

OHADA

UNIFORM ACT ORGANIZING SECURITIES

**Secretariat of the Organization for the Harmonization
of Business Law in Africa**

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The Uniform Act Organizing Securities adopted by the Council of Ministers on 17 April 1997, **came into force on 1 January 1998** at the same time as the Uniform Act relating to General Commercial Law and the Uniform Act relating to Commercial Companies and Economic Interest Groups (EIGs).

The provisions of this Act are, in accordance with the stipulations of the Treaty relating to the Harmonization of Business Law in Africa, directly applicable and obligatory in the sixteen Contracting States (subject to depositing ratification in Senegal, the depositary State of the Treaty):

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

With the exception of Senegal, none of the OHADA Contracting States has revised its law on securities which, for this reason, remains subject to the provisions of the 1804 French Civil Code on the subject. The revision of this component of the law is thus necessary because of its old age and the loopholes affecting the instruments relating to collateral securities, secured debts and their classification.

I. COLLATERAL SECURITIES

A. In the first place, the **surety-bond** whose rules have not been revised since 1804, has largely benefited from the many key solutions brought by case law and doctrine for nearly 200 years to the major problems posed in practice by this form of security, notably in the following areas:

1. To **protect the consent of the guarantor**, it is required, under penalty of being declared void, that the surety-bond be expressed in writing for a fixed sum under principal and accessories of the debt (Article 8). Same applies to the general surety-bond or to any commitment which can only be made for a maximum sum determined by contract; the said surety-bond is subject to renewal where the sum in question is reached, or to revocation before it is reached (Article 9).

Special provision is made to protect the consent of an illiterate guarantor (Article 4).

2. The principle is that the **surety-bond is joint and several** unless otherwise expressly provided for (Article 10).

3. To shield the guarantor from a surprise by incidents of payment caused by the secured debtor which could stop him from taking the necessary preventive measures to secure his interests, the **creditor has the obligation**, under penalty of losing his recourse against the guarantor:

- of informing him of any default by the debtor, shortening or extension of the term (Article 10),
- of the state of the principal debtor's liabilities, where the surety-bond is general (Article 14).

B. The revision of the law on securities offered the opportunity to introduce at the legislative level and for organizational purposes, autonomous guaranties and, in particular, **guaranty at first call**, because of its growing importance in business relations and the many problems it poses in practice, which problems are often delicate to solve because of the legal void in the subject. The regulations (which are lenient so as not to become oppressive) are borrowed from the rules suggested by the International Chamber of Commerce for the drafting of such guaranties in a recently published document on the *"Uniform Rules of the ICC relating to guaranties at first call."*

1. **Strict substantive and procedural conditions** have been laid down (under penalty of being declared void) to prevent natural persons from contracting such guaranties (Article 29) and to allow only commercial companies and economic interest groups which can submit to them to be fully informed on the nature and contents of their commitments (Article 30).

2. The **effects** of guaranty at first call are those recognized in business practice and by case law, subject to certain details on the procedure of the call for payment, expiry of the guaranty, pleas of the defendant at the disposal of the guarantor or the principal in case of fraud or clear abuse by the beneficiary, remedies available to the guarantor, etc.

II. SECURED DEBTS

The area of secured debts on personal property and real property has also undergone many innovations.

A. Transferable guarantees

1. The **possessory lien** in the past was governed by special but dispersed instruments (sale, deposit, succession, labour law...), from which one could deduce that implementation was fairly general and successful. It is now governed by general provisions (Articles 41 to 43), which define the possessory lien as a full guarantee and organize the judicial procedure for exercising it with reference to a pledge.

2. The techniques for establishing the **pledge** (Article 44 to 62) have been updated as concerns certain intangible personalities (proof of debt, registered security or bill to order) or

fungible or consumer articles. The establishment of a pledge on claims, in particular, has now been covered by special provisions which enable the pledgee to realize the pledged claim without prejudice to himself nor to the debtor who holds the claim offered as pledge.

3. Besides **pledging without dispossession**, which is classical for business, professional equipment and vehicles (for the last item, the word used before was pledge) which has not undergone any notable changes (Articles 69 to 90, Articles 91 to 99), room has been created for the pledging of shares in the capital of a company on the one hand (Articles 64 to 68) as set forth in the provisions of the Uniform Act relating to Commercial Companies and Economic Interest groups and, on the other hand, for the pledging of stock of raw materials and merchandise (Articles 100 to 105).

The last mentioned form of pledging calls for some observations. In the past it was noticed that there existed many types of warehouse warrants (agricultural, hotel, petroleum, etc.) and that each was governed by a special instrument. This variety and spread of the instruments (which did not facilitate research and cognizance of such securities) has now been conveniently reduced by common and uniform regulations of all the warehouse warrants, which have consequently dropped their English appellation (warrants) and are now known by the more appropriate French term for pledging, which is what they are in fact and in law. The creation of a pledging note, which is a truly endorsable promissory note recording the claim and its guarantee, permits the raising of the claim.

4. The list of **general liens of the civil code** had become archaic, numerous and disorderly. Besides, their basis (personalty or realty) and their classification were determined in a very confused manner by French legislators more so as their list had been extended beyond measure over two hundred years.

It was thus necessary to reduce the list by eliminating preferential rights which had no bearing in Africa or in our times (for example, preferential right of the child-minder, preferential right of the Housing Loans Fund, etc.), and to determine as exactly as possible their basis and rank, first among the preferential rights and then among all the other securities. Such is the object of the provisions of Articles 106 to 108.

5. **General liens** are essentially hidden. Nevertheless, some of them guarantee very big sums (Treasury, Customs, Social Security Institutions) which, upon disclosure, are a source of surprise and irritation for the creditors who granted credit to the debtor in total ignorance of these preferential liabilities, which often absorb all the assets.

It seemed necessary to ensure the publicity of some of these preferential rights so as to make them demurrable to creditors through a Trade and Personal Property Credit Register (governed by the Uniform Act relating to General Commercial Law, in conjunction with the Trade Register) which, in other respects, pools the registration of all transferable guarantees subject to the registration formality (pledging and preferential right of the vendor of a business, pledging of shares in the capital of a company, pledging of professional equipment, motor vehicles, pledging of stock...).

6. The list of special liens on personalty (Articles 109 to 116) also needed streamlining in order to remove those which no longer applied in modern economic life (e.g., preferential right of the innkeeper on the personal effects of the traveller) or reduce excessive ones (e.g. preferential right of the lessor of a building on the furnishings in rented premises which guaranteed two years' rents due and two years of rents accruing after the seizure).

Another delicate issue remained to be solved, namely the conflict between special liens on personalty concerning the same movables. The solutions handed down by French Law were particularly complex in this respect and often impractical and controversial (priority given to preferential rights founded on the idea of a pledge as opposed to those founded on the idea of increment value introduced by the creditor in the debtor's estate; priority given to the preferential right of the warden on all those whose claims predate his; in case of equality between pledgees, preference is given to the last to enter into possession; in the case of equal ranking of creditors who procured increment value, preference is given to the first distrainor). A single rule was chosen to solve the conflict: preference is given to the first to bring action for distraint (Article 149 (6)).

B. Real property securities

Contrary to the law on transferable guarantees, the law on real property securities which applies in the Contracting States of OHADA seems to be more modern, notably as a result of three colonial instruments defining land tenure and comprising provisions relating to such guarantees and land registration. The last-named securities have been little amended or not at all by laws passed after independence to reform land tenure systems. The instruments concerned are:

- the decree of 28 March 1899, as amended by the decree of 12 December 1920 applicable in Congo, Gabon, Chad and Central African Republic;
- the decree of 24 July 1906 applicable in Togo;
 - the decree of 26 July 1932 applicable in Senegal, Mauritania, Mali, Guinea, Burkina-Faso, Niger, Benin and Côte d'Ivoire;
 - the decree of 21 July 1932 applicable in Cameroon.

Since the law on real property securities has been significantly organized in the same way in all these countries, consolidation presents no major difficulties.

1. Mortgages (Articles 117 to 146)

(a) Enumeration

Since the **pledge of real estate** was abolished by these legislations, it was deemed unnecessary to reinstate this security, which was somewhat archaic and impractical, given that the transfer of rents can effectively replace it for the better .

Contractual mortgages (Articles 126 to 131) constitute the ordinary law on mortgages, subject to the special provisions governing forcible mortgages (Article 118). The articles of mortgage in duly certified form or by private deed are decided on by the legislation of each Contracting State (Article 128).

The replacement of all the preferential rights on real property (which still exist in French law) by **forcible mortgages** was maintained insofar as it makes all mortgages uniform and coherent.

It was deemed judicious to regulate the forcible mortgage of the vendor (the exchanger, coheir, and money lender: Article 134), of the architect and entrepreneur (Article 135), as well as the conservatory mortgage ordered by the court (Articles 136 to 144). Each Contracting State is given the latitude to regulate by legislation the other forcible mortgages, notably those under family law or public accounting.

(b) Time limitation

It was deemed timely to repeal the rule according to which registrations of mortgages do not expire because this exposes the debtor to bearing high costs for cancellation, even where he has settled his debt, whereas he could wait patiently for the time limit of validity of the registration to run out for it to end automatically without costs (Article 123).

2. Land registration

The colonial decrees cited above equally organize land registration: each real property right (ownership, usufruct, servitude, mortgage, long lease, construction lease, surface right, right of usage and right to live somewhere) must be registered, that is:

- a registration procedure must be followed for establishing a land certificate, without which no establishment, conveyance or modification of a real property right is possible. All or nearly all the countries concerned have already passed laws in this direction and in so many ways that it was risky venturing into this area of little importance for land registration proper, which derives from it;

- land registration is managed by administrative services (land registry) which, for the same reasons as above, do not seem to need reorganizing;

- lastly, the rules or formalities of registration proper of mortgages (registration of the establishment, release, conveyance, or modification) could have been consolidated or harmonized to advantage in such a way as not to confuse creditors; but there is no hiding the fact that if they are touched, the registration rules and formalities of other real rights and operations linked to them will have to be touched as well (sale, contractual or legal servitude,

concession of long lease, construction lease, surface right, right to live somewhere, transfer of rents, etc.). It seemed too early and delicate to go that far.

III. DISTRIBUTION AND CLASSIFICATION OF SECURITIES

A. The classification of securities, as bequeathed by French Law, is particularly complex and confusing even for the more enlightened minds. That is why it was deemed judicious to establish separate classification for securities in real estate matters and in movables, with an enumeration of the order in which they should be served, of the different guarantees which may have been provided for and organized by instruments of the uniform law (Articles 148 and 149).

This method helps to avoid any questions about the outcome of this or that guarantee.

B. Granted, it is unavoidable that a separate instrument adopted by a Contracting State subsequently and outside the uniform text could create a general lien or a new forcible mortgage for the benefit of an individual or corporate body deemed of interest (for a new fiscal tax or local parafiscal tax, for a new financial or credit establishment with a social vocation, for example).

It was thus necessary to provide in the uniform instrument that the separate instrument shall expressly show the ranking of the new preferential right by reference to another preferential right of the uniform law that is already listed and classified, otherwise, the rank of the new guarantee will automatically be that of the last preferential right immediately preceding ordinary creditors (Article 106).

Such a provision was needless in the case of the creation of a new forced mortgage insofar as the principle in vogue is that the ranking of mortgages is determined by their date of registration.