

OHADA

UNIFORM ACT RELATING TO GENERAL COMMERCIAL LAW

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The Uniform Act Relating to General Commercial Law which was adopted by the Council of Ministers on 17 April 1997, like the Uniform Act Relating to Commercial Companies and Economic Interest Groups and the Uniform Act Organizing Securities, entered into force on 1 January 1998.

In accordance with the provisions of the Treaty on the Harmonization of Business Law in Africa, the provisions of this Act are directly applicable and binding in the sixteen Contracting States, namely:

Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

The plurality and diversity of African national legal systems was undoubtedly a real obstacle to free movement as concerns both the domestic market of the African continent and its foreign trade.

The right thing to do therefore, to repeat the terms of the preamble of the Constitution of the Republic of Senegal, was "to spare no effort to seek the unity of Africa".

This fact very rightfully led the Heads of State and Government of the Franc Zone to prepare a project for the harmonization of business law in Africa.

Thus, a Treaty which drastically changed the legal framework of business in Africa by creating a new common legislation and subjecting disputes arising from such legislation to special proceedings was signed on 17 October 1993 in Mauritius.

All countries which are today signatories to this Treaty will henceforth have a common commercial law instituted by an act entitled

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The preparation of the Act is reviewed in Part I and the broad outline of its content is presented in Part II of this document.

PART I

PREPARATION OF THE HARMONIZED

GENERAL COMMERCIAL LAW

I.1. The state of commercial law before harmonization

Legislation applicable to General Commercial Law and to other aspects of business law was, prior to harmonization, the product of two successive legislative periods.

The first period covers the entire legislation in force at the time of independence of each of the African States made up essentially of the French Commercial Code which was declared applicable to overseas Territories by a law enacted on 7 December 1850 which modified conditions laid down in 1850 relating to the conduct of commercial activities.

Since this date various amendments had been made to this Code, particularly by the laws of 17 July 1856, 9 July 1902, 28 March 1931 and the decree of 24 March 1955.

Though this commercial law already had genuine uniform characteristics, failure to extend some rules in force in the parent State or their maladjustment to the administrative organization of overseas Territories obviously made this legislation inadequate, and in any case, obsolete.

Though the principle of freedom of trade and industry was reaffirmed by many constitutions as a fundamental right, many restrictions have however hindered the application of this rule since the independence of African States.

Furthermore, some countries had also taken measures to regulate the carrying on of specific activities.

Thus:

- the ordinance of 26 August 1981 regulated commercial activities in Burkina Faso;
 - the law of 27 November 1980 stipulated many important measures concerning the control of economic activity in Cameroon;
 - the order of 3 October 1983 regulated the carrying on of commercial activities and the provision of services in the Central African Republic;
 - the laws of 21 April 1983 and 10 September 1990 regulated access to the profession of trader in Congo;

- the law of 1 August 1964 also regulated the profession of trader in Côte d'Ivoire; this law was supplemented by a law of 28 July 1978 relating to competition, prices and the prosecution and repression of offences against economic legislation.

Various texts were also enacted in Gabon, Guinea, Mali, Niger, Senegal and Togo.

It would appear therefore from this brief and non exhaustive inventory that general commercial law was the subject of extremely diverse regulations with regard to both its sources (laws, decrees, ordinances, etc.) and object.

Only Senegal and Mali were concerned with codification: Senegal by drawing up a new codification through the piecemeal promulgation of a Code of Civil and Commercial Obligations, and Mali by publishing, more recently, a Trade Code.

Such was the background to the task of harmonization.

I.2. The major stages of the project.

The objective of harmonization presupposed a very extensive consultation of economic operators. To this end, a seminar bringing together jurists, magistrates, lawyers and representatives of the private and public sectors was organized in Abidjan from 19 to 20 April 1993.

Many relevant observations were made at this seminar organized in discussion groups more particularly as concerns general commercial law. These observations were taken into account by the experts responsible for preparing the pilot study.

Consequently, the notion of "economic activity" as the basis of this codification was rejected in favour of the classic concept of "commercial transaction".

Moreover, economic operators stressed the dominant role which had henceforth to be played by the Trade Register as an informative and security institution in the services of companies.

As the method of work was defined during a meeting held in March 1994 in Ouagadougou, a pilot study was forwarded to each of the National Committees during the fourth quarter of 1994.

The pilot study was divided into five parts, namely:

- status of trader;
- trade and personal property credit register;
- commercial lease and business;

- trade middlemen; and
- commercial sale.

The National Committees examined the draft and made very many observations which were considered during another seminar held in Bangui early 1995.

It was during this seminar that the three hundred and eight articles of the pilot study were discussed one by one. Many observations made by the National Committees were adopted and they enriched the text.

Thus, at the close of the Bangui seminar the first draft Uniform Act of the OHADA Treaty Relating to General Commercial Law was adopted unanimously by the representatives of the National Committees present.

II. CONTENT OF THE UNIFORM ACT

II. 1. Status of trader

It should be recalled that Article 1 of the 1807 Trade Code, which was applicable in almost all the countries which are today signatories to the OHADA Treaty, defined traders as persons "whose regular occupation is to carry out commercial transactions". This definition thus referred to Article 632 of the Trade Code which stated that the law deemed "commercial transaction" as any purchase of foodstuffs and goods for resale, etc.

Gabon, for its part, made a distinction in the ordinance of 28 September 1989 between wholesale traders and retail traders, those who sell mainly goods that they do not produce, and, on the other hand, service providers.

Lastly, other persons proposed that the status of trader should derive from the notion of economic activity, a proposal that was rejected during the Abidjan seminar.

The draft Uniform Act as adopted by the National Committees:

- maintains the classical definition of trader;
- but excludes from the list of commercial transactions dealer/trader contracts.

Moreover, the Uniform Act adds to this list the exploitation of natural resources, middlemen's operations as well as telecommunication operations.

The other provisions of the Uniform Act dealing with the status of trader concern the capacity to trade (finally women and men are treated as equals) and the statement of accounting principles applicable to trade.

II.2. The Trade and Personal Property Credit Register

For most of the countries concerned, apart from Gabon, Guinea, Senegal, Mali and Togo, legislation relating to the Trade Register of the old French law of 18 March 1919, according to which the Trade Register was only a simple catalogue of information whose content had no legal value.

The draft Uniform Act henceforth provides that the purpose of the Trade and Personal Credit Register shall be:

"for the registration of natural persons having the status of trader, as well as commercial companies, other corporate bodies and branches of foreign companies carrying on a commercial activity on the territory of the Contracting States".

The provisions relating to registration provided for in Articles 27 to 45 of the draft have been intentionally described in great detail so that they can be applied immediately.

Furthermore, this Act is innovative for most of the countries which are signatories to the Treaty as it provides, as in Senegal and Mali, that movable securities could also be registered in the Trade Register.

In addition to the classical securities such as the pledging of a business, the preferential right of the seller of a business, the pledging of professional equipment or motor vehicles, the pledging of stocks, the preferential right of the Treasury, the Customs Administration and Social Security Institutions, the draft Uniform Act also provides that the Register can record entries relating to the pledging of shares, ownership reserve clauses and leasing contracts.

All these provisions aim to offer companies a wider range of commercial information on the legal and financial situation of their commercial partners, as well as the possibility to put in place serious legal guarantees and hence to foster trade.

The effect of a validly made entry is to render demurrable to third parties the guarantee given.; Article 65 of the draft provides, however, that each guarantee shall be entered in the Register for a specified period so as not to paralyze, through the accumulation very old entries, court registries responsible for the management of the Register.

11.3. Commercial lease and business

The renewal of commercial leases was governed in the signatory countries to the Treaty mainly by the French law of 30 June 1926.

The principle has been retained in the Act for all premises for commercial, industrial or office use, as well as for secondary premises located in towns of more than 10,000 inhabitants (Article 71 of the Uniform Act).

The purport of these provisions is governed by the option given the parties to conclude a lease of a specified or an unspecified duration, as the right to renew the lease is reserved only for the lessee who shows proof of having carried on under the conditions stipulated in the lease, the activity provided for a minimum period of two years (Article 91).

Concerning the status of a business, this notion has been modified considerably by this Uniform Act. In deed, the new text takes account, as far as possible, of the accounting aspect of the business as expressed in the Uniform Act Organizing and Harmonizing Company Accounting Systems.

Thus, Article 104 provides that a business shall obligatorily comprise all or part of the elements referred to as goodwill, namely: customers, sign, business name and the right to renewal of lease.

II.4. Trade middlemen

The provisions of this Uniform Act govern not only the conclusion of contracts by the middleman, but also any transaction carried out by the latter in view of concluding or performing the said contract, whenever the middleman is registered in the Trade and Personal Property Credit Register of one of the Contracting States or the middleman acts in the territory of one of the Contracting States or rules of private international law allow for the implementation of these provisions (139 and 140).

As concerns the commercial agent, some provisions of the Uniform Act should be compared with the French law of 25 June 1991 which applies the European Directive with regard to the matter.

In this regard, the writers of the Uniform Act were concerned about the effective implementation of a text intended to govern the most current commercial relations between a commercial agent and his principal.

II.5. Commercial sale

It should be remarked that in the area of commercial sale, none of the Contracting States to the Treaty was signatory to the Vienna International Convention of 11 April 1980 on the Uniform Act Relating to the Commercial Sale of Goods.

Furthermore, there was no codification relating to commercial sale in the internal laws of the States and the only reference to a law in this area was references to the provisions of the Civil Code or to some texts specific to the regulation of exclusive sale or purchase contracts (decree of 7 December 1970 in Senegal).

As most major international trading countries have today acceded to the Vienna Convention, it was essential to introduce in the positive law of the Contracting States to the Treaty a law that is as close as possible to the provisions applicable now in most of the States.

Therefore, the provisions of Book V of the Uniform Act apply to all contracts of sale of goods between traders, be they natural persons or corporate bodies. The provisions of the Book do not apply to sales to consumers, sales after seizure, sales of chattels as well as to contracts in which the major part of the obligation of the party that delivers the goods shall be the supply of manpower or other services (Articles 202, 203 and 204).

This text, which is very pragmatic, gives prominence to the will and conduct of the parties above all mandatory rules.

Apart from provisions inspired by the Vienna Convention, the Uniform Act also provides for solutions regarding the transfer of ownership, the transfer of risks and the period of limitation for commercial sales which is fixed by Article 274 at two years with effect from the date the action may be instituted.

The first legal experts who examined this text must have noticed that the text wanted to reflect the economic reality and the life of African companies in order to foster trade and make it save for all economic operators, namely individual traders, managers and their collaborators and boards of directors and the judges or arbitrators who will have to ensure its implementation.

The adoption of this Uniform Act is thus a testimony, in the words of President Keba M'baye while closing the Bangui Seminar, of "the capacity of African laws to back up economic progress", and of the success that it should score amongst law professionals and economic operators.