

The revised OHADA Uniform Act on security law

INTRODUCTION

Africa is not only a continent with a large and young population but also with abundant natural resources and this creates pressing needs for modern infrastructure. Its potential for development has become its most attractive economic aspect. As a matter of fact, a sustainable investment and development cannot be achieved without a strong and stable legal and commercial framework that would protect private investment or property; nor can it be achieved without an independent judicial system in place to ensure an effective and impartial settlement of disputes. These parameters are essential to enable potential investors to invest in Africa. In these circumstances, a number of African states suffering from outdated and improper legislation agreed to create a modern, harmonised and accessible business law area, known as OHADA.

OHADA is an international organisation created by Treaty signed in Port-Louis (Mauritius) on 17 October 1993 by fourteen African states. The acronym stands for "Organisation pour l'Harmonisation du Droit des Affaires en Afrique" (Organisation for the Harmonisation of Business Law in Africa). Its creation results from a political will to strengthen the African legal system deemed as indispensable for the development of the continent. At present, OHADA has 17 member states, taking into account the recent completion of the accession of the Democratic Republic of Congo in 2012.

Security law is an essential piece of legislation providing for various guarantees protecting creditors by securing the enforcement of the debtors' obligations. The revised OHADA Uniform Act on security law has been adopted on 15 December 2010, but it became effective in each of the - then - 16 member states on 16 May 2011 - it specifies that the security granted before 16 May 2011 will continue to be governed by the former Uniform Act on security dated 17 April 1997. Since 12 September 2012, the revised OHADA Uniform Act on security law also applies (together with all the other OHADA Uniform Acts) to the Democratic Republic of Congo (to see our article on the accession of Congo to OHADA please [click here](#)).

In terms of improvements, the revised Uniform Act on security law could be summarised on four main points which are a new legal framework for pledges, innovation relating to the registration and enforcement of security interests, and the security agent. Although this reform was inspired by the French security law, it is ahead of French law on various matters, especially concerning the security agent, so that some French lawyers now suggest that French law could be inspired by OHADA law in this respect.

THE NEW GENERAL FRAMEWORK FOR PLEDGES

The reform introduces a clear regime governing the pledges, since pursuant to the revised Uniform Act, the tangible nature of the pledged asset is the new criterion for the enforceability of the pledge. Dispossession is now used as an alternative way to achieve perfection of the pledge against third parties. It is easy to assess the impacts of this simplification if we remember that under the former Uniform Act, the pledge agreement was effective between the parties once assets had been handed over to the creditor or the agreed third party. Such mechanism implied deterrent costs for the parties, and was inefficient from an economic standpoint, especially concerning the pledge over inventory. For the commodities business, absence of dispossession will provide a real advantage, given that sales of items pertaining to the pledged stock will generate cash flows which may be assigned or pledged pursuant to an assignment of or a pledge over receivables agreement. The new regime allows for security to be granted in order to secure present or future obligations, and a pledge can also be granted over a future asset. Although the range of security interests has been extended¹, OHADA system has not created a global security interest capable to cover all or most of the debtor's assets, like the debenture or the English law floating charge. The structure of the OHADA security law remains based on a Napoleonic legal system, which provides for a number of



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¹ All security, whether it is a mortgage or a pledge, either over tangible or intangible assets present or future, can now be granted by a written document containing the required information.

security interests covering each type of asset (business, banking account, receivables, etc.).

REGISTRATION OF SECURITY INTERESTS

The revised Uniform Act has removed the obligation to register (*enregistrer*) security interests with the tax authorities, even if such registration is still required in practice in certain jurisdictions. The new regime only requires to register (*inscrire*) the security interests at the competent Trade and Movable Property Credit Register (*RCCM*) - whose operating was improved - for enforceability against third parties. The registration requirement has indeed been generalised to all security interests (except for the pledge over financial instruments accounts) even if they relate to tangible or intangible assets, following the UNCITRAL guide². This could raise a concern, for instance concerning the registration of the assignment of receivables. Such security remains generally undisclosed to the assigned debtors so as to avoid drawbacks from a commercial standpoint. This registration requirement may thus make the assignment of receivables less attractive than foreign security interests or cash collateral (*Transfert fiduciaire de somme d'argent*).

ENFORCEMENT OF SECURITY INTERESTS – Contractual attribution clause ("*pacte comissoire*")

In respect of the enforcement of security interests, in principle, the revised Uniform Act has kept the common remedies available in number of civil law systems. It means that in case of payment default, the pledgee can resort to forced sale at a public auction or can request the judicial attribution of the pledged assets up to the amount of the secured obligations. However, the former Uniform Act prohibited the "self-help" for enforcement, a clause permitting the secured creditor to self-appropriate the pledged asset upon the occurrence of a payment default of its debtor without any intervention of the court. Under the revised Uniform Act (article 104) if the pledged asset is a sum of money or an asset whose value is subject to an official quotation, the parties can agree that in case of payment default, the creditor will become the owner of the pledged asset, it being specified that where the debtor is a professional debtor (within the meaning of article 3 of the revised Uniform Act), the contractual attribution clause may be provided for all types of tangible assets.

THE SECURITY AGENT

The security agent may certainly be considered as the main illustration of the modernisation of the OHADA security law. The security agent is a hybrid institution, between the civil law mechanism of agency (*mandat*) and the well-known security trustee. The revised Uniform Act allows creditors to appoint a security agent, which must be a credit institution, either domestic or foreign. The security agent may constitute, register, manage and enforce security interests on behalf of the other creditors. Article 5 of the revised Uniform Act provides that the security agent acts in its own name and in its capacity as security agent, for the benefit of the secured creditors. It is important to note that the security interests held by the security agent are segregated from its own assets, and cannot be seized by its own creditors, even in case of insolvency of the security agent. These security interests will constitute a dedicated patrimony ("*patrimoine d'affectation*"). The mechanism of the security agent will resolve issues relating to the sharing of security interests between the creditors, and bring more flexibility in the management of the security interests by the security agent, given that the security agent do not need a specific power of attorney in this respect.

² The acronym stands for "United Nations Commission on International Trade Law", which has published a guide in 2007.

THE OHADA UNIFORM ACT ON SECURITY INTERESTS

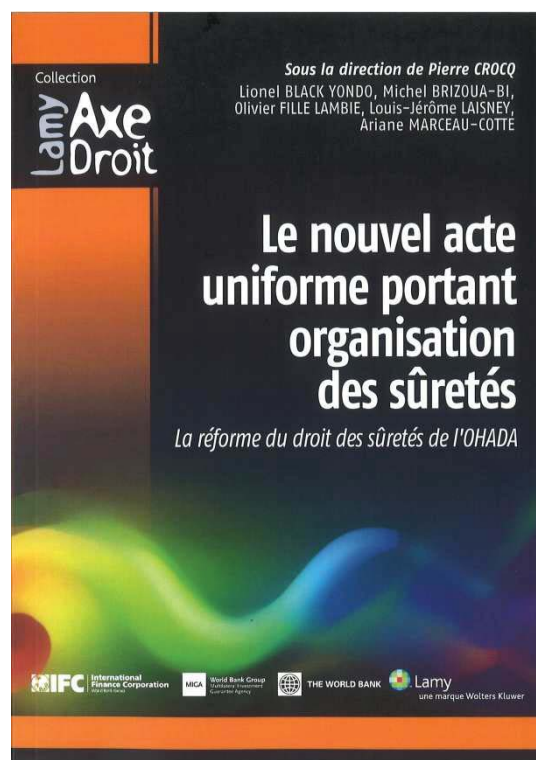
The OHADA Uniform Act on Security Interests (UAS) has recently undergone a comprehensive reform introducing many improvements to this harmonised regime applicable across 17 African countries.

Involved for many years in financings in Africa, the Banking Department of Hogan Lovells (Paris) has an extensive experience of OHADA security law.

As part of their involvement in the recent UAS reform, Olivier Fille-Lambie (Partner) and Louis-Jérôme Laisney (Associate) are co-authors of a book which draws a picture of the main innovations set out by this reform:

- new rules applicable to existing security interests under the former UAS (simplified formalities, strengthened effectiveness, etc.),
- new security interests introduced by the revised UAS (security assignment of receivables, cash collateral, pledge over financial instruments account, etc.),
- unified regime for security registration, and
- creation of a legal regime for the new OHADA law security agent.

The book is available in French. For any information, please contact anne.geoffroy@hoganlovells.com.



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