HARMONIZATION OF BUSINESS LAWS IN AFRICA: THE CONFLUENCE OF OHADA AND NIGERIA COMPANY LAW*

1.1 INTRODUCTION

The eradication of mass poverty is the greatest challenge facing contemporary Africa. The direct result of our history has been the fragmentation of the continent into small and barely viable political and economic states. The fall out of this balkanization is the underdevelopment, poverty, exploitation and marginalisation of Africa within the global economy. These have festered inimical consequences, the grave picture which the nascent gale of globalization has helped to throw up. Thus, a child in Africa dies of disease, famine, or conflict every three seconds; 200 million people have no access to health service; 46% of the population of sub-saharan Africa, all most half, live on less than one USA dollar per day; average income per capital is lower now than at the end of the 1960's; one in five of the population, that is 20% are affected by conflicts; over 25 million Africans suffer from HIV/AIDS virus; 46 million primary aged children are not enrolled in schools and over 60% of these are girls[1].

The fundamental challenge is how to lift Africa out of this doldrum of poverty and debt. The answer is trade. The long term solution is not in aid but in trade. Trade is the criterion for economic development. A situation where Africa owes over $600 billion dollars in external debt and contributes a partly 2% to world trade[2] is unacceptable.

Furthermore, the fourth quarter of the last century also witnessed precipitous activities in regional and international relation threatening to redefine the global regime of unilateral and multi-lateral economic relationship. This requires that African countries now more than ever before

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[1] See Kimfe, A., The Challenges and Prospects of Pan-African Economic Intergration; Occasion papers, No. 12, June/July 1999. cited in Ladan M.T., Intergration and Harmonization of Business laws: Issues, challenges and Opportunities for ECOWAS; being paper presented at the International Conference of Ministers of Justice and Attorney Generals of West African Countries, Abuja 4th – 6th April 2005. P. 18.

[2] See Uwah, J., How not to assist Africa. Business Times Newspaper, July 11 – 17, 2005. P. 7.

need to play down their differences and put on a more cohesive and unified front.

It is now obvious that the growth of the continent will be a function of how it manages to attract domestic and international investment into the region. An important aspect of such strategy would be a uniform and harmonized system of business laws, clearly formulated and transparently applied. With such a system in place, investors who wish to embark on regional projects would not have to contend with a multiplicity of laws, which may serve to confuse and not assist them.

African countries must create enabling environment to attract foreign direct and foreign portfolio investments to stimulate their economies to provide jobs, fund infrastructures, increase per capital income and gross domestic products. Since companies are the main channels for conducting FDI and FPI globally, how they are organized is the concern of all.

It is this imperative that ushered in the OHADA agenda, which like a maturing hurricane is gradually sweeping through the continent. This discussion will examine the efforts at harmonization of business laws in Africa with particular emphases on company law. To assess the level of Nigeria's preparedness emphasis will be laid at identifying similarities and disagreement between the Nigerian company law and the harmonized regulation on company law. This expose provides an audit of the level of readiness of the Nigerian environment to this continental drive.

This paper begins with conceptual and content clarification. The similarities and dissimilarities between the OHADA Treaty, Rules of Procedure of the Common Court of Justice and Arbitration and the Uniform Act on Commercial Companies and General Interest Groups will be overviewed under the heading 'The confluence waters of OHADA and the Nigerian Company Law'. Noticeable difficulties in this terrain will be highlighted under the subheading of knotty areas. Finally, conclusion will draw the curtain on the discussion.

1.2 CONCEPTUAL CLARIFICATION

"Harmonization" "OHADA" and the phrase "Nigerian Company Law" are prominent in this topic. An explanation of these will set the compass for this discourse.

Literally, the term 'Harmonization' indicates when things go well together and produce an attractive result. It refers also to the state of making systems or rules similar in different countries or organization. In this context, it is the convergence of various legal systems or regulations, policies or practices to make them the same or similar, or to make them fit in well with each other.

Harmonization brings about certainty in the law and predictable determination of the appropriate law to apply in resolving practical problems on uniform basis. It creates a culture of legal protection of community citizens' rights to move freely, engage in-intra regional trade and investment activities without the fear of not getting accurate advice about the applicable rules, right of access to justice and legal remedies and enforcement of judgments.

With harmonization, each country retains its legal system. The advantages of harmonization lie in the convergence of various legal traditions and the consequent enrichment of the respective legal systems.

OHADA is the acronym for *Organisation pour l' Harmonization du Driot des Affaires en Afrique* (Organization for the Harmonization of Business law in Africa, occasionally referred to in English as "OHBLA"). It is an international organization created by a treaty signed in Port-Louis, Mauritius on 19th October 1993 by 14 African States[3]. In content, OHADA is a legal tool for economic integration and development via legal integration. The simplification and certainty which the system engenders is a major attraction for economic operators to invest in Africa.

This ambitious project took shape over the course of several summit meetings of Heads of State and Govenrment from French speaking countries of Africa. At a summit in April 1991 in Ouagadougou, Burkina-Faso, the Finance Ministers of the Franc-zone entrusted a group of jurists led by H.E. Mr. Keba Mbaye, with the task of assessing the political and technical feasibility of the project. This group prepared a report which was approved in October 1992 at a summit in Libreville, Gabon, where a Steering Committee of three jurists was charged with drafting a treaty and identifying areas of law to be harmonized. At a summit in 1993, the

[3] Benin, Burkina Faso, Cameroun, Central Africa Republic Comoros, Congo, Cote d' Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo.

prepared treaty was presented for signature and came into force on the 18/09/1995[4].

At present OHADA has sixteen members; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Federal Islamic Republic of the Comoros, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo. Broadly speaking, the membership currently reflects a common tradition. With the exception of Equatorial Guinea, Guinea Bissau and the English speaking provinces of Cameroon, all the OHADA member states are French speaking. In addition, all the member states have a civil law tradition except for the English speaking provinces of Cameroon, which has the common law legal system.

As a Public International Organization, OHADA is a legal entity with its own rights and obligation distinct from those of its member states. It can enter into contract, sue and be sued, own moveable and immoveable properties and can appear in domestic court. OHADA enjoys privileges and immunities with regard to its properties and employees so that it can perform its activities freely. All civil servants and employees working for bodies belonging to OHADA enjoy diplomatic privileges and immunities. In terms of funding, OHADA derive its own resources form annual contributions paid by member states and also from aids from other international organization and foreign states[5].

The Council of Ministers[6], is the supreme decision making body of OHADA and is composed of the Ministers of Justice and Finance of all the member states. The Common Court of Justice and Arbitration (CCJA)[7] in Abidjan performs judicial and Arbitral functions. The Permanent Secretariat[8] is the permanent body of OHADA with headquarters at Yaounde, Cameroon. It is headed by Permanent Secretary and performs administrative functions of OHADA. The Regional Training Center for

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[4] Martor, B., Pilkington, N., Sellers, D., Thouvenot, S., Business law in Africa OHADA and the Harmonization Process (SIC) (Eversheds, UK 2002) P. 5.

[5] Ibid. A number of public institutions strongly support this project. These include OHADA UNDP, EU, DFID and the International Development Division of the French Ministry of Foreign Affairs inspired by the project an African Law Institute has been established recently with the support of the African Development Bank.

[6] OHADA Treaty, Article 27.

[7] OHADA Treaty, Article 14.

[8] OHADA Treaty, Article 40.

Legal Officers (ERSUMA)[9] promotes the Advanced Regional School of Magistracy at Port Novo, Benin.

The principal aims of OHADA, are to unify business laws throughout the member states and to promote arbitration as a means of settling contractual disputes[10]. To achieve this, OHADA issues unified legislations in the form of Uniform Acts in different areas of law. These Acts are directly applicable in all the member state, and supersede the national legislations on the subject. However, they do not prevent the member states from enacting specific legislations, which do not conflict with the uniform Acts.

To date seven Uniform Acts have come into force. These Acts cover General Commercial Law, Commercial Companies and Economic Interest Groups, Securities, Simplified Recovery Procedures and Enforcement Measures, Collective Insolvency Proceeding and Arbitration.

The Uniform Act on Commercial Companies and Economic Interest Groups (The Uniform Act) came into force on the 1st January 1998. It forms the largest part of the OHADA reform containing over 900 Articles and has considerably reformed company law in member states.

This Act draws so much inspiration from modern French company law and targets contemporary commercial reality. As a direct result of this harmonization, commercial companies having their registered offices on the territory of any one of the member states are now subject to the same law throughout the OHADA region, whether they are foreign owned companies or local companies. Article 2 of the Uniform Act states clearly that all the provisions of the Act are mandatory and cannot be derogated from unless otherwise provided.

'Nigerian company law' is the law enacted in the Federal Republic of Nigeria on the subject of companies. As an item on the Exclusive Legislative List[11], only the Federal Government of Nigeria can enact laws on the subject. The Federal Government of Nigeria has indeed done so.

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9 OHADA Treaty, Article 41.

10 OHADA Treaty, Article 1.

11 Items 32, Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999, herein referred to as the Constitution.

The Companies and Allied Mattes Act, 2004 (CAMA)[12] is the current law on this subject. This is the first serious effort at enacting a law on companies in Nigeria taking into consideration the peculiarities of the country. Drawing so much lessons from its predecessors, CAMA consolidates the erstwhile three branches of Nigeria's corporate law. CAMA contains provisions on company formation, management and winding up; Incorporated trustees; and Business names. The Law Reform Commission that midwife the law borrowed the experience of other jurisdictions beside the United Kingdom and thus produced a legislation with far reaching provisions. The compatibility and otherwise of CAMA and the Uniform Act on Commercial Companies and Economic Interest Groups will be undertaken under the next succeeding heading.

1.3 THE CONFLUENCE WATERS OF OHADA AND THE NIGERIAN COMPANY LAW

1.3.1 Company Status

A Company duly incorporated is an *Ens Legis*. It has the attribute of a 'person' at law with attendant rights and obligations. It can litigate, own and dispose of its properties. OHADA and the Nigerian Company Law are *at idem* on this. By ARTICLE 98, Uniform Act from the date of registration of a company with the Central Commercial Registry (the RCCM) sequel to which a certificate of incorporation is issued, giving details of the company including registration number, the company is considered a corporate body.

Section 37 CAMA is in complete agreement with the said Article 98. It provides clearly that from the date of incorporation mentioned in the certificate of incorporation, the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company. Consequently, the company can own properties, has its common seal but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided in the enabling Act.

1.3.2 Types Of Companies

The Uniform Act provides in the main for two kinds of limited liability companies and recognized association that approximate to partnership relationship.

[12] Laws of the Federation of Nigeria, Chapter 20, 2004.

The *SOCIETE ANONYME* (SA) is the most important type of Company under the Uniform Acts. It is the vehicle for large investments. It must have a capital of at least 10 million FCFA or 100 million FCFA if the company makes public offering of its securities.

The *SOCIETE A RESPONSABILITE LIMITEE* (SARL) is a commercial company covered under ARTICLE 309 to 384 of the Uniform Act. They are resorted to for smaller business ventures. The share capital of an SARL must not be less than one million FCFA.

The Uniform Act also provides for unlimited liability companies, which though statutorily provided for are comparatively less in use. Article 270 of the Uniform Act provides for the *SOCIETE EN NOM COLLECTIF* (SNC). This is more of a private partnership and the members are jointly and severally liable for the company's debt.

Article 293 of the Uniform Act provides for the *SOCIETE EN COMMANDITE* (SCS). This is partnership arrangement with two categories of shareholders. In the first category are shareholders who are jointly and severally liable, without limitation, for the company's debt. These are active partners. The second category of shareholders is the sleeping partners who are liable for the company's debt only up to the limit of their contribution to the capital.

Article 854 of the Uniform Act provides for the *SOCIETE EN PARTICIPATION*. This is more of a joint venture by independent partners who agree that the venture will not be registered by the RCCM and the venture will not have its own corporate personality. The partners are free to agree on the purpose of the joint venture, the rights of partners and rules for functioning and winding up.

Article 864 of the Uniform Act provides for *SOCIETE DE FAIT*. This will arise where two or more individuals or corporate bodies act as if they were in partnership, but without having properly formed any one of the types of companies contemplated under the uniform Act. Any interested party may apply to the court to confirm the existence of *Societe De Fait*. If the court does so, the rules applicable to the shareholders of an SNC are then applicable to the partners.

Article 869 of the Uniform Act unprecedentedly creates a novel vehicle for carrying on business under the Uniform Act. This Article introduces the ECONOMIC INTEREST GROUPS, (GIE). This is a legal entity whose exclusive purpose is to facilitate or develop the economic activities of its members and to improve the result of such activities. A GIE can be constituted without capital and does not itself give rise to the generation and distribution of profit. It is an auxiliary structure set up to facilitate its members activities. The members retain their own legal identity within the GIE and are jointly and severally liable for its debts unless otherwise agreed with any third party with whom the GIE may contract.

Under CAMA, companies can be broadly classified into two kinds, Public and Private Companies. A public company is a much more ambitious and adventurous enterprise and a veritable vehicle for large investments. According to section 27(2)(a) CAMA, for a company to be a public company, it must have a share capital of not less than ₦500,000. The prefix PLC appears after its name. Functionally, this kind of company under CAMA approximates to the S.A. under the Uniform Act.

Private companies are envisaged for smaller or less ambitious enterprises. Its members generally do not exceed fifty and must have an authorized share capital of not less than ₦10, 000. This too compares with the SARL under the Uniform Act.

An incorporated company may choose to be one limited by shares, guarantee or unlimited. Partnerships are not substantially covered under CAMA. However, CAMA contains provisions for registration of business names from which partnership may seek name registration. The law also provides for incorporated trustees for associations and societies that may not necessarily be commercially oriented.

Basically, on the two forms of companies, the two instruments have much in common and can appropriately influence each other.

1.3.3 Competence To Join In The Formation Of Companies

Article 7 of the Uniform Act and Section 20 CAMA are unanimous on the capacity to join in the formation of companies. An individual corporate legal entity and government may join in the formation of a company. Infants, persons of unsound mind or subject to legal disability have limited capacity to join in the formation of companies under these regimes.

1.3.4 Number Of Shareholders

As regards strict legal requirement,the Uniform Act parts course completely with CAMA on this issue.

Article 5 of the Uniform Act allows a single individual or legal entity to be a sole shareholder of a company, be it an SA or an SARL. This position accords with contemporary commercial reality where bulk of private companies are one man companies but a child, wife, relation or friends are incorporated and given very nominal participation to satisfy the legal requirement of at least two members.

By section 18 CAMA, any two or more persons may form and incorporate a company by complying with the requirement of registration of companies under the Act. Furthermore S. 22(3) CAMA prescribes a maximum membership of fifty for private companies.

1.3.5 Incorporation Process

The incorporation process under the Uniform Act involves basically four stages[13].

The first stage is the preparation of subscription Bulletins. This documents evidence the subscription of cash contributions. They contain information regarding the company, the shares and the subscribers and are issued by the founders of the company and signed b each subscriber. The company holds one original copy and the second is deposited with the Notary who in turn must draw up a statement of subscription and payment.

Stage two involves the deposit of funds and the notarization of statement of subscription and payment. The funds subscribed are either deposited with a Notary or in a special account opened in the name of the company. Subscribers must pay at least one-quarter of the value of their shares and have a period of up to three years within which to complete payment. On presentation of the subscription bulletins, the Notary draws up a deed referred to as the Notarized Statement of Subscription and Payment witnessing the amount of the subscriptions, which must correspond to the amount appearing on the subscription bulletins.

The next stage is for the preparation and notarization of the articles of association. The articles of association are established by notarized deed or private contract, which must nonetheless be deposited with a notary. The articles are signed by the subscribers or their proxies after the notarized statement has been drawn up. Article 101 of the Uniform Act provides that

[13] Uniform Act, Article 390 – 392

a company is effectively constituted once its articles of association have been signed.

The last crucial stage is the registration stage. Once the articles have been signed and notarized, the company must be registered with the Central Commercial Registry (RCCM)[14]. It is only after this registration that the company acquires its own separate legal personality. The following must accompany the application for registration:

i. 2 certified copies of the articles of association
ii. 2 original copies of the notarized statement of subscription and payment.
iii. 2 certified copies of a list of the first directors
iv. 2 extracts from any criminal record of the first directors.
v. Any other document that may be obligatory under the local law.
The application for registration must indicate the: -
   a. Name of the company
   b. Trading name, logo, acronym
   c. Its activities
   d. Status
   e. Amount of the registered capital indicating cash and contribution in kind
   f. Address of the registered office
   g. Duration of the company
   h. Full name, date and place of birth and domicile of the directors
   i. Full name, date and place of birth and domicile of the auditors[15].

Within fifteen days after registration of the company, a notice must be inserted in a journal empowered to publish legal notices in the member state where the company is situated and also in the local newspapers[16].

The incorporation documents under CAMA are to be found in section 35. The following documents are to be prepared and filed with the Corporate Affairs Commission.

[14] Ibid, Article 19
[15] Uniform Act on General Commercial Law, Article 27.
[16] bid, Article 261 and 257

1. Memorandum and Articles of association
2. Notice of the address of the registered office of the company.
3. Statement in the prescribed form containing the list and particulars together with the consent of the persons who are to be the first directors of the company.
4. A statement of the authorized share capital signed by at least one director.
5. Any other document required by the Commission to satisfy the requirements of any law relating to the formation of a company.
6. A statutory declaration in the prescribed form by a legal practitioner that the requirements for the registration of a company have been complied with.

Once the corporate Affairs Commission is satisfied with these documents, it may proceed to register the company and issue a certificate of incorporation. The company must then proceed to publish it's name legibly in all its correspondences, instruments, billboards and company seal.

The incorporation processes under both regimes are similar. Noticeably remarkable are the harmonisable documentation requirements, the role of legal practitioners and the pivotal role of a central registry.

1.3.6 Management

This is one area in company administration where the waters of OHADA and the Nigerian Company Law have parted ways.

The Uniform Act[17] provides for two alternative methods of management for an SA, one of which must be chosen in the articles of association.

1. A sole Managing Director acting as Chief Executive Officer, assisted if required by one or more Deputy Managing Director.
2. A board of directors presided over by either
   a. Chairman of the board who must be assisted by a General Manager acting as Chief Executive Officer for the company
   b. Chairman of the board who also act as Chief Executive Officer for the company, who may be assisted by one or more Deputy General Managers.

17 Uniform Act, Article 414

However, where an SA has more than three shareholders, it must have a board of directors to manage its affairs. On the other hand, if a single shareholder wholly owns an SA, it cannot have a board of directors, but must have a managing director only. Along the same line one or more managers can manage an SARL.

Under CAMA[18], every registered company shall have at least two directors. Where the number falls below two and steps are not taking to remedy the situation within one month, the company shall cease to carry on business. It is a ground for lifting the corporate veil and attaching liabilities incurred by the company to any director or member who is privy to this reduction in the number of directors[19]. The common law tradition is simple that every registered company must have a board of at least two directors.

Furthermore, on composition of board of directors, the Uniform Act contains a requirement that has no place under CAMA. Where a company has a board of directors, the board must have at least three and not more than twelve directors. Where, however the company makes public offering of its securities, it may have up to fifteen directors[20]. This prescription is not in CAMA.

1.3.7 Appointment and Removal of Directors

The Uniform Act[21] and CAMA[22] are practically unanimous in the manner directors of companies are appointed. Appointment of a director could be by provisions in the articles of association, the general meeting of members, and by the board of directors where casual vacancy exist subject to ratification by members at the next general meeting.

A situation not contemplated in the Uniform Act but covered under CAMA is where these three organs are not available, how then can directors be appointed? For instance, where all the directors and shareholders die in a plane crash. Section 248(2) provides that the personal representatives of the shareholders can convene a meting to elect new directors, failing which the creditors of the company can call a meeting and elect directors for the company.

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18 CAMA, Section 246

19 Ibid, Section 246(3)

20 Uniform Act, Article 416, 829

21 Ibid, Article 419, 429

22 CAMA, Sections 247, 248

By Article 433 of the Uniform Act, directors' tenure in an SA can be revoked at anytime by a decision of an ordinary general meeting *AD NUTUM REVOCATION*. This is to say that no reason need be given and the director cannot claim damages for wrongful dismissal. In the case of an SARL, shareholders holding not less than half of the company's shares can remove any director from office without prejudice to any action for damages. Under CAMA, directors are removable from office by ordinary resolution of the general meeting of members notwithstanding anything contained in the article of association or any agreement between the company and the director in question. This right of removal is without prejudice to any action for damages for wrongful dismissal. A provision similar to article 433 of the Uniform Act does not exist in CAMA.

While this authority to members to easily remove directors can provide an effective market for corporate control, it may also be open to abuse. Directors that refuse to oblige to the inordinate demands of shareholders can find themselves removed from office unjustifiably and without any remedy.

1.3.8 Company Meetings

The Uniform Act[23] provides for four kinds of corporate meetings where corporate decisions can be taken.

(i) The ordinary general meeting
(ii) Extra ordinary general meeting
(iii) Special meeting for class shareholders
(iv) Board meetings in companies where there are boards.

Similarly, CAMA[24] provides for five kinds of corporate meetings.

(i) Statutory meeting
(ii) Annual general meeting
(iii) Extra-ordinary general meeting
(iv) Class meeting
(v) Board of directors meeting.

Under the Uniform Act, there is no provision for a statutory meeting which is required to be held by public companies in Nigeria within six months of incorporation. In practice companies in Nigeria evade this requirement by first incorporating as a private company and later converting to a public company. Aside from this the meetings contemplated under the Uniform

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23 Uniform Act, Article 453, 546 – 550, 551 – 554, 555 - 557

24 CAMA, Section 263, 211, 213, 215

Act are very similar to those under CAMA in terms of constitution and functions.

1.3.9 Shareholders' Rights

The Uniform Act and the CAMA are largely unanimous on the rights and obligations of each shareholder. These are: - Right to a share in the company's profit whenever one is declared and distributed; right to the company's net asset when these are share out following the winding up of the company or when the company's share capital is reduced; the right to participate in and vote on the collective decisions of shareholders taken at general meetings; where necessary, an obligation to share in the company's losses up to the amount of the shareholders contribution.

As a starter of the company and the target of protection by law, these rights are inviolable and sacrosanct. Both laws have treated them so. A noticeable difference in this are is on shareholders' obligation on shares held. Under the Uniform Act[25], shareholders must pay up their equity contribution within three years. Under CAMA, no time limit is presented and may remain unpaid until winding up[26].

1.3.10 Auditor

To enable investors realize their investment, the institution of auditor is firmly entrenched in corporate governance to serve as corporate watchdog. The two regimes provide for the office of company auditor. Article 721 Uniform Act compels every SA to have at least one auditor. An SARL with share capital above 10 million FCFA; annual turnover above 250 million FCFA; and permanent staff above 50 employees is compelled to have at least an auditor. An SARL that does not meet these requirements has the option to have or dispense with the appointment of an auditor. But for this exception, the two are at consensus on this point.

Under CAMA, Section 37 compels every registered company, without exception, to have at least an auditor to audit the financial statements of the company.

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[25] Uniform Act, Article 53

[26] CAMA, Sections 21, 92

1.3.11 Early Warning Procedure

One of the novel investors' protection device in the Uniform Act[27] is the Early Warning Procedure. If in the course of his duties, an auditor becomes aware of anything that may jeopardize the company's activities, he may ask the management for explanations. The management must respond within one month, with the analysis of the situation and any measure that may be envisaged to remedy the situation. Also, under Articles 157 and 158 of the Uniform Act, any shareholder of the company has the right, twice a year to send written questions to the management regarding anything which may jeopardize the continuation of the company's activities. The management must reply to such questions within one month.

In this era of global concern for corporate governance, this is a highly welcomed and beneficial provision for ensuring corporate checks and balances. CAMA does not have any provision to the like effect.

1.3.12 Corporate Litigation

A major area of difference between the Uniform Act and CAMA is in the area of corporate litigation. Article 166 Uniform Act confers on the management the power to institute corporate suits. In the events of inertia by management, in the case of an SA, shareholders representing at least 5% of the registered capital either individually or collectively may institute proceedings in the company's name. In an SARL, shareholders representing at least ¼ of the total number of shareholders and at least holders of 25% of the registered capital may institute proceedings. To re-inforce this right, any clause of the articles of association subjecting the institution of an action in the company's interest to a prior notice or authorization of the general meeting or management or waiving the right to institute such proceedings is null and void. Specifically articles 169, 331 and 742 of the Uniform Act prohibit any decision by the general meting or the management purporting to terminate such proceedings. This leverage is intended to protect minority shareholders against potential oppression by the management or the majority members.

CAMA[28] adopts the old common law rule in <u>FOSS V. HARBOTTLE</u>[29], which vest the authority to address corporate wrong on the company

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[27] Uniform Act, Article 150, 153

[28] CAMA, Section 299

[29] (1853)2 Hare 461

represented by the collective will of majority of the members. The minority members may have their say but the majority will have their way. Thus the majority of the members can decide when and what to litigate, and when to commence or terminate corporate suits. The intendment of this rule is to promote corporate democracy and prohibit a situation where a few minority will hold to ransom the entire company at the slightest provocation.

1.3.13 Duration of Company

Another area of disagreement between the Uniform Act and CAMA is with regard to the lifespan of a company. Under the former, the maximum lifespan of years of a company is ninety-nine years. Under CAMA once a company is incorporated, it has the attribute of perpetual succession. Members and officer may come and go, the company remains. This common law feature of company law has found expression in common law countries and remains a major attraction for enterprises.

1.3.14 Winding Up

A major point of confluence is in the area of winding up. Article 200 of the Uniform Act provides for seven different situations in which a company may be wound up.

(i) Upon achievement of the company's purpose
(ii) Upon expiry of the terms for which the company was formed, subject to a life span of 99 years.
(iii) By annulment
(iv) By decision of the shareholders
(v) By court order at the request of a shareholders if there are legitimate reason for the winding up.
(vi) By a judgment ordering liquidation in the event of insolvency
(vii) For any other reason provided by the articles of association.

These modes of winding up are envisaged in Section 401 – 536 CAMA. Basically the winding up of a company may be effected by the court, voluntarily by the members and or subject to court's supervision.

1.3.15 The Common Court of Justice and Arbitration

A major feature of the OHADA Treaty is the birth of the Common Court of Justice and Arbitration (CCJA). The Court is charged with interpretation and enforcement of the OHADA Treaty, business regulation and the Uniform Acts made pursuant to the Treaty[30].

This court has original and appellate jurisdiction. It's seat is in Abidjan and may move from one member state to another if necessary. It is the apex court as far as matters covered under the treaty is concerned and its judgment is final and conclusive[31].

Proceedings before the court shall be adversarial and each party must be represented by duly qualified lawyer. Hearing before the court shall be in public. To enable mattes before the court to be disposed off timeously, a file containing the supporting evidence and documents and accompanied by a list shall be appended to all proceedings[32]. This front-loading system dispenses with the technicalities of production of evidence and exhibits at trials and the accompanying time waste.

The CCJA shall consist of seven judges drawn from different nationals of the member states and are elected for seven years. They include five judges with at least fifteen years judicial experience, a Barrister who is a member of the Bar, in the contracting state, of at least fifteen years standing and a Law Professor of at least fifteen years professional experience[33].

Pursuant to Article 8 and 9 of the Treaty, the Council of Ministers of Justice and Finance of OHADA adopted at N'Djamena, Chad – Rules of Procedure for the CCJA. These rules of Procedure of eleven chapters, nine parts and 59 Articles provide for membership and functioning of the Court, proceedings before the court and enforcement of decisions of the Court.

The Court shall be presided over by a President who shall hold office for a single term of three and half years. The quorum of the court is a bench of three or five judges[34].

The President of the court appoints a Registrar-in-chief who shall act as a Secretary of the court and organize the court registry. He is to be assisted by other staff[35].

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[30] OHADA Treaty, Article 7, 14
[31] OHADA Treaty, Article 14-20
[32] Rules of Procedure of the Joint Court of Justice and Arbitration, Article 27.
[33] OHADA Treaty, Article 31
[34] Rules of Procedure, opcit, Article 6
[35] Ibid, Article 10

Article 42 of the Treaty expressly stipulates that the official working language of OHADA is French. The original text of the OHADA Treaty, Rules of Procedure for the CCJA and the Uniform Acts are all in French. The problem of language translation must necessarily arise with the profound fear that texts may not be concisely, precisely or accurately interpreted or translated. For instance in Article 6, 7, 26 of the Treaty references is made to the Common Court of Justice and Arbitration. In the Rules of Procedure reference is made to the same body as Joint Court of Justice and Arbitration.

Furthermore, there are obviously areas of constitutional incompatibility between these laws and the Nigerian Constitution. By Article 8 and 9 of the Treaty, the Uniform Acts came into force ninety days after their adoption by the council of Ministers and shall be 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. There is clear conflict between these articles and Section 12 of the Constitution of the Federal Republic of Nigeria 1999. The later provides clearly that no treaty between the Federation and other county shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Articles 14 and 15 of the Treaty vesting appellate jurisdiction and final decision on the CCJA also conflict with Section 236 of the Constitution, which prescribes the Supreme Court of Nigeria as the final Court.

These are in the Rules and Procedure for the CCJA apparent conflicts that would require a legislative surgical scapel. Article 22 of the Rules and Procedure provides that the court shall sit in private and only judges shall take part in the proceedings, which shall remain secret. Yet article 23 of the Rules and Procedure compels parties before the court to obtain the services of a counsel. Article 35 of the Rules of procedure provide for hearing in public.

The over concentration of the institutions of OHADA in the French speaking countries would need to be revisited to engender mutual cooperation, trust and harmony. Though the Spanish speaking Equatorial Guinea, Portuguese Guinea Bissau and the English Speaking part of Cameroon constitute the minority in this organization, the presence of these institutions in any one of these countries or area will appeal more to the non-French speaking areas of Africa to join or remain in the fold.

1.5 CONCLUSION

On the whole economic co-operation and regional integration offer tremendous opportunities for economic growth, enabling regional member countries to overcome the historic constraints of small national markets, increasing intra-Africa trade and providing opportunities for integrating Africa economies into the global economy.

The harmonization of historic legal traditions and national policies and establishment of effective transnational implementation tool offer opportunity to empower the economies of African Countries. The adoption of a continental framework and the establishment of implementation institutions especially juridical institution will prove an effective instrument to improve the continental environment for private sector promotion.

To remove the hindrances identified in this paper, there is dire need for active co-operation through judicial, executive and parliamentary dialogue at the highest level among nations in Africa. This will instill the spirit of OHADA and empower decision makers towards integrating their countries into this project.

The Regional School of Magistracy should be well funded by member states and should have presence in countries outside French speaking countries.

The time is ripe for Article 42 to gradually begin to give way. To continue to adopt one single language as the official language for the organization may not incentivise countries outside the Franc-zone to join this continental effort.

Further awareness on this project should be fast tracked. The importance of this can never be over emphasized.

OHADA, no doubt is an ambitious project and there is so much to do to attract other countries into the organization. However the hurricane of democracy blowing through Africa re-awakens the sense of responsiveness of citizens and states to national, continental and global challenges of economic empowerment. This is the (thrust) of OHADA and its lure for acceptance.

Although OHADA was conceived in the French speaking countries of the continent. African leaders have quickly come to understand that this priceless tool for economic intergration should be extended to other parts of the continent. With the endorsement of the New Partnership for Africa's Development (NEPAD) at the G8 Kananaski Summit in June 2002, the extension of OHADA to the English Speaking African Countries appears inevitable.