Exponential growth of African business law and the spread of common law

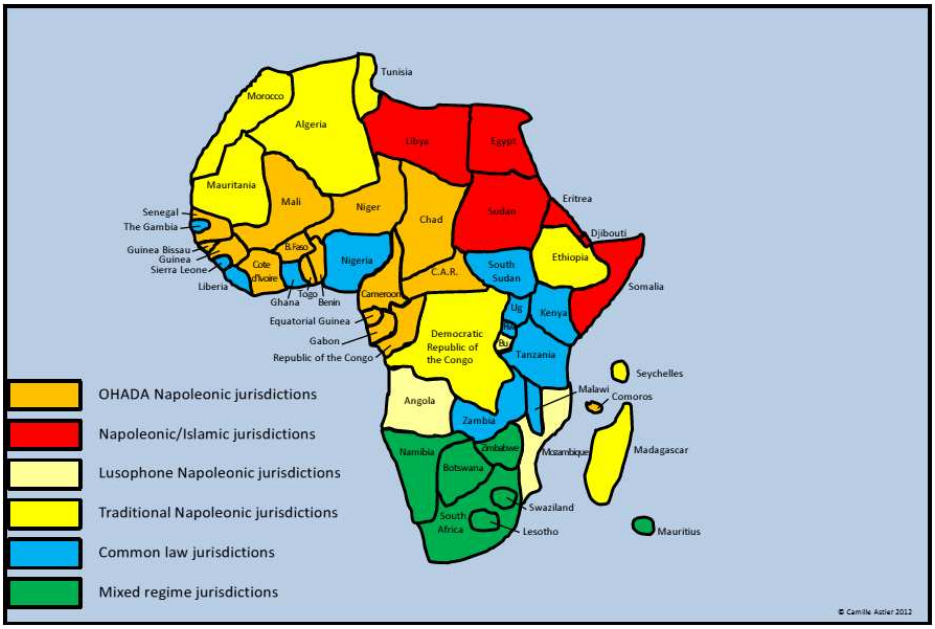
Despite the northern hemisphere slowdown, Africa's economy is growing, and growing fast. With a forecasted growth of about 6% for the next two years (according to the IMF), Africa has been the fastest growing region (ahead of East Asia in eight of the past ten years according to The Economist). This economic growth is coupled with an exponential regulatory boom: most of the African countries who had inherited legal systems through colonialism, or created them immediately after independence, are now interested in developing and advancing their own legal system adapted to their needs and the changing realities of the African investment landscape. A striking aspect of this developing legal world is how the common law system is rapidly spreading to the Napoleonic jurisdictions.

OVERVIEW OF THE LEGAL SYSTEMS IN AFRICA

The legal systems of most of the African countries are vestiges of colonisation. So naturally most of the French and Portuguese former colonies have legal systems based on the **Napoleonic code**, whereas the former English colonies have a **common law** legal system. South Africa has a **mixed Roman Dutch/Common law** regime (having first been colonised by the Dutch and then the British) which then spread to Namibia, Botswana, Zimbabwe, Lesotho and Swaziland.

The map below shows the split between the main three legal families amongst the African jurisdictions:

Legal families of the African jurisdiction



Key Contacts

Camille Astier
Senior Associate, London
camille.astier@hoganlovells.com
T: +44 20 7296 2291

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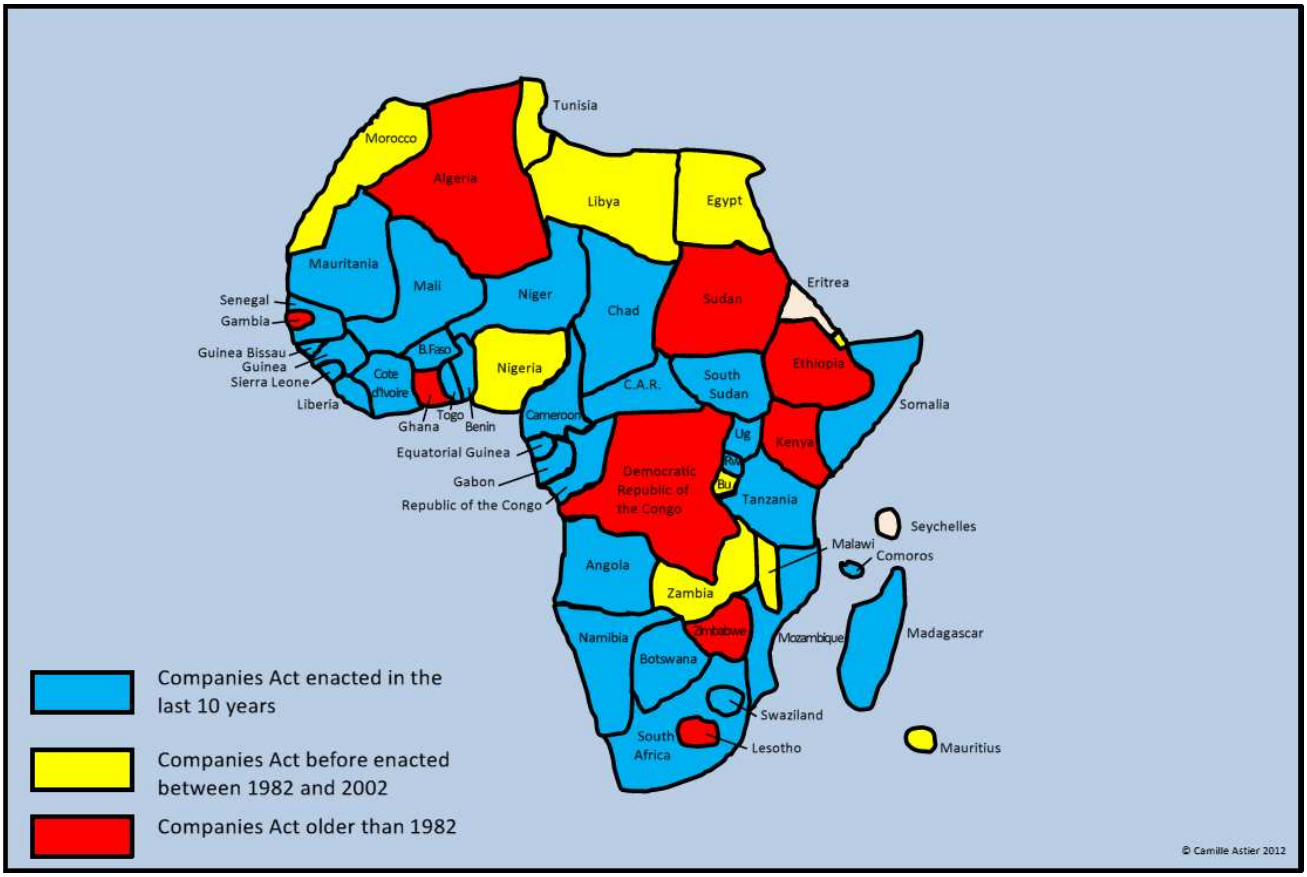
EXPONENTIAL GROWTH OF BUSINESS LAWS

It is worth noting many jurisdictions have recently written and/or revamped their business laws. **Nigeria** is going through large reforms in line with their Vision 2020 policy (i.e. by 2020 Nigeria has pledged to become one of the 20 biggest economies in the world); **Kenya** is in the process of updating all its business laws; **South Africa** (which has now been added as the "s" in the BRICS club) also recently updated its Companies Act. Additionally, post conflict countries (**Rwanda**, **Liberia**, **South Sudan**) are developing efficient business tools and adopting new laws. The **Democratic Republic of Congo** is about to join OHADA (OHADA is a French acronym which stands for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires") and accordingly, in a few months, its post-independence legal system will suddenly be replaced by a new set of modern business laws closely following the French system.

The map below shows how recent the business laws of each African jurisdiction are.

How recent are the corporate/commercial laws?



Of course this makes sense, business laws are important tools to attract investors. Most of the traditional Napoleonic jurisdictions have remained faithful to their civil law regime and all the common law jurisdictions have kept their common law system in place. However **common law concepts and ideas are expanding into the Napoleonic jurisdictions**. Let's take a few examples.

Rwanda. After the 1994 genocide, Rwanda was left with a handful of lawyers and a burning desire to change. Based on research suggesting that common law systems attract more investment, Rwanda changed from the civil to the common law system. Due to the lack of capacity issues, the change process is on-going. So Rwanda switched its 19th century civil law system (based on Belgian law, which in turn was based on French law) to a modern common law system based on Mauritian law (which itself is based on English law). This conscious switch helped Rwanda achieve the third place of African countries in the "ease of doing business" survey (behind Mauritius and South Africa, but with its 45th place worldwide, is ahead of Luxembourg, way before China (which ranks 91st), Brazil (which ranks 126th) or India (which ranks 132nd).

OHADA. OHADA was created in 1993 by several Francophone West African jurisdictions which decided to establish a common set of modern business laws between themselves to attract investors. Now 16 jurisdictions (and soon 17 with the Democratic Republic of Congo) share the same business laws and the same Supreme Court in Abidjan, Ivory Coast. Although the underlying basis of OHADA is clearly French, the OHADA Uniform Acts (applicable in every OHADA jurisdiction directly) are currently going through a large revolutionary reform. So for example the 2011 Uniform Act on security interests introduced the security agent and gave extensive powers to security agents to hold the security on behalf of all the creditors. Similarly, enforcement of security without court involvement, quite frequent in common law

jurisdictions, has also been made available. So yes, OHADA started with a French recipe but many common law twists have recently been added to make the system more efficient.

The African Loan Market Association ("ALMA"): The Loan Market Association is an organisation of both lenders and borrowers. It creates standardised documents which are then used by the market as precedents. It would be hard to conceive creating a commercial loan agreement governed by English law not based on the LMA. On the back of the LMA's success, similar institutions were created in both the US (the LSTA) and Asia (the APLMA). Last year the African LMA was created. As the initiative was driven by South Africa, the governing law of the first standard precedent created by the ALMA was South African law. It makes sense, except that South African law is not as flexible as English law: it has a limited trust concept and does not really have an established concept of insolvency set-off. It was therefore decided by ALMA that the larger cross-border deals would continue to be governed by model documents governed by English law.

These are only three examples, there are others (like Burundi and Ethiopia).

KEY DIFFERENCES BETWEEN THE NAPOLEONIC AND COMMON LAW LEGAL SYSTEMS: WHAT'S THE BIG DEAL?

The common law legal system tends to favour investors more than the Napoleonic legal regime. Again let's take three key examples: the trust, insolvency set-off and security interests.

The **trust** allows a person (the trustee) to hold title to an asset belonging to another person (the beneficiary), This legal concept did not originally exist in traditional Napoleonic countries because it was always regarded as suspicious on the ground of false wealth, whereas it is extremely well established in all the common law countries. In secured transactions, the security trustee will hold the security on behalf of a syndicate of banks and will be able to enforce security on its behalf. Another main advantage of the trust is that if the trustee becomes insolvent, the assets are immune from the trustee's creditors

Similarly the regime of **insolvency set-off** is different between the traditional Napoleonic and common law systems. Still today in France, set-off is permitted between solvent parties but restricted on insolvency. In England, legal set-off is limited between solvent parties only (unless it is otherwise provided by contract, so for example by having an express "set-off clause" in credit agreements) but mandatory on insolvency. The law is the exact opposite in each system. The set-off criterion is one of the best financial indicators as the cut cannot be clearer: the existence of insolvency set-off pays the creditor (like in England) whereas its absence privileges the debtor (like in France). So from a point of view of an investor, there is little doubt which system is preferable.

Finally the availability and scope of **security interests** are wider in common law jurisdictions (who favour the creditor) whereas they are limited in Napoleonic jurisdictions (who tend to favour the debtor). Again, from the point of view of investors, traditional common law is more advantageous.

Indicator	Value	Traditional Napoleonic	Traditional common law
Trust	Protects against insolvency and facilitates holding of security for co-lenders	Not available	Widely available
Insolvency set-off	Protects creditors on insolvency	Not available	Available
Security interests	Protects creditors on insolvency, reduces the risk of credit and therefore encourages the availability of credit	Security asset by asset (involving fixed charges), enforcement through court which can be lengthy, expensive and time consuming	Floating charge covering all the present and future assets. Short, cheap outside the court enforcement usually possible

CONCLUSION

Common law is spreading to the Napoleonic jurisdictions but this movement needs to be put into context. Firstly, over 50% of the African jurisdictions (by number) still have their system based on a Napoleonic system. Secondly, the roots of the Napoleonic systems are deep and the Rwandan example which switched completely from one system to another remains the exception. Finally, the common law movement has also spread to the heart of some the Napoleonic jurisdictions (for example France introduced the "fiducie" - which is a limited form of trust).