

➤ Edito:

Continental law and the crisis - contributions towards a better regulation

"Contributions towards a better regulation", this is the title chosen for the conference that the legal professions are organizing together on May 11 in Washington, DC, with the support of the Foundation for continental law. Bailiffs, notaries, lawyers, administrators, academics and business jurists have decided to set up a proactive dialogue avec their American counterparts, lawyers and policymakers, within the premises of the World bank itself. The aim is to exchange on the topic of continental law concepts which may contribute to the thinking of American authorities in respect of the ongoing overhaul of economic and financial regulation policies. Themes such as the credit crunch, the excesses of the "subprime" loans, the prevention of business failures and the renewed role for the State in the national economy will be as many occasions for a comparatist approach between both legal systems.

At the end of October 2009 we will hold in Egypt the second edition of the Convention of continental law jurists for the Mediterranean. We wish to give this event an even greater dimension than last year's edition, which had already seen representatives from 18 countries and 11 international institutions meet in Nice. The idea here is to offer the academic and professional communities a chance to network on a large scale, with the overall ambition to support growth and sustainable development in the Mediterranean. One theme discussed will for instance be the E.U. regulation creating a single European payment order. This will therefore be an exceptional forum in respect of the wide scope of available contacts and of the variety and number of institutional global players and donors.

Both these examples are typical of our Foundation's core values. As a tool available to all jurists, whatever their nationality and expertise, the Foundation for continental law always abides by every actor's priorities. It simply wishes to offer a forum where each and everyone may express himself and meet with foreign partners. Thus does the Foundation for continental law fulfill its mission as a promoter of the diversity of legal systems across the world. In this fashion, it strives to contribute to a real convergence of legal systems and to enhance a balanced presence of the major legal traditions.

News of the Foundation

➤ **Continental Law Summer University: the annual Continental Law meeting point**

The Foundation is organizing its first Continental Law Summer University, to be held from the **6th to the 25th of July**, under the direction of its Scientific Council. A new annual and international meeting place for all persons interested in the continental legal culture, whether academic scholars, legal professionals, or students, the Summer University focuses on students having completed their legal studies' cycle, on professors, and professionals, and will provide a training course and Certificate in Continental Law upon completion.

➤ **International Legal Calendar: Online showroom for Continental Law**

The International Legal Calendar, available online since the beginning of the year on the Foundation's website home page, is a tool that is being provided to all legal professionals and institutions, allowing them to publish a single schedule of all national and international events having Continental Law as their theme.

Serving as a worldwide showcase for the numerous initiatives and organized events, this International Legal Calendar displays the abundance, multiplicity and diversity of activities carried out by continental law practitioners.

Developed specifically for these practitioners, this is an easy to use tool that is multilingual and free of charge. All Foundation partners are welcome to check it, to register, or to offer the Foundation to publish their events.

➤ **Economic Efficiency of the Law**

After a first reaction, highlighting the most obvious flaws of the Doing Business method (Report edited by the Association Henri Capitant), as well as different meetings with the Doing Business team, the latter not being very responsive to the arguments pointing out the flaws in the evaluation of continental law systems, the 2eD programme of the Civil law initiative foundation pursues the work of analysing, monitoring and commenting the Doing Business questionnaires.

We have thus presented the said questionnaires, directly sent to the national respondents by Doing Business, with a number of resources to raise public awareness to the debatable issues of the questionnaires, to formulate criticisms, offer bibliographical references and an overview of the reforms adopted in France that impact the subject matters of the questions asked by Doing Business. Finally, we have filled in the questionnaires with the answers that we feel appropriate under French law, thus adopting a transparency policy that is so dear to the north-American concept of corporate governance.

Seydou Ba

President of the Association for the unification of law in Africa (UNIDA)

Former president of the OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires-Organization for the Harmonization of Business Law in Africa) Common Court of Justice and Arbitration

Honorary Presiding Judge of the Senegal Court of Cassation

The Organization for the Harmonization of Business Law in Africa (OHADA) Treaty ties together 16 West African countries. The treaty consists of "uniform acts" comprising one single set of laws relating to business.

As a former president of the OHADA Common Court of Justice and Arbitration, what factors do you believe contributed to this success?

When OHADA was established in 1993, the following was a reality: foreign investors were becoming more and more rare in our countries. After visits to governments and investors, it became apparent that companies had lost confidence in our legal and judicial systems. We therefore thought about how to make the legal and judicial environments of companies secure in order to start attracting investors again.

One of the reasons for OHADA's success lies in its institutional unity, which is ensured through a permanent secretariat and the radical uniformization of the law. The laws which are ratified and become directly applicable in all the countries are "uniform acts." This provides the advantage of a unified law which is simple and accessible to all foreign investors. Furthermore, the Common Court of Justice and Arbitration ensures the common application and interpretation of a harmonized law. The rulings of the Common Court carry the authority of *res judicata* in all OHADA member states and can be executed within each member state without requiring a double decision conferring authority to execute. This uniform law ensures better legal information and prevents conflicts of laws within OHADA.

OHADA is concrete proof of a successful convergence of laws. In your opinion, can this success be replicated in other sub-entities of the continental legal system, such as Latin America for example?

I believe that is entirely possible in Latin America and elsewhere. Indeed, it is currently underway in the Caribbean with OHADAC. I also believe that countries of eastern or southern Africa, some of which are already associated through the Southern African Development Community (SADC), can act to bring their laws closer together. I would also refer you to the case of Madagascar which, though it does not belong to OHADA, has adopted some of its texts as they were particularly appropriate to its needs.

The 16 OHADA member states follow the continental system of law. Can you nevertheless envisage "common law" countries joining?

When OHADA was established, we deliberately avoided using notions that applied exclusively to civil law in order not to close the door on English-speaking and "common law" countries. The OHADA treaty states in fact that all African countries can join. Though most of the 16 countries currently comprising OHADA are French-speaking, there are nevertheless one Portuguese-speaking country, Guinea-Bissau, one Spanish-speaking country, Equatorial Guinea, and Cameroon which is partially English-speaking. In addition, Ghana and Nigeria, both of which are English-speaking, have expressed great interest in OHADA and have created OHADA clubs in their countries. I personally view this as very positive, provided it takes place in stages.

www.ohada.org

What are the Foundation's top action items for 2009?

We are primarily dedicated to training. Each year, we offer our members at least 15 workshops relating to current legal issues, which are organized in partnership with large business law-firms.

We also provide some fifteen career workshops (for example "Career and Progression", or "Managing the Legal Function", "Transport and Logistics", etc.) or thematic workshops (for example: "Company Law", "The Environment and Sustainable Development", "Audiovisual", etc.). These commissions are run by members of the Association and meet at least once per quarter.

In areas outside of metropolitan Paris, where the AFJE has a presence through its regional delegations, we also organize conferences and workshops depending on the nature of the local membership. We are particularly active in the Rhône-Alps, Provence- Alps-French-Riviera, and the Northern and Southern Pyrenees regions.

This year, the AFJE will continue to be involved with the ongoing "think tank" project fostering a rapprochement between lawyers and in-house counsel, which we feel is very important for reinforcing the legal function within companies, and in order to place French businesses on a level playing field with those companies operating in common law jurisdictions as well as in the majority of the European Union's larger countries, as regards to legal privilege. Lastly, 2009 will witness an important event: the AFJE will be celebrating its 40th anniversary. We are preparing for this anniversary which will be celebrated on the occasion of our general assembly at the end of the year.

One of the primary objectives of the AFJE is to assist the legal players within companies and their management to grasp the importance of the legal function. In your opinion, is the legal aspect sufficiently taken into account by French companies?

The legal function has made significant progress in French companies in the last twenty years, especially those which have to deal with globalization. According to the latest "Observatoire des directions juridiques" ("Observatory of Legal Management") published by the Ernst & Young law firm, Law Departments heads report to the Office of the President or to senior company management in over 50% of cases. This grants them the authority and independence required for fulfilling their mission with regards to other functions of the company. Their tasks are no longer limited to litigation management but extend to the full range of legal issues which may arise in a company, in particular negotiation and drafting of contracts, engineering and management of subsidiaries and stakeholders, legal oversight and enforcement of compliance programs.

Obviously much progress remains to be made within the vast network of SME's- SMI's (small and medium sized enterprises and industries) in which the availability of legal tools is less well known to us.

A recent study* conducted by two British institutes of the legal management of 100 European companies highlights the distortion which exists between the practice of international contracts and the subjective perception of surveyed council: the latter attach great importance to Common Law, whereas in actual fact they mainly rely on the law in which they have been trained. What do the results of this study mean to you?

These results are only surprising in part. In the activities comprising the negotiation and drafting of international contracts, a distinction needs to be made between the substance of the matter and its form.

An international contract negotiated by a French lawyer with a foreign party will usually be the size of a typical Anglo-Saxon contract because it is not possible to limit it, as would be the case among French parties, to address the particular terms and auxiliary clauses in the contract, and for the remainder, to incorporate the provisions of the Commercial Code by reference, for example, as regards to the conditions of sale.

Foreign contracting parties would have to understand the complete panoply of the respective rights and obligations of both parties, including those which are of general common knowledge, and which they, in particular, must know. The contract thus has to be didactic in nature and this in turn results in a huge detailed document, the American way. Hence, the likely subjective perception that international contracts are dominated by Common law. What is certain is that they are currently dominated by an editing and drafting style and are most often written in English.

However, when it comes to the governing law clause, as well as the choice of jurisdiction provision, drafters have the normal tendency to prefer the application of the law that they are the most familiar with, their own, and to submit the contract to the jurisdiction of courts in their home country or the arbitral institution that they are the most familiar with.

www.afje.org

* "Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law".