

Democratic Republic of Congo: OHADA comes into force today

Interview with Franck Kaleo Tshimbadi, Correspondent lawyer from Cabinet Mbuyi Tshimbadi, Kinshasa. Interviewed by Simon Nesbitt and Rashida Abdulai, Hogan Lovells.

1. WHEN WILL THE OHADA UNIFORM ACTS COME INTO EFFECT IN THE DRC?

Since 12 September 2012, all the OHADA Uniform Acts apply in the DRC.

2. DO THE OHADA UNIFORM ACTS DIFFER SIGNIFICANTLY FROM THE CURRENT LEGAL REGIME IN DRC? IN WHAT RESPECTS?

Yes and no. The OHADA Uniform Acts are based on modern French law so our legal system has suddenly been boosted by 125 years. It is a big change, and it is definitely a good thing as modern laws adapted to our society. Also the OHADA Uniform Acts have been in force in 16 countries for several years so there is no novelty fear for investors. Suddenly we have arbitration rules, this is completely new and can only be welcomed by investors. At the same time, these new OHADA Uniform Acts are not a complete revolution as they remain faithful to our Napoleonic roots: our pre-OHADA laws were based on Belgium laws, which were themselves based on French laws. Our change is not as radical as Rwanda's 180 degrees turn who adopted common law and English as the business language in 2009. In addition the OHADA Uniform Acts only cover the business aspects so for example our family and criminal laws remain unchanged.

3. IN YOUR VIEW WHAT WILL BE THE MOST IMPORTANT CHANGES TO DRC LAW FOLLOWING THE COMING INTO EFFECT OF THE OHADA UNIFORM ACTS?

One of the most important features of the OHADA Uniform Acts is that they cannot be unilaterally changed by one country, all 17 need to agree. This level of certainty is a key attraction for investors.

Also the fact that there is a supra national court is compelling, the DRC is now completely part of a whole new team and cannot act as an isolated cowboy.

4. WE UNDERSTAND THAT THE OHADA UNIFORM ACTS WILL HAVE DIRECT EFFECT AND SUPREMACY OVER NATIONAL LAWS IN DRC. WILL THIS OVERNIGHT CHANGE BE PROBLEMATIC?

This is far from an overnight change - we have been cooking our adhesion to OHADA for the last decade. The is one of the main reasons for our delay in joining the club: our judges and lawyers have been adequately trained.

5. WILL THERE BE ANY TRANSITIONAL PROVISIONS? FOR EXAMPLE, HOW WILL LEGAL PROCEEDINGS UNDER THE CURRENT REGIME BE ADJUDGED FOLLOWING THE COMING INTO EFFECT OF THE OHADA UNIFORM LAWS?

There has been almost a decade between our decision to join the OHADA club and the OHADA uniform acts coming into force, so specific transitional provisions were not necessary. However, each Uniform Act contains some provisional measures. Please see below the table summarising when each Uniform Act will be applicable.

Key Contacts



Franck Kaleo Tshimbadi

Correspondent lawyer from Cabinet Mbuyi Tshimbadi, Kinshasa
ktshimbadi@etudetshimbadi.cd
T +243 990 0141 41 / +243 818 159 137



Simon Nesbitt

Partner, London
simon.nesbitt@hoganlovells.com
T +44 20 7296 5219



Rashida Abdulai

Associate, London
rashida.abdulai@hoganlovells.com
T +44 20 7296 5966

	TRANSITIONAL PERIOD OR IMMEDIATELY APPLICABLE?	RELEVANT ARTICLE
UNIFORM ACT RELATING TO GENERAL COMMERCIAL LAW	Two years for existing companies	ARTICLE 1 "Natural persons or corporate bodies, and economic interest groups, set up or being formed on the date of entry into force of this Uniform Act must harmonize the conditions under which they carry on their activity with this new legislation within a period of <u>two years</u> from the date of publication of this Uniform Act in the Official Gazette."
UNIFORM ACT RELATING TO COMMERCIAL COMPANIES AND ECONOMIC INTEREST GROUP	Two years for existing companies	ARTICLE 919 "Natural persons or corporate bodies, and economic interest groups, set up or being formed on the date of entry into force of this Uniform Act must harmonize the conditions under which they carry on their activity with this new legislation within a period of two years from the date of publication of this Uniform Act in the Official Gazette."
UNIFORM ACT ORGANIZING SECURITIES	Applicable to security granted on or post 12 September 2012	ARTICLE 150 "This Uniform Act shall apply only to securities granted or established after its entry into force."
UNIFORM ACT ORGANIZING SIMPLIFIED RECOVERY PROCEDURES AND MEASURES OF EXECUTION	Immediate application for collective proceedings starting on or post 12 September 2012	ARTICLE 336 & 337 "This Uniform Act shall repeal all provisions relating to matters which concern it in the Contracting States." "This Uniform Act shall apply to preventive measures, forced acts of performance and recovery proceedings instituted after its entry into force."
UNIFORM ACT ORGANIZING COLLECTIVE PROCEEDINGS FOR WIPING OFF DEBTS	Immediate application for collective proceedings starting on or post September 2012	ARTICLE 257 "All previous provisions repugnant to those of this Uniform Act are hereby repealed. This Uniform Act shall apply only to collective proceedings initiated after its entry into force."
UNIFORM ACT ON ARBITRATION	Applicable to Arbitration proceedings starting on or after 12 September 2012	ARTICLE 35 "Celui-ci n'est applicable qu'aux instances arbitrales nées après son entrée en vigueur."
ACTE UNIFORME RELATIF AUX CONTRATS DE TRANSPORT DE MARCHANDISES PAR ROUTE	Immediate application for contracts entered into on or after 12 September 2012	ARTICLE 30 "Les contrats de transport de marchandises par route conclus avant l'entrée en vigueur du présent Acte Uniforme demeurent régis par les législations applicables au moment de leur formation."
ACTE UNIFORME RELATIF AU DROIT DES SOCIÉTÉS COOPÉRATIVES	Immediate application	ARTICLE 112 "Sont abrogées à compter de la date d'entrée en vigueur du présent Acte Uniforme et de son Annexe toutes dispositions contraires."

6. THE DRC HAS BEEN IN THE PROCESS OF JOINING OHADA FOR OVER SEVERAL YEARS. WHY DID THE RATIFICATION PROCESS TAKE SO LONG?

The main concern was to ensure that our judges and lawyers were fully trained with the new laws.

7. IS THE RATIFICATION OF THE OHADA TREATY WELCOMED BY LOCAL LAWYERS AND BUSINESSES IN THE DRC?

We have been speaking in length about the new laws, I think everybody is excited about them - although it is a big change and businesses will have to adapt to the new laws.

8. THE OHADA REGIME IS KNOWN FOR BEING ARBITRATION FRIENDLY, HOWEVER, THE DRC WILL BE ONE OF THE FEW MEMBERS YET TO SIGN AND RATIFY THE NY CONVENTION. DO YOU THINK THAT THIS WILL CHANGE?

The ratification of the NY Convention is certainly the logical next step and I think (and hope) that it will happen in the very near future.

9. HOW DO YOU THINK THE DRC'S ACCESSION TO THE OHADA REGIME WILL AFFECT THE ATTRACTIVENESS OF THE DRC FOR FOREIGN INVESTORS?

Immensely. The new laws are modern and adapted to our world, known by investors and as explained above increase legal certainty. .

10. WILL THE DRC'S ACCESSION TO THE OHADA REGIME INCREASE THE EASE OF DOING BUSINESS IN THE DRC?

Definitely, for all the reasons mentioned above. We are looking forward to the 2013 ranking of the annual World Bank's ease of doing business survey.

11. ARE YOU AWARE OF ANY OTHER EFFORTS TO MAKE THE LEGAL REGIME IN THE DRC MORE ATTRACTIVE TO FOREIGN INVESTORS?

It is currently delicate to confirm anything.

12. IN YOUR VIEW HOW WILL THE DRC'S ACCESSION TO THE OHADA REGIME AFFECT RELATIONS WITH OTHER MEMBER STATES?

The DRC has now become the little brother of the 16 other OHADA countries which already form a large caring and supporting family. Also our OHADA adhesion shows the world that we care about the rule of law and are happy to defer the final ruling to our new Supreme Court based in Abidjan (Ivory Coast).

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