

Kronieke / Chronicles

Convergence of governance systems in SADEC: the OHADA and COMESA examples*

1. Introduction

The question that this title poses is: how is the convergence the governance systems of business activities in the various member states of SADEC best effected? In order to some throw light on this question with a view to possible strategies a closer look will be taken briefly at both the OHADA (Organisation for the Harmonisation of Business Law in Africa) treaty which deals with the harmonisation and modernisation of the business laws of its meber states as well as the COMESA treaty which establishes a free trade zone.

2. Organisation for the Harmonisation of Business Law in Africa (OHADA)

2.1 The OHADA treaty

OHADA was established by the *Treaty on the Harmonisation of Business Law in Africa* in 1993. Its objectives are to remedy the legal and judicial insecurity that prevails in contracting states by modernising and harmonising business law in member states and in this way to re-establish investors' confidence and to facilitate trade between the contracting states;¹ to put, at the disposal of each contracting state, common rules that are simple and adapted to the economic situation; to promote arbitration as a speedy and discreet instrument for settling commercial disputes; to improve the training of judges and auxiliary officers of justice to adjudicate commercial law disputes; and to encourage the setting up of an African Economic Community.²

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1 The insecurity that exists is due to the fact that most of the business law of the Contracting states date back to the colonial era, which are no longer consistent with the contemporaneous economic situation and international relations.

2 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

The same webside information can also be viewed at

<<http://www2.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>. See article 1.

From 1 July 1999 fifteen states³ in Central and West Africa are members of OHBLA (Organisation for the Harmonisation of Business Law in Africa) which is the organisation responsible for the implementation of the OHADA treaty.⁴ Any OAU member state is free to become a contracting party. Also, any other OAU non-member state may become a contracting party to this treaty where all the contracting states consent to this.⁵

2.2 Status, immunities and privileges of OHBLA

OHBLA has full international judicial personality and more specifically, it has the capacity: a) to contract; b) to acquire furniture and real estate and to transfer them; and c) to initiate legal proceedings and to be a party in litigations.⁶

The following persons have diplomatic immunities during the exercise of their functions:

- the civil servants and employees of the Permanent Secretariat Office, the Regional High Judiciary School and the Common Justice and Arbitration Court, as well as
- judges of the Court and the Arbitrators.⁷

OHBLA, as such, also possesses immunity and privileges in the territories of each contracting state.⁸

2.3 Institutions constituting OHBLA⁹

OHBLA comprises four institutions responsible for the formulation and implementation of the new common law, namely:

- a) The Council of Ministers of Justice and Finance;
- b) The Permanent Secretariat;
- c) The Advanced Regional School of Magistracy (ERSUMA);¹⁰ and
- d) The Common Court of Justice and Arbitration.¹¹

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

4 Article 3.

5 Article 53.

6 Article 46.

7 Article 49.

8 Article 47.

9 French is the working language of OHBLA. See article 42.

10 Also known as the Regional High Judiciary School.

11 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>. See article 3.

2.3.1. The Council of Ministers of Justice and Finance

The Council of Ministers of Justice and Finance adopts by unanimous vote (of the representatives of the contracting states who are present and who exercised their right to vote)¹² “uniform acts”, on consultation with the Common Court of Justice and Arbitration, which are *directly* applicable in each of the internal laws of the contracting states.¹³ It meets at least once a year.¹⁴

It therefore acts as a type of general meeting.

2.3.2 The Permanent Secretariat

The Permanent Secretariat, which is attached to the Council of Ministers, is responsible for:

- the coordination of activities and monitoring of the organisation’s works;
- the *preparation of uniform acts in consultation* with the governments of contracting states;¹⁵
- the preparation of the annual business law harmonisation programme; and
- publication of OHADA’s Official Gazette.¹⁶

2.3.3 The Advanced Regional School of Magistracy

This school, which is attached to the Permanent Secretariat, is responsible for the training and further training of judges and auxiliary officers of justice of contracting states in the new harmonised business law.¹⁷

2.3.4 The Common Court of Justice and Arbitration

The Common Court of Justice and Arbitration consists of seven judges elected for seven years, reeligible once, from among the nationals of the contracting states.¹⁸ The Court elects its President and 2 (two) Vice-Presidents from among its members for a non-renewable period of three years six months.¹⁹

It has the following responsibilities:

- it is consulted for its *advisory opinion* on *draft uniform acts* prior to their submission and final adoption by the Council of Ministers, and also on the *interpretation and application of uniform acts*;²⁰

12 On the condition that at least two-thirds of the contracting states are present.

13 See articles 7 & 8.

14 Article 28.

15 Article 6.

16 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

17 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

18 Article 31.

19 Article 37.

20 See article 14.

- it is court of *annulment* in the place of the national supreme courts for every dispute relating to the *uniform law*. Matters may be referred *directly* to the court by one of the parties to the proceedings before a national court or may be brought to it by *referral* from a national court;
- it *organises and supervises the proper functioning of arbitration proceedings*: (1) it *appoints or confirms* arbitrators, (2) it is *informed* of the progress of proceedings and (3) *examines* draft awards, for which it may *only propose procedural changes*.²¹

The treaty provides that any party to a contract may refer a contract litigation to the arbitration procedure:

- if it has its domicile or its usual residence in one of the contracting states, or
- where the contract is enforced or to be enforced in its entirety or partially on the territory of one or several contracting States.²²

2.3. Uniform Acts

Uniform Acts are acts enacted for the adoption of common rules.²³ The treaty stipulates that the Permanent Secretariat is obliged to notify the governments of the contracting states of preliminary draft uniform acts which, in turn, have 90 days from the date of reception of the notification to forward their written observations to the Permanent Secretariat.²⁴

The preliminary draft uniform act, together with the observations of the contracting states and a report by the Permanent Secretary is then forwarded to the Common Court of Justice and Arbitration which has to give its recommendation within 30 (thirty) days. The final text is adopted by the Council of Ministers by unanimous decision of the representatives of the contracting states present and voting.²⁵

Under normal circumstances, uniform acts enter into force 90 days after their adoption by the Council of Ministers of Justice and Finance.²⁶ Thereafter they are published in the Official Gazette of OHADA as well as in the Official Gazette of each of the contracting states.²⁷

The uniform acts are *directly* applicable and obligatory in contracting states, notwithstanding any contrary provisions of a previous or subsequent internal law.²⁸ It is expressly stated in the treaty that no reservations are allowed.²⁹

21 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>. See articles 21 & 24.

22 Article 21.

23 Article 5.

24 Article 7(1).

25 See section 7. <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

26 Article 9.

27 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>. See article 9

28 See article 10. <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

29 Article 54.

Since its establishment, the Council of Ministers has adopted 5 uniform acts which have already entered into force. These are:

- a) Uniform Act relating to General Commercial Law;
- b) Uniform Act relating to Commercial Companies and Economic Interest Groups;
- c) Uniform Act Organising Securities;
- d) Uniform Act Organising Simplified Recovery Procedures and Measures of Execution,
- e) Uniform Act Organising Collective Proceedings for Wiping off Debts; and
- f) Uniform Act on arbitration under the OHADA Treaty.³⁰

These uniform acts deal with commercial law, the law of commercial companies and economic interest groups, securities, bankruptcy proceedings, the law of debts collection as well as discharging liabilities.

The Council of Ministers also adopted the following rules with regard to arbitration and to the functions of the Common Court of Justice and Arbitration:

- Rules of Arbitration of the Common Court of Justice and Arbitration;
- Rules of procedure of the Common Court of Justice and Arbitration.³¹

3. COMESA (Common Market for Eastern and Southern Africa)

3.1 Objectives of COMESA

COMESA is an organisation consisting of 21 states,³² which have agreed to cooperate in developing their natural and human resources.³³ The Treaty establishing COMESA was signed in 1993. COMESA was preceded by the treaty establishing the Preferential Trade Area.³⁴

The objectives of COMESA are:

- cooperation between the contracting states in the creation of an enabling environment for foreign, cross-border and domestic investment. Put differently, to establish a free trade area;³⁵

30 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

31 <<http://parma.lexum.umontreal.ca/ohada/pres/pres.00.en.html>>.

32 They are Angola, Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe

33 <www.comesa.int>.

34 <www.comesa.int/brackgrnd/backhist.htm>.

35 <www.comesa.int>.

- to deepen and broaden the integration process among member states through the adoption of more comprehensive trade liberation measures such as the complete elimination of tariff and non-tariff barriers to trade and elimination of customs duties; through the free movement of capital, labour, goods and the right of establishment; by promoting standardised technical specifications, standardisation and quality control; through the elimination of controls on the movement of goods and individuals; by standardising taxation rates and conditions regarding industrial cooperation, particularly on company laws, intellectual property rights and investment laws; and through the promotion of the adoption of a single currency and the establishment of a Monetary Union; and through the adoption of a Common External Tariff (CET);³⁶
- to establish a secure investment environment; and
- to create a harmonised and more competitive market.³⁷

The member States have agreed on the need to create and maintain:

- a full free trade area guaranteeing the free movement of goods and services produced within COMESA and the removal of all tariffs and non-tariff barriers;
- a customs union under which goods and services imported from non-COMESA countries will attract an agreed single tariff all COMESA States;
- free movement of capital and investment supported by the adoption of common investment practices so as to create a more favourable investment climate for the entire COMESA region;
- a gradual establishment of a payments union based on the COMESA Cleaning House and the eventual establishment of a common monetary union with a common currency;
- the adoption of a common visa arrangement, including the right of establishment leading eventually to free movement of *bona fide* persons.³⁸

3.2 Decision-making organs of COMESA

The decision-making organs of COMESA are

- a) Authority of Heads of State and Government;
- b) Council of Ministers;
- c) Court of Justice (which has been operational since 1998);
- d) Committee of Governors of Central Banks.³⁹

36 <www.comesa.int>.

37 <www.comesa.int>.

38 <www.comesa.int>.

39 <www.comesa.int>.

The Intergovernmental Committee, the Technical Committees, the Secretariat and the Consultative Committee make recommendations to the Council of Ministers, which in turn make recommendations to the Authority.

3.2.1 Authority of Heads of State and Government

It is the supreme policy organ of COMESA and is responsible for the general policy, direction and control of the performance of the executive functions of the Common Market and the achievement of its aims and objectives. The decisions and directives of the Authority are by consensus and are binding on all subordinate institutions, other than the Court of Justice, on matters within its jurisdiction, as well as on the member states.⁴⁰

3.2.2 Council of Ministers

It is the second highest policy organ of COMESA. It is composed of ministers designated by the member states. The Council is responsible for ensuring the proper functioning of COMESA in accordance with the provisions of the treaty. The Council takes policy decisions on the programmes and activities of the COMESA, including the monitoring and reviewing of its financial and administrative management. As provided for in the treaty, Council decisions are made by consensus, failing which, by a two-thirds majority of the members of the Council.⁴¹

3.2.3 Court of Justice

It is the judicial organ of COMESA, having jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. Specifically, it ensures:

- the proper interpretation and application of the provisions of the treaty;
- and it adjudicates any disputes that may arise among the member states regarding the interpretation and application of the provisions of the treaty.

The decisions of the Court are binding and final. Decisions of the Court on the interpretation of the provisions of the COMESA treaty have precedence over decisions of national courts.

It is headed by a President and consists of six additional judges appointed by the Authority. Consideration is being given to establishing the Court of Justice in the not too distant future.⁴²

3.2.4 The Committee of Governors of Central Banks

It is empowered under the Treaty to:

40 <www.comesa.int>.

41 <www.comesa.int>.

42 <www.comesa.int>.

- determine the maximum debt and credit limits to the COMESA Clearing House;
- the daily interest rate for outstanding debt balances; and
- the Staff Rules for Clearing House staff.

It also monitors, and ensures the proper implementation of the Monetary and Financial Cooperation programmes.⁴³

3.2.5 The Inter-governmental Committee

It is a multi-disciplinary body composed of permanent secretaries from the member states in the fields of trade and customs, agriculture, industry, transport and communications, administrative and budgetary matters and legal affairs.

Decisions of the Committee are by a simple majority. Its main functions include:

- the development of programmes and action plans in all the sectors of cooperation, except in the finance and monetary sector;
- the monitoring and keeping under constant review and ensuring proper functioning and development of the Common Market; and
- overseeing the implementation of the provisions of the treaty and, for that purpose, requesting a technical committee to investigate any particular matter.⁴⁴

3.2.6 Technical Committees

There are 12 Technical Committees, namely,

- on Administrative and Budgetary Matters;
- on Agriculture;
- on Comprehensive Information Systems;
- on Energy;
- on Finance and Monetary Affairs;
- on Industry;
- on Labour, Human Resources and Social Affairs;
- on Legal Affairs;
- on Natural Resources and Environment;
- on Tourism and Wildlife;

43 <www.comesa.int>.

44 <www.comesa.int>.

- on Trade and Customs; and
- on Transport and Communications.

All these committees are responsible for the preparation of comprehensive implementation programs and monitoring their implementation and then making recommendations to the Council.⁴⁵

3.2.7 The Consultative Committee of the Business Community and other Interest Groups

It is responsible for providing a link and facilitating dialogue between the business community and other interest groups and other organs of COMESA.

3.2.8 The Secretariat

It is headed by a Secretary General who is appointed by the Authority for a term of five years and is eligible for re-appointment for a further term of five years. The basic function of the Secretariat is to provide technical support and advisory services to the member states in the implementation of the treaty. To this end, it undertakes research and studies as a basis for implementing the decisions adopted by the Policy Organs. The various activities of the Secretariat encompass:

- Agriculture;
- Transport and Communications;
- Industry and Energy;
- Trade and Customs;
- Monetary Cooperation; and
- Administration.⁴⁶

3.3 Promotion of COMESA

Several institutions have been created to promote sub-regional cooperation and development. These include:

- the COMESA Trade and Development Bank;
- the COMESA Clearing House;
- the COMESA Association of Commercial Banks;
- the COMESA Leather Institute; and
- the COMESA Re-Insurance Company.⁴⁷

45 <www.comesa.int>.

46 <www.comesa.int>.

47 <www.comesa.int>.