

The treaty also provides that before initiating the arbitration procedure, "any dispute between the Parties will be evaluated in the context of consultations and negotiations by the "**Joint Committee**" upon the written request of the State of the investor concerned (Articles 26.1 and 26.2 of BTI).

The representatives of the investor and the host State (or other competent authorities) participate, as far as possible, to the "**bilateral meeting**" (Article 26.2 of BTI).

The procedure ends at the request of "any Party" and following the adoption by the Joint Committee of a summary report of the position of the "Parties".

If the dispute is not settled within six months, the investor may resort to **international arbitration after exhausting domestic remedies** (Article 26.5).

In the OHADA system of arbitration the amicable resolution of litigation can be set by independently by:

- → a preliminary phase of resolution before the arbitration prior to any arbitration; In this case, the arbitral tribunal have the power to verify the effectivity of its application before opening an arbitration. It has also the power to mandate the completion of this preliminary phase (art. 8.1. UAA)
- → a "mediation". The mediation is defined by Uniform Act on Mediation (UAM) as "any process, regardless of its name, whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute, adversarial relationship or disagreement ("the dispute") arising out of a legal or contractual relationship, or related to such relationship, involving natural persons or legal entities, including public bodies or States;" (art. 1 UAM);

[17] BTI Morocco – Nigeria, Dec.3.2016, https://www.bilaterals.org/IMG/pdf/5409.pdf

→ a Consent award which refers to cases where an arbitrator, during arbitral proceedings, attempts to facilitate a settlement directly with the parties (art. 20 ARCCJA);

→ "*amiable compositeur*" which allow the arbitral tribunal to settle the litigation by referring to equity (art. 15 UAA).

As we see the variety of amicable resolutions of the litigation are more secured for the Moroccan investments than the preliminary stage of amicable resolution settled by the BTI, very complex with a joint committee of the two States parties.

At the end of the first part of our thesis, OHADA system can be seen as really impacting intra African trade between OHADA States parties and with others African States *extra parte* at OHADA's treaty.

But it could do much more if the OHADA was expanded.

II. THE EXPAND OF OHADA's HARMONIZED TRADE LAW, IN ORDER TO REALIZE THE AFRICAN UNION ASPIRATION OF INTRA AFRICAN TRADE

The expand of the OHADA will intensify the African Union aspiration for a global market in Africa. The expand of his scope (A) may be completed by the expand of his space (B).

A. The expand of his scope

Concerning his scope, when the new Uniforms Acts are expected (1), we call for a new institution of OHADA for companies (2).

1. The expected Uniforms Acts

The Uniform on Labour Law (a) and on public private partnerships (b) are in discussion.

a. Labour law

A single and harmonized regulation of labour law will determine an intra African market. This Uniform Act will allow the same social rights inside OHADA's territory.

The article 2 of the OHADA Treaty specifies that labor law is one of the matters that may be subject to harmonization. However, the article 8 of the said Treaty requires the unanimous rule of the States Parties with a presence of at least 2/3 of the said States.

A preliminary draft Uniform Act on labor law was drawn up in Douala on November, 24, 2006 and has not yet entered into force because of the unanimity rule…

One of the main critics made to this preliminary project was that it was too much for the workers and could blow the desire of investors to come into OHADA's space. Effectively, there was in this preliminary project a real protection of the strike right and the possibility of "lock-out" of establishments in case of strikes (articles 242 and 246 of the Preliminary Uniform Act)

Another critic was the differences between the economies of the State parties which constitute an obstacle to the determination the same "minimum salary" for all of the States. In the preliminary project, it was said that it will be determinate by each State (article 114).

Also, the preliminary Act seems to duplicate a "**western model**" of labour law without any consideration of African singularities:

- → The article 2 defines the worker as "*anyone who is committed to putting his activity **for remuneration**, under the direction and authority of another natural or legal person, public or private, called employer*": what do we understand by the remuneration, just only money?
- → The legal duration of work cannot exceed forty (40) hours per week (article 82);

→ Every worker has a daily rest of at least eleven (11) consecutive hours (article 97) and a weekly rest of at least twenty-four (24) consecutive hours (article 98), etc.

Despite the critics the standardization of the labour law could enhance much more intra African trade if considers the social economies of Africa, and the local mentalities. It must not just copy the "Western model" detailed before but be founded on African realities.

For us, the Uniform Act shall:

- integrate the familial work which constitutes the first level of employment;
- distinguish between rural work and urban work because they do not cover the same realities;
- integrate mediation resolution on disputes;
- Africanise the concept of "remuneration"
- Fix a minima salary (basis) in the OHADA's states founded on a ratio of all the minima salaries of each State.

b. Uniform Act on Public-private partnerships

The OHADA Business Law did not provide in its treaty to regulate public-private partnership contracts as part of the harmonized business law. For the World Bank[18] "*A Public-Private Partnership is a long-term contract, between a public entity and a private company, through which the private company is committed to providing a global service that can combine financing, design, implementation, operation and maintenance of a public infrastructure. The private company is remunerated either by the fees paid directly by the users, or by payments from the public entity, conditioned on the achievement of certain levels of performance of the service, or by a combination of both.*"

In fact, these contracts, originally imposed to states by World Bank or International Monetary Fund, have become real "markets" within the meaning of economic business law. Given the proven impact of these markets on the economies of African countries, harmonization of PPP rules within the OHADA space would be a major asset for the Member States.

This could surely help intra African trade if it provides special dispositions to "intra African public private partnerships". This would allow African investors some facilities to contract with African states. This would also consolidate the African Market.

Filing this goal to consolidate the right of investments in OHADA's space a Uniform Act on Public Private Partnerships is now expected.

2. A Council of Companies to associate them to the decisional process of legislation

The actual political institutions of OHADA don't associate the companies to the process. The President's Conference, the Council of Ministers or the Permanent secretary are both political institutions, which define the policy, the general orientations of OHADA.

But, to enhance intra-African trade, OHADA need to associate Companies to political concerns in order to impact directly the economies.

This is why we suggest, in addition, a consultative institution which could be called the "Council of Companies" which will give opinions about OHADA's reforms and will draft an annual report about economic impact of OHADA in intra-African Market.

[18] http://www.initiative-ppp-afrique.com/Partenariat-public-prive/Definitions-et-outils/Definition

Could be members of this Council African groups like DANGOTE and greatest Banks like Africa Export Import Bank (AFREXIMBANK) which received in 2017 from the African Bank of Development a $ 300 million credit line to support intra-African trade[19].

B. The Expand of his space to Common Law countries

The expand of OHADA's territory is in discussions each year because it constitutes a testimony of its success and the capacity of Africa to unite under the banner of the economic progress offered by a harmonized business Law. Thus, the opportunity of the expand to Common Law countries (1) will determine the conditions of this expand (2).

1. The opportunity to expand for intra African Trade

Actually, main of the State parties at ECOWAS[20] are members of OHADA excepting Nigeria and Ghana which practice Common Law.

This situation contrasts with the economic relationships between these two countries and the others of ECOWAS.

Concerning Ghana and Ivory Coast, trade between them is characterized by the **preponderance of Ivorian exports**. In 2015, for example, global trade amounted to 286.392 billion FCFA (Source: Ministry of Commerce), of which 259.704 billion represents the share of Ivorian exports. The main products exported are: drilling or operating platforms, floating or submersible, oil bitumen, diesel oil, parts of drilling or drilling machines, cashew nuts, fresh or dried. Unfortunately, **Ivorian imports are relatively low**. In 2015, they amounted to 26.689 billion FCFA. The main products imported by Côte d'Ivoire from Ghana are: crude oils of petroleum or bituminous minerals, other products of related industries[21].

Concerning Nigeria/Cameroon trade, the volume of imports from Nigeria to Cameroon amounted to 433.2 billion CFA francs in 2016 despite BOKO HARAM[22].

In case of dispute relating to inter-African transport of goods with a OHADA State party (which is for the main part made by roads) there will be a conflict of laws between the Uniform Act on transports[23] and the laws of transports of Nigeria or Ghana or between the Uniform Act on transports and the bilateral conventions on inter-States transit of goods.

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[19] https://afrique.latribune.fr/think-tank/entretiens/2017-05-24/commerce-intra-africain-financement-industrialisation-afreximbank-en-premiere-ligne-interview-721143.html

[20] ECOWAS was established by the Treaty of Lagos signed on May 28, 1975 by fifteen West African countries: Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger , Nigeria, Senegal, Sierra Leone, Togo. Cape Verde joined the Community in 1976 but Mauritania decided to leave in 2000

[21] SHORT PRESENTATION OF COOPERATION BETWEEN THE IVORY COAST AND GHANA, Ministry of Foreign Affairs of Ivory Coast, 2015

[22] http://www.cameroon-info.net/article/commerce-exterieur-les-echanges-entre-le-cameroun-et-le-nigeria-chutent-de-52-en-2016-290283.html

[23] The article 1 of the Uniform Act of transports provides that:
"(1) *This Uniform Act applies to any contract for the transport of goods by road where the place of pick-up of the goods and the place of delivery specified in the contract are situated either on the territory of an OHADA Member State, or in the territory of two different States of which at least one is a member of OHADA. The Uniform Act applies irrespective of the domicile and nationality of the parties to the contract of carriage.*
(2) The Uniform Act does not apply to the transport of dangerous goods, funeral transport, moving transport or transport carried out under international postal conventions."

2. Conditions of the expand

The expansion of OHADA Business Law to Common Law system could not be done without a new Uniform Act on Contracts (a) and section for Common Law in CCJA (b)

a. A Uniform Act on Law of Contracts

Many authors deplored the fact that OHADA harmonized Business Law before harmonizing Law of the contracts which is the basis.

OHADA's executive must take it as an opportunity to draft a Uniform Act of Law of contracts based both on systems of Civil and Common Law.

They are many reasons to think that the two systems of contracts are not too distant as it is usually presented.

1°) In both traditions, the offer and simple acceptance have no binding effect and are therefore insufficient for the validity of the contract.

2°) The notion of "Consideration[24]" and "Promissory estoppel[25]" in Common Law is often similar to the Civil law notion of "Cause[26]" which both emphasizes the idea of reciprocal counterparts;

3°) The notions of "frustration[27]" (Common Law) and "force majeure"(Civil law) are also often similar

4°) etc.

This Uniform Act may, as we suggest, integrate the both systems in order to regulate all the African Business Law and to disclose the contradictions between the two systems.

b. A section for Common Law in CCJA

The expand of OHADA Business Law to Common Law will not be complete without the legitimacy of the Common Court of Justice and Arbitration to settle disputes based on Common Law contracts.

We know that, the CCJA is, exclusively, the Suprem jurisdiction of the States parties concerning matters settled by OHADA.

A special section for Common Law must be created to handle this litigations and to develop a mixt and single vision of African jurisprudence on Business Law.

[24] The definition of the notion of consideration was set out in Currie v Misa, where it is referred to as a principle which constitutes either a disadvantage to the creditor or a benefit to the debtor. Lush J. defines the consideration as "*a right, interest, profit or advantage obtained by one party or the abstention, disadvantage, loss, liability suffered or undertaken by the other party*" (1875) LR 10 Ex 153

[25] It implies a promise or "representation" made by a party during the performance of a contract on its future conduct and from which it results that it will not require the performance of certain provisions of the contract. If the other party has relied on this promise, the author of it cannot retract it.

[26] The notion of « Cause » means that the contract should have "a legal and certain contain" (article 1128 French Civil Code)

[27]

CONCLUSION

The OHADA Business Law emphasises the second aspiration of the African Union Agenda of an "integrated continent".

By its standardization of Business Law OHADA opens the door to the growth of an intra-African Market between its members and with the others African countries like Morocco.

However, there is still a lot to do: expand the scope of OHADA and expand its space are ones of the solution.

But, OHADA is not alone; it's slaloming in the great land of Africa between too many economical regional organizations allowed by African Union AMU, CEN-SAD, COMESA, CEA, ECCAS, ECOWAS, IGAD, SADC.

Fortunately, the recent adoption of the Continental Free Trade Area is expected to drive the intra African trade market at the first one in Africa.

OHADA may be expanded, as the legal system of Business law in Africa, working in intelligence with economical regional organizations mentioned before to strongly enhance intra African trade.

"*Africa must Unite*" not just as a slogan repeated to enhance intra African relationships, Africa must Unite by harmonizing its commercial legislation in order to strongly develop its economy and generate an unique vision of laws and society.

2063 is not so far, and there is still a lot to do.

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