

LMA Webinar

The OHADA regime and its relevance to the loan market

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What is the OHADA?

- The acronym stands for Organisation for the Harmonisation of Business Law in Africa (**O**rganisation pour l'**H**armonisation en **A**frique du **D**roit des **A**ffaires)



Created by the Treaty of Port Louis on 17 October 1993



17 Member States of West and Central Africa



Main objective: To remedy the legal and judicial insecurity that prevailed in Member States by modernising and harmonising their business law.



Benin
Burkina Faso
Cameroon
Central African Republic
Chad
Comoros
Congo
DR Congo
Equatorial Guinea
Gabon
Guinea
Guinea-Bissau

Ivory Coast
Mali
Niger
Senegal
Togo

The OHADA Uniform Acts

9 Uniform Acts are directly applicable in the 17 Member States

Initial Uniform Acts	Revised Uniform Acts
Debt recovery simplified proceedings	General commercial law (<i>revised on 15 December 2010</i>)
Arbitration	Security law (<i>revised on 15 December 2010</i>)
Companies' accounting	Commercial companies and economic interest groups (<i>revised on 30 January 2014</i>)
Transportation of goods by road	
Cooperative companies	Insolvency proceedings (<i>revised on 10 September 2015</i>)

The OHADA institutions

- Council of Ministers, composed of Finance and Justice Ministers of the member States
- Conference of Heads of States and governments
- Common Court of Justice and Arbitration (*based in Abidjan, Ivory Coast*)
- Permanent Secretary Office (*based in Yaoundé, Cameroon*)
- Regional Judiciary High School (*based in Porto Novo, Benin*)

OHADA in short

- Unified legal area attractive for investors
- Civil law legal system
- Modern business friendly legal system
- Coexistence with national and regional regulations (UEMOA, CIMA, OAPI, etc.)

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The revised Uniform Act organizing Security law



The revised OHADA Uniform Act organizing Security law

- Perfection of security interests
 - Introduction of a security agent (*agent des sûretés*)
 - Formalities
- The new legal framework for pledges (*gages*)
 - The revised general regime of pledges (*gages*)
 - Specific rules for the pledge over inventory (*gage de stocks*)
- Security interests over cash and receivables
 - Security over receivables: Assignment of receivables and charge over receivables
 - Security over cash: Cash collateral and account charge

Perfection of security interests

A. Introduction of a security agent

Appointment of the security agent

Any "*domestic or foreign financial institution or credit institution*" (art.5 UAS)

A. Introduction of a security agent

Powers of the security agent:

- Powers granted for any type of security interests (even those which are not regulated by the UAS)
- Powers:
 - Perfection of security interests
 - Filings of security interests
 - Managing security interests
 - Enforcement of security interests
- Protection of the dedicated patrimony ("patrimoine d'affectation")

B. Formalities

- No more obligation to register (*enregistrer*) security interests with the tax authorities under the new UAS but, in practice, maintenance of registration (*enregistrement*) requirements under certain jurisdictions
- Required filings at the competent Trade and Movable Property Credit Register (RCCM) for enforceability (*opposabilité*) against third parties
- Practical concerns (eg. securities over receivables)
- Discrepancy over filing costs depending on the jurisdiction

New legal framework for pledges (*gages*)

A. The revised general regime of pledges (*gages*)

The tangible nature of the asset, a new criterion for the validity of the pledge

- Drawbacks as to dispossession requirements (former UAS rules)
- Dispossession now used as an alternative way to achieve perfection (*opposabilité*) of the pledge (*gage*) against third parties
- Right to grant a pledge (*gage*) over future assets

A. The revised general regime of pledges (*gages*)

– **Characteristics of a pledge without dispossession**

- Conservation duties for the pledgor
- Sanction for a breach of conservation duties
- Insurance requirements
- Right to sell the stocks for the pledgor

– **Characteristics of a pledge with dispossession**

- Obligations of a remunerated depositary
- Liability of the creditor
- Retention of title
- Sanction for a breach of conservation duties

B. The specific pledge over inventory

Subject to the general regime of pledge of tangible assets

- Economical advantages of a pledge of inventory without dispossession in commodities financing
- The "*subrogation réelle*" technique allows the sale of stocks and their rebuilding

C. Enforcement of the pledge

- Sale at a public auction
- Judicial attribution
- An innovation: the possibility of a contractual attribution clause (*pacte comissoire*)

Security interests over cash and receivables

A. Security over receivables (perfection)

	Assignment of receivables	Pledge of receivables
Receivables	All types of receivables	
Mandatory provisions	Minimal (secured liabilities and assigned / pledged receivables must be sufficiently identified)	
Enforceability as against third parties	Registration with the competent RCCM	
Enforceability as against the assigned / pledged debtor	Notification of the assignment / pledge (unless the assigned / pledged debtor is a party to the assignment / pledge agreement)	
Effects	Assignment of the assigned receivables to the secured creditor	Exclusive right to payment of the pledged receivable after notification

A. Security over receivables (enforcement)

- **Assignment of receivables:** No need to enforce considering the advantages of a full transfer of title over the receivables
- **Pledge over receivables:**
 - Notification and exclusive right to payment (the secured creditor is the only person to whom payments may lawfully be made to)
 - Also classic ways to enforce a pledge of receivables (judicial attribution or contractual attribution clause)

B. Security over cash (perfection)

	Cash collateral	Pledge over bank account
Assigned / pledged receivable	Sums standing to the credit of a blocked account opened in the name of the creditor	<i>"Credit balance, whether temporary or definitive, standing on the account on the day of enforcement of the pledge subject to the settlement of pending transactions"</i>
Mandatory information	Secured obligations, amount of the assigned sums, identification of the blocked account	Secured obligations, identification of the pledged account
Enforceability as against third parties	Notification to the bank holding the blocked account (No registration with the RCCM)	Registration with the RCCM
Enforceability as against the holding bank		Notification of the pledge (unless the holding bank is a party to the pledge agreement)
Effects	Transfer of title to the secured creditor	Exclusive right to payment of the pledged sums after notification

B. Security over cash (enforcement)

– **Cash collateral:**

- Ownership of the creditor of the funds deposited in the blocked account
- Payment of the sums standing to the blocked account, up to the amount of the due and unpaid secured liabilities, 8 days after service of a notice to the debtor

– **Pledge over bank account:**

- Exclusive right to payment after notification (or account bank party to the pledge agreement)
- Judicial attribution or contractual attribution clause

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The revised Uniform Act organizing insolvency proceedings



The revised OHADA Uniform Act organizing insolvency proceedings

- **New definition for cash flow insolvency** (*cessation des paiements*)
- **Preventive proceedings**
 - Conciliation
 - Preventive recovery (*Règlement préventif*)
- **Curative proceedings**
 - Judicial reorganisation (*Redressement judiciaire*)
 - Liquidation of assets (*Liquidation de biens*)

The revised OHADA Uniform Act organizing insolvency proceedings

- **Cash flow insolvency:** *"where the debtor is unable to cope with its payable liabilities with its available assets, excluding situations where the credit facilities or the terms of payment in favour of the debtor allow it to cope with its payable liabilities "*
- The revised IPUA acknowledges:
 - the credit facilities, which increase the available assets, and
 - the terms of payment, which delay and decrease the payable liabilities

Preventive proceedings

Conciliation

Innovation of the revised IPUA: Confidential proceeding aimed at an out-of-court agreement to terminate the debtor's difficulties

- When the debtor is facing actual or foreseeable difficulties, to the extent it is not already cash insolvent (*cessation des paiements*)
- Confidentiality of the conciliation agreement and its judicial homologation
- Stay of proceedings:
 - No stay of proceedings during negotiation of the conciliation agreement
 - Stay of proceedings once the conciliation agreement is homologated
- Initial term of 3 months which may be extended for an additional 1 month-period
- Benefit of the conciliation extended to guarantors

Judicial recovery (*Règlement préventif*)

Proceeding aimed at a rescheduling agreement with the assistance of an expert appointed in court

- When the debtor is facing serious economic or financial difficulties, to the extent it is not already cash insolvent (*cessation des paiements*)
- The court may:
 - order stay of proceedings for a 3 + 1 month period
 - impose up to 2 years term of payment to non-consenting creditors
- The debtor manages its business alone, except for:
 - Payment of prior debts
 - Sale exceeding the current course of business
 - Granting of security
- Stay of proceedings benefit extended to individual guarantors

Curative proceedings

Judicial reorganisation (*Redressement judiciaire*)

Proceeding aimed at a curative scheme of arrangement under the supervision of a bankruptcy administrator

- Conditions: Debtor is cash insolvent but possible recovery (discounts and terms of payment) or transfer of activity
- Effects:
 - Management divestiture: Management by a bankruptcy administrator
 - Filing of claims arising before the opening judgment
 - Creditors' group
 - Stay of proceedings and interests
 - Continuation of on-going agreements
 - Hardening period for up to 18 months before opening judgment
- Solutions:
 - Scheme of arrangement with discounts and terms of payment (standard or simplified)
 - Scheme of arrangement with partial or total transfer of assets

Liquidation of assets (*Liquidation des biens*)

Proceeding aimed at liquidating the debtor's assets to distribute the sale proceeds among its creditors

- Privilege of "new money"
- Initial term of 18 months which may be extended for an additional 6 month period
- Closing of liquidation:
 - due to extinguishment of liabilities, or
 - due to insufficient assets

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