

# THE ECOWAS TREATY AS A LEGAL TOOL FOR THE ADOPTION OF OHADA TREATY AND LAWS BY ANGLOPHONE ECOWAS STATES

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## **Introduction**

The Economic Community Of West African States (ECOWAS) is a regional group of fifteen countries, established by a Treaty in 1975 to promote economic integration in “all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters ....”<sup>1</sup>

The Ecowas countries are Benin, Burkina Faso, Cape Verde, Cote D’Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo with a total population of over Two Hundred and Sixty Million people.

Nigeria, an Anglophone country that operates the Anglo-Saxon legal system is surrounded by Francophone Ohada countries namely: Benin, Chad, Niger and Cameroun. Ghana, another Anglophone country that also operates the Anglo-Saxon legal system is also surrounded by Francophone Ohada countries, namely: Togo, Ivory Coast, and Bourkina Fasso. Liberia, Sierra-Leone and The Gambia, all Anglophone countries, are similarly surrounded by Francophone Ohada countries. In other words, all the Anglophone countries in Ecowas, operating the Anglo-Saxon legal system, are effectively surrounded by Francophone Ohada countries operating the civil law system and Ohada Treaty and Laws. All but two, (Cameroon and Chad), of the Ohada countries surrounding the Ecowas Anglophone countries, are members of Ecowas.

The geographical conglomeration of the Francophone and Anglophone Ecowas States creates a natural avenue for the introduction of the Ohada Treaty and Laws in the Anglophone countries with the ultimate goal of adopting the Treaty and Laws. The issue that arises from such process of introduction and adoption is whether or not the adoption will be wholesale, and with or without modifications. Whichever option is proposed will lead to harmonization of the Civil Law and Common Law systems of Business Laws.

The state of Business Laws in the Ecowas States and the need for harmonization in pursuance of the aims and objectives of the Ecowas treaty, call for the examination of the relevant Articles of the Ecowas Treaty and a consideration of how the provisions of the Articles can best be applied and put to use. The topic and subject matter of this paper is therefore apt for the purpose of the intellectual discourse and offers the opportunity to proffer practical suggestions for the introduction and adoption on of the Ohada Treaty and Ohada Treaty-based Harmonised Business Laws in the Anglophone Ecowas States and the operation of the Treaty and Laws in the entire Ecowas Region.

The subject matter is discussed within the context of the relevant Articles of the Ecowas Treaty, which by their explicit provisions, render the treaty a tool for the adoption of the Ohada Treaties and Laws in the Anglophone Ecowas States.

In order to have a clearer understanding of the relevance and inevitability of the Ecowas Treaty as a tool for the adoption of the Ohada Treaty and Laws in the region, the creation and functions of some of the legal structures and institutions established pursuant to the provisions of the Articles of the Ecowas Treaty are also examined. Some Ecowas legal structures and institutions relevant to this paper are also compared to those of Ohada.

In furtherance of the inevitability of Harmonised Business Laws in the Region and as a practical demonstration, the contract for the West Africa Gas Pipeline Project is also highlighted.

Apart from the strategy of exploiting the relevant provisions of the Ecowas Treaty for the purposes of the adoption of the Ohada Laws and Treaties or other harmonised business laws, other strategies are also highlighted.

## Ohada Treaty

The Ohada Treaty was signed by fourteen Francophone African States in Port-Louis (Mauritius), on 17 October 1993 and today there are sixteen Member States, namely: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Federal Islamic Republic of the Comoros, Congo, Ivory Coast,, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo (DRC) has signified its intention to join the Ohada States and is taking steps to actualise its admission into Ohada.

The Ohada Treaty gave birth to Ohada as an International Organisation. Ohada is defined by the learned authors of **“Business Law in Africa – Ohada and The Harmonisation Process** (2nd Edition), page 1, as follows:

*“Ohada is an international organisation that was created by a treaty signed in Port-Louis (Mauritius) on 17 October 1993 by 14 African States. The acronym ‘OHADA’ stands for ‘Organisation pour l’Harmonisation en Afrique du Droit des Affaires’ (Organisation for the Harmonisation of Business Law in Africa, occasionally referred to in English as ‘OHBLA’<sup>2</sup>.*

The learned authors on the same page also captured the essence and the raison d’etre of Ohada as:

*“The idea behind the creation of OHADA sprang from a political will to strengthen the African legal system by enacting a secure legal framework for the conduct of business in Africa, which is viewed as essential to the development of the continent.”<sup>3</sup>*

In the immortal words of Judge Keba Mbaye, the late President of UNIDA (Association for Unified System of Business Laws) and the first President of Ohada:

*“OHADA is a legal tool thought out and designed by and for Africa to serve the purpose of regional integration and economic growth*

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<sup>2</sup> “Business Law in Africa – Ohada and The Harmonisation Process page 1

<sup>3</sup> “Business Law in Africa – Ohada and The Harmonisation Process page 1

*on the Continent*<sup>4</sup>

The “purpose of regional integration and economic growth on the Continent” is also expressed in similar terms in the preamble of the Ecowas Treaty.

### **The Ecowas Treaty**

The Ecowas Treaty was signed in Lagos, Nigeria, by the Ecowas States on 28<sup>th</sup> May, 1975 and a revised Treaty was signed in Cotonou, Republic of Benin, on 24<sup>th</sup> July, 1993. The aims and objectives of the revised Treaty (‘the Treaty’) are clearly stated in the preamble of the Treaty which states in part:

*“We, the Heads of State and Government of the Member States of the Economic Community of West African States (ECOWAS) ...*

*CONSCIOUS of the over-riding need to encourage, foster and accelerate the economic and social development of our States in order to improve the living standards of our peoples;*

*CONVINCED that the promotion of harmonious economic development of our States calls for effective economic co-operation and integration largely through a determined and concerted policy of self-reliance; .....*

*CONVINCED that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will .....*<sup>5</sup>

The promotion of harmonious economic development, co-operation and integration of the Ecowas States, as envisaged in the preamble of the Ecowas Treaty, can only be achieved if predicated on a regime of harmonized laws adopted and applied as supranational laws by the Ecowas States. The desire for harmonised Business Laws in Ecowas States is in conformity with the overall aims and objectives of the Ecowas Treaty in many regards, including the attainment of the status of an Economic and Monetary Union as provided for in Articles 54 and 55 of the Treaty.

One of the major challenges confronting the aims and objectives of the Treaty is the lack of a common supranational legal tool adopted by Ecowas States as binding. Article 3(h) of the Treaty is a ready tool in overcoming this major challenge. This Article, by its character, is transnational and should serve as

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<sup>4</sup> “Business Law in Africa – Ohada and The Harmonisation Process page vii

<sup>5</sup> Ecowas Treaty available at [www.Ecowas](http://www.Ecowas)

the root and legal vehicle for the promotion of, and the adoption of harmonised Business Laws in the region, including the Ohada laws. It provides for **“the establishment of an enabling legal environment”**.

Article 3(h), as important as it is, cannot be viewed or promoted in isolation of the other relevant provisions of Articles 3, 13, 14, 15, 16, 54 and 55, which deal respectively with the Aims and Objectives of Ecowas; the establishment of a Community Parliament; An Economic and Social Council; A Court of Justice; An Arbitral Tribunal; the Establishment of an Economic Union and the Completion of Economic and Monetary Union. These Articles deal essentially with legal, economic and social matters as well as institutions created pursuant to the provisions the Treaty. A holistic application of these relevant Articles will serve a better purpose in the introduction and adoption of the Ohada Treaty and Laws in the Ecowas States.

The Ecowas Articles, which also set out the functions of each of the institutions, may graphically be put as follows:

- Article 3 - Aims and Objectives
- Article 13 - The Establishment of a Community Parliament
- Article 14 - The Establishment of an Economic and Social Council
- Article 15 - A Court of Justice
- Article 16 - An Arbitral Tribunal
- Article 54 - Establishment of an Economic Union
- Article 55 - Establishment of a Monetary Union

For the purpose of this paper, our main focus will be on legal issues and legal institutions. The provisions of Articles 54 and 55 will be referred to in passing as they are essentially economic issues which, to a large extent, are relevant to the overall objectives of the Ecowas Treaty, but do not constitute a legal tool for the adoption of the Ohada Treaty and Laws.

## **ARTICLE 3 – AIMS AND OBJECTIVES**

Article 3 of the Treaty sets out its aims and objectives, which, inter alia, are to promote co-operation and integration leading to the establishment of an Economic Union. The relevant provisions of Article 3 are 3(2)(e-i), and in particular, Article 3(2)(h), which deals with the establishment of an enabling legal environment.

### **Article 3(2)(e-i) provides as follows:-**

- e. the establishment of an economic union through the adoption of common policies in economic, financial social and cultural sectors, and the creation of monetary union.*
- f. the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on **cross-border investments**.*
- g. the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises.*
- h. **the establishment of an enabling legal environment;***
- i. the harmonization of national investment codes leading to the adoption of a single Community Investment Code.*

## **ARTICLES 6 and 13 – ECOWAS PARLIAMENT**

The ECOWAS Parliament is a creation of Articles 6 and 13 of the Ecowas Treaty. Article 6 of the Treaty sets out the various institutions of the Community, including, the Ecowas Parliament (also known as the Community Parliament) under Article 6(1)(c); and the Community Court of Justice (also known as Ecowas Court) under Article 6(1)(e).

Article 6 states as follows:-

### *1. The Institutions of the Community shall be:*

- a) the Authority of Heads of State and Government;*
- b) the Council of Ministers;*

- c) ***the Community Parliament;***
- d) *the Economic and Social Council;*
- e) ***the Community Court of Justice;***
- f) *the Executive Secretariat;*
- g) *the Fund for Co-operation, Compensation and Development;*
- h) *Specialised Technical Commissions; and*
- i) *Any other institutions that may be established by the Authority.*

2. *The Institutions of the Community shall perform their functions and act within the limits of the powers conferred on them by this Treaty and by the Protocols relating thereto.*

Article 13 of the Treaty provides for the establishment of a Community Parliament and states as follows:-

1. *There is hereby established a Parliament of the Community.*
2. *The method of election of the Members of the Community Parliament, its composition, functions, powers and organisation shall be defined in a Protocol relating thereto.*

The relevant Ecowas institutions are (i) The Community Parliament and (ii) Community Court of Justice

### **The Ecowas Parliament**

The 'Community Parliament' which is more commonly known as the 'Ecowas Parliament' is a forum for dialogue, consultation and consensus for representatives of the peoples of West Africa with the aim of promoting integration. The seat of the Parliament is Abuja. Its members are deemed to represent all the peoples of West Africa. There are 115 members consisting of Nigeria - 35, Ghana 8, Cote d'Ivoire 7, Burkina Faso 6, Guinea 6, Mali 6,

Niger 6, Senegal 6, Bénin 5, Cape Verde 5, The Gambia 5, Guinea Bissau 5, Liberia 5, Sierra Leone 5 and Togo 5.

Members of the Parliament are elected for a term of five years by direct universal suffrage (DUF) by the citizens of Member States or alternatively in the absence of DUF, members of the National Assemblies of Member States or their equivalent institutions or organs may elect members from among themselves as members of the Parliament.

Members enjoy Parliamentary immunity in all Member States except in case of 'in flagrante delicto' (being caught in the very act of committing the crime), or unless lifted pursuant to clearance sought and obtained from the Bureau of the Parliament which is made up of the Speaker, Deputy Speakers, Treasurers and Parliamentary Secretaries.

A member of the Parliament shall not, while in office, be a member of government, the constitutional council, the supreme court of a Member State; or a member of a Courts or a Tribunal of a Member State; or a judge, lawyer or registrar in the Ecowas Community, Court of Justice and the Court of Arbitration.

The Parliament is empowered to consider the following

- i. issues concerning human rights and fundamental freedoms of citizens
- ii. interconnection of:
  - a. energy networks
  - b. communication links between Member States
  - c. telecommunications systems
- iii. increased cooperation in the area of radio, television and other intra- and inter-Community media links
- iv. development of national communication systems.

The Parliament may be consulted on matters relating to:

- i. public health policies for the Community



- ii. common educational policy through harmonisation of existing systems and specialisation of existing universities
- iii. adjustment of education within the Community to international standards
- iv. youth and sports
- v. scientific and technological research
- vi. Community policy on environment.

Issues relating to the review of the ECOWAS Treaty, citizenship and social integration may also be referred to the Parliament to make recommendations to the appropriate institutions and/or organs of the Community.

The Principal Officers of the Parliament are the Speaker, sixteen Deputy Speakers, three Treasurers and six Parliamentary Secretaries. The first set of Principal Officers was elected during the first sessions held in Abuja on 21st and 26th January, 2001. The Parliament's Rules of Procedure were also adopted during these sessions.

The Parliament has two ordinary sessions each year which may not exceed three months and are presently limited to two weeks each. The first sessions are held in May and the second, September beginning the first week. The Parliamentary proceedings are open to the public, unless otherwise directed by the Speaker. Although, the Ecowas Parliament has been sitting since 2001 its sessions are not as regular nor as active as one would expect.

The Secretariat of the Parliament is headed by an appointed Secretary-General assisted by a Deputy Secretary-General.

## **ARTICLE 15 – ECOWAS COURT OF JUSTICE**

**The Community Court of Justice also known as Ecowas Court was established in 1991, pursuant to Article 15 of the Treaty which provides as follows:-**

1. *There is hereby established a Court of Justice of the Community.*

2. *The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.*
3. *The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.*
4. *Judgements of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.*

The Court consists of seven (7) Justices, appointed from Member States and is headed by President who is assisted by a Vice-President and the five other justices. The presidency is rotated amongst members according to the protocol of the Court. The official languages of the Court are English, French and Portuguese in accordance with the Article 31 of the Protocol and Article 87 of the Treaty.

The Court is empowered by the provisions of Article 76(2) to exercise jurisdiction over any dispute arising from the interpretation or the application of the provisions of the Treaty in the event only that the parties to the disputes have not amicably settled the dispute through direct agreement without prejudice to the provisions of the treaty. The decision of the Court is final.

Article 76 provides as follows:-

1. *Any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols.*
2. *Failing this, either party or any other Member States or the Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to appeal*

The competence of the court is derived from the provisions of Article 9 of the Protocol on the Community Court of Justice which states as follows:-

- 1. The Court shall ensure the observance of the law and the Principles of equity in the interpretation and application of the provisions of the Treaty.*
- 2. The Court shall also be competent to deal with disputes referred to it in accordance with the provisions of Article 36 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States and the Institutions of the Community, on the interpretation or application of the provisions of the Treaty.*
- 3. A Member State may on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the disputes have failed.*

*The Court shall have any powers conferred upon it specifically by the provisions of this Protocol.*

#### **ARTICLE 16 - ARBITRATION TRIBUNAL**

Article 16 of the Treaty provides for the establishment of an Arbitral Tribunal and states as follows:-

- 1. There is hereby established an Arbitration Tribunal of the Community.*
- 2. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto*

The Arbitration Tribunal envisaged under Article 16 is yet to be established. As an Interim measure, the Ecowas Commission by a 2005, Protocol, vested the Ecowas Court with the jurisdiction of an Arbitral Tribunal pending the establishment of the Arbitral Tribunal. There are presently no Rules of Procedure for the Tribunal and consequently the Ecowas Court has not exercised its arbitral jurisdiction till date.

## **ARTICLE 54 – ECONOMIC UNION**

Article 54 provides for the Establishment of an Economic Union and states as follows:-

- 1. Member States shall give priority to the role of the private sector and joint Regional multinational enterprises in the regional economic integration process*
- 2. Member States shall give priority to the role of the private sector and joint Regional multinational enterprises in the regional economic integration process.*

The economic Integration provided for in Article 54 of the Treaty remains a dream till date due to the lack of serious collective political will on the part of the Member States as envisaged in the Preamble. The political statements made over the decades have not yielded any fruit. Even as recently as this year, scores of such statements have been openly made in favour of economic integration. Some of the statements were reported in the Newspapers with fanfare.<sup>6</sup>

## **ARTICLE 55 - ECONOMIC AND MONETARY UNION**

Article 55 provides for the harmonization of monetary, financial and fiscal policies and the setting up of a Monetary Union and a single regional Central Bank and the creation of a single West African currency. The Article provides as follows:-

- 1. Member States undertake to complete within five (5) years following the creation of a Custom Union, the establishment of an economic and monetary union through:*

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<sup>6</sup> 1. Nigeria, four others meet Ecowas single currency requirements - Page 17, The Guardian of June, 28, 2007  
2. Ecowas Ministers to agree on common approach to migration - Page 17, The Guardian April 14, 2007  
3. Ecowas: Years of Regional Integration Vision page 15, The Guardian June 14, 2007  
4. Nigeria-Benin Fair will Promote Integration Page17 The Guardian August 15, 2007  
5. Ecowas shifts full integration to 2020 Page The Guardian, June 7 2007  
6. In search of common travel market for West Africa Page 46 – Page 46, The Guardian, October 5, 2007

- i) *the adoption of a common policy in all fields of socioeconomic activity particularly agriculture, industry, transport, communications, energy and scientific research;*
  - ii) *the total elimination of all obstacles to the free movement of people, goods, capital and services and the right of entry, residence and establishment;*
  - iii) *the harmonisation of monetary, financial and fiscal policies, the setting up of West African monetary union, the establishment of a single regional Central Bank and the creation of a single West African currency.*
2. *The Authority may at any time, on the recommendation of the Council, decide that any stage of the integration process shall be implemented more rapidly than otherwise provided for in this Treaty.*

The “Authority” referred to in Article 55(2) means the Authority of Heads of State and Government of the Community established pursuant to Article 7 of the Treaty. Article 7 deals with the Authority of Heads of State and Government, its Establishment and functions. Article 7 (1) and (2) state as follows:

1. *There is hereby established the Authority of Heads of State and Government of Member States which shall be the supreme institution of the Community and shall be composed of Heads of State and/or Government of Member States.*
2. *The Authority shall be responsible for the general direction and control of the Community. and shall take all measures to ensure its progressive development and the realisation of its objectives.*

## **Economic Integration**

One key word that is commonly used in both Ohada and Ecowas Treaties is ‘integration’. Integration has many facets, including, economic, political,

social, geographical and legal. Any kind of integration must be predicated on a legal framework. Integration in the two Treaties is also expressed to be achieved through the instrumentality of the law by the creation of a legal framework acceptable to the States which are signatories to either Treaty. The legal framework is through harmonisation of various laws, and in this instance, Business Laws,

The goal of economic and social development of the Ecowas States through economic cooperation and integration, though attainable, remains a far-flung dream due largely to the lack of a political will on the part of the Leaders/Rulers of the various States. They have failed and or neglected to create the enabling legal environment envisaged in Article 3(2)(h) of the Treaty.

The economic and monetary union as set out in Articles 54 and 55 of the Treaty is unattainable, without first creating a secured legal environment with the attributes of certainty.

This poses a strong challenge to the political will of the various Ecowas States and brings to the fore the issues of when and how an enabling legal environment will be created. If and when the legal environment is created the issue of suitable models of harmonised Business Laws will be ripe for consideration and adoption.

The absence of an enabling legal environment and harmonized Business Laws constitutes a major obstacle to doing business in the region, including investments. Investments must be viewed along the vertical (North – South) and the horizontal (South – South) foreign investments. Harmonised Business Laws must promote and secure direct foreign investments from outside the region as well as from within the region. A Senegalese investor can invest in Ghana and vice-versa.

Professor Claire Moore Dickerson, an Arthur L. Dickson Scholar, in an article “Harmonising Business Laws In Africa : Ohada Calls The Tune”, also noted on Investments in Africa as follows:-

*“The OHADA laws articulated purpose is to facilitate investment in general, and foreign investment in particular. .”OHADA may materially*

*change the investment climate in West Africa. If successful, it offers a model for development in other parts of the developing world”<sup>7</sup>*

The need for the promotion of and adoption of harmonized Business Laws in the region cannot be over-emphasised. The Ohada States have taken the lead, and if the need for economic and social development through regional integration is taken seriously, it becomes imperative that the Anglophone countries should join Ohada. In doing so, these countries will move towards harmonization of Business Laws in the region from a Common Law perspective with a view to harmonising with the Civil Law perspective.

The Ohada Treaty has so far produced harmonized laws in the following Uniform Acts:-

1. General Commercial Law (effective from 1<sup>st</sup> January, 1998)
2. Company Law (effective from 1<sup>st</sup> January, 1998)]
3. Securities Law (effective from 1<sup>st</sup> January, 1998)
4. Debt Recovery and Enforcement Law July (effective from 10<sup>th</sup> July, 1998)
5. Bankruptcy Law (effective 1<sup>st</sup> January, 1999)
6. Arbitration Law (effective from 11<sup>th</sup> June, 1999)
7. Accounting Law:
  - For Consolidated Accounts (effective from 1<sup>st</sup> January, 2002)
  - For Combined Account (effective from 1<sup>st</sup> January, 2002)
8. Law Regulating Contract For the Carriage of Goods by Road (effective from January, 2004).

By the provisions of Article 10 of the Ohada Treaty, the Uniforms Acts, (which constitute the Ohada Laws), are directly applicable and binding on Member States. The Uniform Acts prevail in the event of conflicting provisions of any domestic laws of Member States. Article 10 states as follows:-

*“ Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.”<sup>8</sup>*

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<sup>7</sup> Columbia Journal of Transnational Law (2005)

<sup>8</sup> Available at <http://ohada.com>

The Ohada Treaty and Laws offer a unique model for the harmonization of Business Laws as a starting point for the harmonization of other laws within the Ecowas States. The Ohada Initiative has created a body of harmonized Business Laws in its Member States, which have, in consequence facilitated business transactions to a large extent. There are, however, surmountable challenges yet to be overcome by Ohada Member States in areas where Ohada Laws are in conflict with domestic laws of individual Member-States and other implementation areas that need to be straightened out. The Ohada Treaty makes provisions for the resolution of such conflicts.

The Ohada Common Court of Justice and Arbitration in Abidjan, is pursuant to the Ohada Treaty's Article 14 empowered to interpret the provisions of the Treaty and the Ohada Laws. The Article states as follows:-

*The Common Court of Justice and Arbitration will rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts.*<sup>9</sup>

The decision of the court is final and binding on Member –States pursuant to Article 20 of the Treaty which states as follows:-

*“The judgments of the Common Court of Justice and Arbitration are final and conclusive. Execution and enforcement shall be ensured by the Contracting States on their respective territories. In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State”.*<sup>10</sup>

## **THE INTERFACE BETWEEN THE KEY LEGAL INSTITUTIONS ESTABLISHED UNDER THE OHADA AND ECOWAS TREATIES**

It is important to relate, at least in passing, the interface between the key legal institutions created by the Ohada and Ecowas Treaties. The interface between the key legal institutions of Ohada and Ecowas is an important area in the process of harmonisation that cannot be accommodated in this paper for obvious reason. It does not fall within the scope of the subject matter

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<sup>9</sup> Available at <http://www.ohada.com>

<sup>10</sup> Available at <http://www.ohada.com>



which is mainly focussed on the relevant provisions of the Ecowas Treaty that can be invoked for the purpose of adopting Ohada Treaty and Laws in Anglophone Ecowas States.

The relevant major legal institutions are The Ecowas Parliament and the Ecowas Court on one hand and the Ohada Council of Ministers (the Law-Making Organ) and the Common Court of Justice and Arbitration (CCJA) on the other. Their respective functions are, in character, complementary and would have overlapped were they both applicable to all the Ecowas Member States. Mention must, however, be made, that the CCJA does not exercise the identical judicial functions with the Ecowas Court. The composition of the respective institutions also differs as well. For instance to be qualified for an appointment as a Justice of the Ecowas Court, you must be a serving Judge in your country (i.e. a Member State) before your appointment. The knowledge of Arbitration is not a prerequisite for an appointment to the Ecowas Court but it is, for appointment as a Judge of the CCJA. The absence of an Ecowas Arbitration Tribunal is compensated for by the CCJA which presently serves only the Ohada Member States in Ecowas and other members of Ohada in accordance with the Ohada Treaty and Arbitration Law. The CCJA has a positive impact on Arbitration in Ohada Ecowas States and also fills the gap created by the absence of an Ecowas Arbitration Tribunal.

The harmonisation of the functions of these judicial institutions is achievable and should be part of harmonisation process of Business Laws in Ecowas States. Co-operation between the various institutions of the two organisations is essential if any meaningful achievement is to be made in this regard. Even where the functions overlap, it should not lead to usurpation of the functions of one by the other.

### **Enabling Legal Environment**

The Establishment of an enabling legal environment as provided for in Article 3(2)(h) is the most important legal prerequisite for Harmonisation of Business Laws in the region. It provides, without any ambiguity, the essential platform required for the legal framework for the harmonisation Business Laws in the Ecowas sub-region. Article 3(2)(h) provides the legal basis for harmonization

of Laws and can safely be regarded as the “Grundnorm” of harmonised laws in the region, including the Ohada Treaty and the Uniform Acts.

Unfortunately, in over thirty-eight years of the existence of the Ecowas Treaty, the provision of Article 3(2)(h) has never been invoked to create the enabling legal environment. Unless and until this provision is invoked for the purpose of harmonisation of laws within the region, the goal of regional economic and social integration, and the dream of an Economic Union cannot be realised.

### **The Strategies for the Adoption of Ohada Treaty and Uniform Acts in Anglophone Ecowas States In Pursuance of the Ecowas Treaty.**

The Ecowas Treaty offers an opportunity to evolve meaningful, pragmatic and effective strategies for the adoption of the Ohada Treaty and Laws in the Anglophone Ecowas States. The aims and objectives of the two treaties are very similar and are complementary. The common goal of the two treaties is the promotion and achievement of economic and social integration and development through the instrumentality of the Treaties and Laws. Harmonisation of Laws is the veritable means and the starting point of achieving the goals set out in the two treaties.

In evolving strategies, we should to ask a question: “Has the purpose of regional and economic growth on the Continent been achieved since the talk began several decades ago?” The answer is in the negative. In the West African Sub-Region, ECOWAS was established in 1975 for the purpose of regional and economic integration. How much, if any, of that has been achieved till date? Not much, very little indeed. What has the investment climate been like since the creation of ECOWAS? Has there been a secure legal environment (through harmonized Business Laws) to promote investments, whether south – south or north – south investments. These are the questions we should strive to provide answers to, if we are to truly and squarely face the challenges of regional and economic integration through the instrumentality of law and marriage of legal systems, principally the civil law and common law systems.

It is pertinent at this point, to refer to the excerpts of an Address delivered at an Accra Ohada Conference in Accra last March on Strategies for the Adoption of Ohada Treaty and Laws in Anglophone Ecowas States”<sup>11</sup> .

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<sup>11</sup> Ohada Conference organised by the Ohada Clubs of Togo and Ivory Coast on 27 – 29 March 2008

Although in Accra, it was suggested that Ohada was the only adoptable model, this paper has gone a step further in suggesting that other commonly acceptable model may be considered.

{..The focus on harmonization of business law (which is the “raison d’etre” of OHADA) is most appropriate at this point in time, when globalization is the order of the day. At the first OHADA seminar in Lagos held in May 2004,<sup>12</sup> late Professor Ademola Yakubu, the convener, remarked that globalization derives its full meaning within the context of regional integration, therefore African countries must rise up to the challenges of harmonizing its different laws to take the continent away from the stigma of a developing status to that of a developed one.

The Professor also remarked that African countries need better legal cooperation to bring about certainty in the business law among African nations and that cooperation does not necessarily create a loss of sovereignty or a situation where one of the contracting states becomes helpless.

Dr. Martha Tumnde(née Njikam) of the University of Buea, Cameroon also remarked at the conference that Most African countries inherited laws from Europeans, which resulted in patchwork of different laws that created a state of legal uncertainty. This legal balkanization of the continent created a state of insecurity for foreign investments. The present movement tends towards the reconciliation of laws in the area of business law. The purpose of harmonization is basically to end this trend of balkanization<sup>13</sup>

One very important point and conclusion that can be drawn from the Lagos Ohada Conference is that Africa must end balkanization of its different laws and legal systems and embrace harmonization of business laws and legal systems in order to attract investments and ensure economic growth....}.

Scholars, both from within and outside the continent of Africa, have made meaningful intellectual contributions over the years, which must now be put into practical use if we do not want to be engaged in endless debates that will not achieve the desired goal of economic integration and growth in the sub-region through law.

The process of harmonisation of business laws may be treaty based and the Ecowas Treaty provides the fulcrum for this. There may therefore be no need to sign another treaty. The Ecowas Treaty and the Ohada Treaty are co-extensive and not mutually exclusive. What therefore needs to be done is the

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<sup>12</sup> The first Ohada Seminar in Nigeria convened by late Professor Ademola Yakubu, Faculty of Law, University of Ibadan Nigeria

<sup>13</sup> ditto

collective adoption by the Ecowas States of the Ohada Treaty as may be amended to accommodate both the civil law and common law legal systems with the aim of widening the scope of the Treaty and extending membership to the Anglophone States. Alternatively Harmonized Business Laws based on the Ohada model or any other model that is suitable for both legal systems can be adopted by incorporation in the Ecowas Treaty in pursuance of its aims and objectives.

The advantages of harmonization of Business Laws cannot be over emphasised. It encourages, free flow of investments, cross-border trade, certainty in business law, legally secured environment, political stability, economic growth and regional economic integration. We must therefore seek to understand or have a clear understanding of what harmonization of Business Laws is all about in invoking the provisions of the Ecowas Treaty and in particular Article 3(2)(h).

The political will of Ohada States to have a Uniform Business Law has been ably demonstrated at Port Louis (Mauritius) on 17<sup>th</sup> October, 1993. The continuous existence of Ohada as an entity with clearly set-out goals is an assurance that their political will has not dwindled. The Anglophone States of Africa (in general and the Ecowas States in particular), with the common law heritage must demonstrate the political will and espouse the ideals of harmonization. This, may take time, but we can be inspired by the Chinese proverb – *“a journey of a thousand miles starts with the first step”*. The first step must be taken in an organized manner in pursuance of the common goal of harmonized Business Laws.

Harmonisation of laws must not only be well planned and coordinated, it must also be put into effective cross-boarder use and practice. We must therefore evolve acceptable strategies to achieve harmonization of laws beginning with Business Laws. This is why Ohada must take its rightful place in the process of harmonization of Business Laws in Africa. Ohada, to all intent and purposes, must not only be the vehicle for harmonization, it must also be the centre from which reforms in Business Laws in Africa emanates or the centre where Business Laws in Africa are re-written. It is the centrifugal law that we can all draw from as a model for harmonization. This is not to say it is perfect.

On the contrary, it is far from being perfect, but it is sufficiently good for the march towards harmonization of business law and legal systems in Africa.

One good example of reforms in the Ohada Business Law is the current efforts to harmonise Contract Law within Ohada. This task was placed on the wide shoulders and deep legal mind of Marcel Fontaine, (Professor Emeritus and the former Director of the Centre for the Law of Obligations, Law Faculty, Catholic University of Louvain, Belgium) by the International Institute for the Unification of Private Law (UNIDROIT). The Preliminary Draft – “Ohada Uniform Act On Contract Law”- was presented at a UNIDROIT organized conference in Ouagadougou last November – **“The Harmonisation of Contract Law Within Ohada”**. It is note worthy and gladdening to say that the Preliminary Draft is fashioned after the UNIDROIT Principles of International Commercial Contracts. In a brief introduction it was stated:

*The UNIDROIT Principles were designed as a body of general rules of contract law that would find favour with the legal community beyond the legal particularities of each legal system, and are tailored to apply in a contemporary international environment. They espouse solutions common to all systems, or else borrow from a given system when that system's rules are deemed the most suitable.<sup>14</sup>*

The UNIDROIT Principles are a model that can be adopted to suit our peculiarities in the ECOWAS sub-region in the marriage of the Civil Law and Common Law systems. It is being done successfully on the Ohada Uniform Act On Contract Law. It espouses, as does the UNIDROIT principles of International Commercial Contracts, the common law system and the civil law system.

What then should be the common strategies of Harmonisation of Business Law in Africa? The following suggestions may be useful.

1. We must convene, from time to time, stakeholders' conferences and workshops which will include all countries and language zones in Africa, Multilateral Organizations/Institutions, the

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<sup>14</sup> Ohada Quolloque organised by Unidroit on 15-17 November, 2007

African Union, the United Nations, the African Development Bank, the World Bank, the ECOWAS, L'UMEOA, UNIDROIT and Non-Governmental Organisations like UNIDA, etc.

2. An all embracing Working Group (funded by the multilateral institutions mentioned above, States, friends of Africa and other interested stakeholders) must be set up to:-
  - a. Examine Ohada Treaty and Laws and their impact on harmonization of business law in Africa so far.
  - b. Fashion out the best way to introduce Harmonisation of Business Laws in Africa to non-Ohada States through the adoption of the Ohada model or any other acceptable model.
  - c. Draw up a programme of awareness of the Ohada Laws in Anglophone, Lusophone and Arabophone countries in Africa,
  - d. Critically examine the obstacles to Harmonisation of Business Laws in Africa which include:
    - The fear of domination of the Common Law Heritage by the Civil Law Heritage by the adoption of Ohada Treaty and Laws without any modifications.
    - The existing legal systems and structures in Member-States of Ecowas.
    - Language barrier
  - e. Critically examine how to overcome the Obstacles to Harmonisation of Business Law in Africa.
  - f. Establish or assist in establishing a Department of Harmonisation of Business Laws in some Faculties of Law or alternatively Harmonisation of Business Laws as an interdisciplinary course in some Faculties in Anglophone countries.
3. Carry out a critical examination of the interface between existing Ohada Institutions and legal structures – Council of Ministers, CCJA, L'ERUSMA and Existing Regional/ECOWAS Institutions

and legal structures - ECOWAS Court, ECOWAS Parliament etc and their functions with a view to harmonizing the structures and their functions.

4. The Ohada Member States, who are also members of Ecowas, should put in place, the machinery for the invocation of Article 3(2)(h) and other relevant Articles of the Ecowas Treaty for the purpose of harmonisation of business laws in the region using the Ohada Uniform Acts or any other acceptable harmonised laws as models.

### **The West African Gas Pipeline Project Contract – A Demonstration of the Lack of Harmonised Business Laws.**

The West African Gas Pipeline Project was conceived as a tool for economic integration and a boost to the economies of the Ecowas States. The project is for the construction of gas pipeline from Nigeria, through the Republic of Benin and Togo and ending up in Ghana in the first phase. Crude and refined petroleum products are to be pumped through gas pipelines from Nigeria to the three countries.

The project also involves the construction of metering stations in Alagbado in Nigeria, Cotonou in Benin, Lome in Togo and Tema and Takoradi in Ghana; independent power source, a warehouse, corkshop, control room, offices; the installation of related communications, data acquisition, and control systems and the provisions for onshore tie-ins with approach pipelines.

The execution of the major contract involves numerous cross-border commercial transactions, necessitating the negotiation and drafting of international or cross-border commercial contracts with in-built dispute resolution mechanism. The main contract and several sub-contracts involving third parties take cognisance of the two main legal systems in the Region – The Civil Law operated by the Francophone countries of Benin, Togo and Ivory Coast and the Common Law operated by Ghana and Nigeria.

The project apart from involving third parties, also raises many transnational legal issues. The absence of Harmonized Business Laws is evident in the negotiations and drafting of the main contract and sub-contracts. The Business Laws in Nigeria are not the same in Ghana in spite of the Common

Law heritage. Ohada Laws which operate in Benin and Togo and regulate business in these two countries create a more secure legal environment and certainty unlike what obtains in Nigeria and Ghana owing to lack of harmonised Business Laws. The application of Ohada Laws in Benin and Togo might simplify legal issues in the process of execution of the contract but does not remove legal obstacles. Where will disputes arising between the parties and third or multi parties be resolved? Arbitration at the CCJA or the ICC or the London Court of Arbitration? Which national court will exercise jurisdiction in matters arising from the contract?

In conclusion, the adoption of Ohada in Anglophone African countries necessitates some challenges not only to the Ohada Texts but also the Structures. The issue of the interface between Ohada Structures and ECOWAS Structures will come into play. The roles of CCJA and the Ecowas Court; the Ecowas Parliament and the Ohada Council of Ministers will also pose serious challenges to the harmonisation process.

All these and many others will be the challenges in the near future when the process of Harmonisation in the West African Sub-Region and other regions are put in place. The noble vision of the initiators and founding fathers of Ecowas and Ohada must not be forgotten. Presidents and Heads of Governments of the Ecowas States need to take immediate steps to actualize the provisions of Articles 3, 54 and 55 of Ecowas Treaty.

President of the Ecowas Commission equally has an urgent task to set in motion the machinery for the actualization of the provisions of Articles 3, 54 and 55 of the Treaty.

Akin Akinbote

President, Ohada Nigeria and

Chairman (Emiritus) Nigerian Bar Association, Lagos Branch

2<sup>nd</sup> July, 2008