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## Reasons for the harmonization

- Historically, lack of foreign direct investment in Africa
- Reasons cited:
  - lack of secure legal and commercial environment;
  - outdated / incomplete legal systems which vary from one country to the next;
  - slowness of system;
  - lack of independence and unpredictability of judicial system.



## The Initiative

- **1991:** Commission appointed by ministers of finance of various countries to remedy inadequacies of business laws of their respective countries.
- Finding of commission: the adoption of modern legislation would
  - increase the legal security;
  - foster cross-border exchanges and competition; and
  - enhance investors' confidence.
- This legislation to comprise
  - the adoption of modern laws;
  - the training of judges and legal officers charged with the interpretation and application of the said law; and
  - the creation of a court of justice and arbitration.



## Enactment of harmonization legislation

- **1993:** Signature of “Organization for the Harmonization of Business Law in Africa” (OHADA in French) treaty by 13 countries.
- **1995:** Entry into effect of OHADA treaty whose stated purpose:
  - creation of a single, modern, flexible, and reliable commercial & corporate law,
  - arbitration as an appropriate and trustworthy way to settle disputes,
  - providing an opportunity for training judges and judiciary staff and ensuring their specialization.



## OHADA Member States

- OHADA is currently composed of the following 16 Member States: Benin, Burkina Faso, Cameroon, Chad, the Republic of Central Africa, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, and Togo.
- Though of the Member States are French speaking, OHADA also includes Spanish speaking (Equatorial Guinea) and Portuguese speaking (Equatorial Guinea) countries.
- The Democratic Republic of Congo currently negotiating to become a Member of the OHADA.



## Map of OHADA Member States





## How does OHADA work?

- Legislation is issued in the form of Uniform Acts in particular areas of the law.
- Uniform Acts are directly applicable in all Member States, and supersede the previous national legislation.
- Specific legislation not in contravention with the provisions of the Uniform Acts continues to remain in effect.



## Areas of Law covered by OHADA

- The following 8 Uniform Acts are currently in force:
  - General Commercial Law;
  - Commercial Companies and Economic Interest Groups;
  - Law on Security Interests;
  - Arbitration Law;
  - Accounting Law;
  - Collective Proceedings for Clearing of Debts;
  - Simplified Recovery Procedures and Enforcement Measures; and
  - Contracts for the Transportation of Goods by Road.



## General Commercial Law

- General commercial law addresses, inter alia,
  - the status of commercial operators,
  - commercial leases,
  - going concerns (*fonds de commerce*),
  - commercial intermediaries,
  - commercial sale agreements, and
  - commercial registry.
- Other key features:
  - the status of commercial operators. Companies involved in the industrial exploitation of mines are considered commercial operators. Commercial status triggers legal consequences, particularly with respect to accounting and registration.



## General Commercial Law – Commercial Registry

- Novelty of the commercial registry under OHADA:
  - provides security to investors on a local level; allows investors to obtain updated information with respect to commercial operators, including shareholders, directors, and the security interests taken out against companies.
  - available at the national level, and information also transmitted to the Regional Registry.
  - intended to be fully computerized on same system in all Member States.



## Commercial Companies and Economic Interest Groups Law

- Applies to foreign-owned and local commercial companies having their registered office on the territory of one of the Member States.
- Sets out the different types of companies available, including:
  - *Société Anonyme* (SA), joint stock company, akin to a limited company under English law. It is the vehicle most widely used by foreign investors.
  - *Société à Responsabilité Limitée* (SARL), limited liability company, usually used for smaller investments.
- Addresses the creation, management, auditing, restructurings, offerings of securities, corporate governance and winding-up of companies.



## Arbitration Law

- Two types of arbitration proceedings which may be triggered under the Uniform Act on Arbitration Law:
  - Ad hoc arbitration: the Uniform Act applies to any arbitration where the seat of the arbitral tribunal is in one of the Member States.
  - Institutional arbitration: if the arbitration clause refers specifically to the arbitration under the *Cour Commune de Justice et d'Arbitrage* (CCJA) rules of Arbitration, then arbitration proceedings will take place in a manner similar to ICC arbitration.
- The Uniform Act on Arbitration Law significantly enhances the possibility for parties who have won foreign arbitration proceedings to enforce awards in the Member States.



## Other Uniform Acts

- Uniform Act on Accounting law: sets out a harmonized accounting system for companies located in Member States.
- Uniform Act on Collective proceedings for the clearing of debts: deals with insolvency and related situations.
- Simplified Recovery Procedures and Enforcement Measures: sets forth the procedure available to creditors to recover debts.
- Uniform Act on Security Interests: provides for various guarantees which protect creditors, including banks.
- Uniform Act for the Transportation of Goods by Road, based in part on the Geneva Convention for the International Carriage of Goods by Road applicable in Europe.



## Features of the Cour Commune de Justice et d'Arbitrage (CCJA)

- CCJA:
  - CCJA operates as a supreme court for all the decisions handed down by the national Courts of Appeal and relating to OHADA texts so as to ensure uniformity of interpretation;
  - places the national courts under the direct control of the CCJA; and
  - reduces the backlogs of the national courts.



## The Future of OHADA

- Adoption of additional Uniform Acts:
  - Uniform Acts on labour law, sales to consumers in the pipeline;
  - Uniform Acts on intellectual property, banking under consideration.
  - Possible merger of customs and competition laws into OHADA (currently harmonized under the auspices of UMEAO).
  - Uniform Acts on corruption and corporate social responsibility should be contemplated.
- Expansion of OHADA to include more countries, including English-speaking countries such as Nigeria, Ghana and Liberia. Difficulties stem from difference in the legal tradition.
- OHADA generally viewed as a success even though it still faces numerous challenges.



## Fasken Martineau's Experience

- Fasken Martineau's **Global Mining Group** has extensive experience advising Canadian mining companies investing in the mining sector in Africa.
- Fasken Martineau is the only Canadian law firm with an office in Africa.
- No Mining Legislation under OHADA. However OHADA governs:
  - creation and management of local mining companies;
  - commercial contracts underpinning mining projects;
  - security documentation underlying financing of project; and
  - dispute resolution.
- Fasken Martineau's experience is that OHADA contributes to a much improved investment environment for mining companies.
- UEMOA "*Union Economique et Monétaire Ouest Africaine*" (West African Monetary and Economic Union) is in the process of elaborating a regional mining framework called the "Common Mining Policy".



## Fasken can accompany your investment in Africa

- Fasken Martineau DuMoulin LLP: “**Global mining law firm of the year**” for fourth consecutive year by the 2008 Edition of International Who’s Who.
- Fasken Martineau DuMoulin LLP, with offices located in Johannesburg and London, has the expertise and experience to assist you with your investment in Africa.
- Please visit us at: [www.fasken.com](http://www.fasken.com)
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