International Academy of Comparative Law

Académie Internationale de Droit Comparé

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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

Reports to the XVIIIth International Congress of Comparative Law

Rapports au XVIII^{e} Congrès international de droit comparé

Washington, D.C. 2010

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COMPLEXITY OF TRANSNATIONAL SOURCES OHADA MEMBER COUNTRIES (A "REGIONAL" REPORT FROM THE OHADA MEMBER COUNTRIES)

Electronic edition of the national reports presented to the XVIII[th] International Congress of Comparative Law on the theme «Complexity of Transnational Sources» prepared by the Isaidat Law Review for the *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

With the editorial assistance of Laura Lasagna

Version électronique des rapports nationaux présentés au XVIII[e] Congrès international de droit comparé sur le thème «La complexité des sources transnationales», préparée par la Revue Juridique de l'Isaidat pour la *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

Merci à Laura Lasagna pour la révision des textes

ISSN: 2039-1323

(2011) Volume 1 –Special Issue 3, Article 8

COMPLEXITY OF TRANSNATIONAL SOURCES OHADA MEMBER COUNTRIES (A "REGIONAL" REPORT FROM THE OHADA MEMBER COUNTRIES[#])

SALVATORE MANCUSO[*]

Introduction – Question 1. – Question 2.

Introduction

When the International Academy of Comparative Law published the list of subjects and the theme of the complexity of transnational sources was inserted, the idea of preparing a report including the OHADA member countries immediately came out. And the goodness of the idea was confirmed after some talks with the General Reporter as well as when looking at the guidelines proposed by her to address the topic.

Such idea is a result of the stratigraphical analysis of African law applied to the present situation of development of African law. Indeed, in the beginning of this new century, a new layer seems to emerge in African law. It is the law made by the Westerners (mostly

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[#] This report does not include the national reports from Cameroun, Central African Republic, Comores and Guinea Conakry who did not answer to the call for the national reports; while includes also the report from DRC whose process to join OHADA is underway and it is expected to be completed in the very near future.

The Author is grateful to the following national reporters, whose commitment and work permitted to realize this report: Jimmy KODO (Benin), Filiga Michel SAWADOGO (Burkina Faso), Nissouabé PASSANG (Chad), Inès FÉVILIYÉ (Congo), Louis-Danel MUKA TSHIBENDE (DRC), Sergio Esono ABESO TOMO (Equatorial Guinea), Madeleine BERRE (Gabon), Fernando LOUREIRO BASTOS (Guinea Bissau), Jacqueline LOHOUES-OBLE (Ivory Coast), Mamadou KONATE (Mali), Alhousseini MOULOUL (Niger), Joseph ISSA-SAYEGH (Senegal), Michel AKUETE AKUE (Togo). All their national reports will be annexed to the present one, being them considered as an integral part of it.

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Europeans) for the Africans. It is the law that follows the general pattern in terms of legal development presently, where the law has to serve the economic development: the law must be easily accessible and comprehensible for lawyers and non-lawyers, it must provide a legal environment favorable to investments, it shall be affordable and predictable in terms of its application avoiding that the intervention of a State (through legislation or judicial decisions) could render vain any investment. Moreover, the costs related to the application of the law should be minimized for the investor to give him more scale economies, and therefore if the law is harmonized at supranational level the same law can give to the investor the possibility to enter in more than one market. The OHADA law represents the most advanced example of this new layer of African law.

The objective of OHADA is the implementation of a modern harmonized legal framework in the area of business laws in order to promote investment and develop economic growth in the African countries.

Thus, the Treaty calls for the elaboration of uniform acts to be directly applicable in member states notwithstanding any provision of domestic law. Up to now, the uniform acts that have been adopted relate to General Business Law, Company Law and Pooling of Economic Interest, Securities Law, Bankruptcy Law, Credit Collection and Enforcement Law, Accounting Law, Arbitration Law and Contracts for the Carriage of Goods by Road[1]. More uniform acts are expected, in the areas of Contract

[1] The bibliography on the OHADA is now extremely wide. The French law journal "*Revue Penant*" dedicates most of each quarterly issue to doctrine and cases related to OHADA law. For a general overview on the OHADA see: *L'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)*, Petites Affiches n. 205, 13 octobre 2004; Joseph ISSA-SAYEGH, *L'intégration juridique des États africains dans la zone franc*, *Rev. Penant* n. 823 (1997), p. 5, and n. 824 (1997), p. 120 (parts I and II); ID., *Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA*, 4 Unif. L. Rev. 5 (1999); Boris MARTOR, Nanette PILKINGTON, David S. SELLERS e Sébastien THOUVENOT, *Le droit uniforme africain des affaires issu de l'OHADA*, Paris, Lexis Nexis Litec, 2009; Alhousseini MOULOUL, *Comprendre l'OHADA*, 2° ed., Conakry, 2009; Philippe TIGER, *Le droit des affaires en Afrique*, Paris, Presses Universitaires de France, 1999; as well as the collections on the OHADA law, the first one

Law, Labour Law, Co-operative and Mutual Aid Companies Law, Consumer Law.

This new legal framework also provides a mechanism for the settlement of disputes, one of the goals of the Treaty being to establish judicial security in the countries involved[2]. The Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* - CCJA) is the highest level of jurisdiction for all matters involving the application of the Treaty, as well as the Uniform Acts. It has jurisdiction over judicial (it rules on decisions rendered by the Courts of Appeal of the member States) and arbitration matters (supervisory role to the appointed arbitrators and granting enforceable status to the award), thus ensuring the harmonized interpretation of the Treaty, Uniform Acts and corresponding regulations and arbitration agreements[3].

Therefore OHADA is creating a sort of legal system common to the whole member countries, who then share a common legal experience, the strengths and weaknesses of the system, the problems related to its implementation, the needs for its improvement. All this reasons justify the possibility to consider all the member countries together with regard to a subject strictly interrelated with the themes of the same OHADA law.

Question 1. Is the concern about fragmentation of international sources (regional v. universal conventions, codes of conduct and usages of the trade) expressed in your country? By whom (literature, case-law, executive branch of the State, professional association of the Bar)?

There is a general concern in the OHADA member countries about the issue of fragmentation of international sources, even if some of them (Chad, Gabon, Guinea Bissau and Senegal) seem not having directly experimented the problem in their daily practice.

published by Presses Universitaires d'Afrique , Yaoundé , 1999, and the second one by Bruylant , Brussels , 2002.

[2] Pierre MEYER, *La sécurité juridique et judiciaire dans l'espace OHADA*, *Rev. Penant*, n. 855 (2006), p. 151.

[3] Joseph ISSA-SAYEGH, *Quelques aspects techniques* cit. *supra* , p. 12.

In the States belonging to the OHADA area the fragmentation of international sources is considered in different legal domains.

In the area of international law the attention has been drawn to the international and regional legal instruments (like the African Chart for the Protection of Human Rights, directly derived from the 1948 Universal Declaration of Human Rights) and the related instrument for putting them into effect, especially where different legal instruments have been adopted and the necessary editing and revision of the contradictory parts in the preexisting texts has not been done.

As it is well known Africa is the continent with the highest number of regional organizations. Therefore the risk of having conflicts among the legal instruments belonging to each regional organization to which an African State is a member is very high and might cause serious problems.

In the OHADA region several regional organizations are present, covering sectors that are extremely close to – if not even part of – that of business law. This is the case – for example – of the Economic and Monetary Community of the Central African States (Communauté Économique et Monétaire des États de l'Afrique Centrale - CEMAC) and the West African Economic and Monetary Union (Union Économique et Monétaire Ouest Africaine – UEMOA), that of the Inter-African Conference of the Insurance Market (Conférence Inter-africaine du Marché d'Assurances - CIMA) and the African Organization of Intellectual Property (Organisation Africaine de la Propriété Intellectuelle - OAPI), which all cover areas of law pertaining to that of business law pertaining to OHADA.

Indeed, it has to be remembered that the domain belonging to the harmonization of business law in Africa under OHADA has been maintained voluntarily flexible to progress with a step by step way of its harmonization, since for the implementation of the Treaty it is to be understood as business law the regulations concerning company law, definition and classification of legal persons engaged in trade, credit collection, securities and means of enforcement, bankruptcy, arbitration as well as labour law, accounting law, transportation and sales laws, and any further

matter that the Council of Ministers would decide, unanimously, to include as falling within the definition of business law[4].

As a consequence of this situation OHADA and CEMAC recognized the need to have a close cooperation with reference to law-making policies to keep each other informed about projects of legislative acts in progress within each organization, with the objective of reducing the risks of conflicts of supranational laws.

Moreover, it shall not be forgotten that the attempt from OHADA to go for the harmonization of banking law encountered strong resistances at the level of the regional organizations governing the banking sector, and such project has been set aside for the time being.

The coexistence of the CCJA and other supranational courts within other regional organizations (like the CEMAC Court of Justice) can bring in principle to a possible conflict between supranational jurisprudence, conflict that the CCJA tries to avoid by applying the principle of subordination and therefore deciding cases implying the application of other community law (CIMA, OAPI) whenever the case involves the application of OHADA law.

A particular case of potential conflict between regional organizations and their legal instruments could affect DRC once its process of membership to OHADA will be completed, since DRC is also member of the Southern African Development Community (SADC). The two organization pursue different objectives, being that of the OHADA the legal integration and that of SADC the economic integration; anyway SADC does not exclude – in principle – to adopt measures of legal harmonization as an instrument to get to economic integration (therefore potentially covering the area of business law too), and the same membership of DRC to the organization requires it – for example – to comply to the payment system in force in the Community, while the OHADA system is hinged on the CFA Franc. This is the reason

[4] OHADA Treaty, Art. 2, whose original French text says: "*Pour l'application du présent traité, entrent dans le domaine du droit des affaires l'ensemble des règles relatives au droit des sociétés et au statut juridique des commerçants, au recouvrement des créances, aux sûretés et aux voies d'exécution, au régime du redressement des entreprises et de la liquidation judiciaire, au droit de l'arbitrage, au droit du travail, au droit comptable, au droit de la vente et des transports, et toute autre matière que le Conseil des Ministres déciderait, à l'unanimité, d'y inclure, conformément à l'objet du présent traité et aux dispositions de l'article 8*".

why the two organizations started to have informal talks and why a project to study the possibility of legal harmonization within the SADC zone (whose main pillar is the study on how OHADA can contribute to such legal harmonization process either as model or by transplants) , has been recently launched by the University Eduardo Mondlane in Maputo (Mozambique)[5].

A further issue of fragmentation of sources of law is typical of OHADA, since it comes directly from the interpretation of the Treaty.

According to Art. 10 of the OHADA Treaty, uniform acts are directly applicable and overriding in the member States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws[6]. Two probable interpretations of such principle are : a)o interpret Art. 10 in the sense that only the national laws, or the rules contained therein , which are effectively contrary to the norms of a uniform act, are repealed. It is therefore necessary to proceed to an analytical examination of the rules of the domestic laws in order to verify which of them are effectively contrary to the harmonized law. b) to give Art. 10 a wider meaning in the sense of abrogating every norm of national laws having the same object of a uniform act. It avoids thus the necessity to proceed to a detailed analysis of every single norm in order to determine if it is contrary or not to the uniform act. The simple entering into force of a uniform act would automatically repeal the national laws on the same matter, allowing therefore a greater simplicity and uniformity in the application of the uniform laws[7].

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[5] Mozambique is also member of SADC, and started to get interested to the OHADA process of legal harmonization.

[6] The French text of Art. 10 of the Treaty says: "*Les actes uniformes sont directement applicables et obligatoires dans les États Parties, nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*".

[7] Boris MARTOR, Nanette PILKINGTON, David S. SELLERS e Sébastien THOUVENOT, *Business Law in Africa*, (2007) London, GMB Publishing, p. 9; ID., *Le droit uniforme africain des affaires issu de l'OHADA*, (2004) Paris, Lexis Nexis LITEC, pp. 19 ff.

After an initial period of uncertainty in the doctrine[8], the CCJA has clarified that the repealing effect set forth in Art. 10 of the Treaty is referred both to the annulment and to the prohibition to enact any norm of domestic law or regulation present or future (being it an article, a norm, a paragraph or a phrase of it) having the same object of a rule of a uniform act and contrary to it. The Court has moreover established that when a single part of the domestic rules is contrary to the uniform act, the other parts, which are not contrary, remain applicable[9]. A similar interpretation, if it has the advantage to prevent the creation of legislative gaps, it is surely difficultly compatible with the objective of simplicity set forth in Art. 1 of the Treaty, and it creates a fragmentation of the sources of law (international sources of law vs. domestic ones) that may represent a potential cause of disharmony and conflict in the interpretation and application of the norms of the uniform acts. The domestic norms infact are not contrary to the rules set forth in the uniform acts remain into force and complement the application of the latter.

Out of these "institutional" cases of fragmentation of the sources of law, the attention has been equally drawn up on the possible "contractual" fragmentation of the sources of law by the operators of the international commerce whenever they are called to determine the law applicable to an international contract, and

[8] For the first hypothesis see, Djibril ABARCHI, *La supranationalité de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)*, in 37 *Revue Burkinabé de Droit* (2000), pp. 9 ff.; for the second one Filiga Michel SAWADOGO, *Présentation de l'OHADA: les organes de l'OHADA et les Actes Uniformes*, paper presented at the conference *Afrique, art, intégration économique et juridique*, organized in Cairo on 6 th april 2006 by the Faculty of Law of the University of Cairo, Istitute of International Business Law, and by Club OHADA Egypt, p. 26.

[9] See the opinion n. 001/2001/EP of 30 April 2001 rendered by the CCJA upon request of the Ivory Coast in www.ohada.com, and Joseph ISSA-SAYEGH, *Réflexions et suggestions sur la mise en conformité du droit interne des états parties avec les actes uniformes de l'OHADA et reciproquement*, in *Rev. Penant*, n. 850 (2005), pp. 6 ff. For the application of such principle by the jurisprudence of the member States see *Cour d'Appel* Port-Gentil 9 December 1999 e 28 April 1999 n. 60/98-99; *Cour d'Appel* Niamey 8 December 2000 n. 240 all in www.ohada.com; and *Cour d'Appel* Douala 15 May 2000 n. 81/ref., this last in 12 *Revue camerounaise de droit des affaires* (2001), commented by Gaston KENFACK DOUAJNI.

also through international arbitrations; while the application of the usages of trade seems not to take place in the jurisprudence of the concerned jurisdictions.

Almost all the national reporters agree to assign a fundamental role to the doctrine in detecting and evidencing the cases of fragmentation and conflict of the sources of law. Where the issue of fragmentation of sources has been experimented (Benin, Burkina Faso, Equatorial Guinea, Gabon, Ivory Coast, Mali, Niger, Senegal, Togo) the judges are the subjects who face with the problem, not having often the full knowledge of the multitude of texts to be applied. In Niger and Togo it has been evidenced how the other legal practitioners are also experimenting the issue of the fragmentation of transnational sources, while the role of the business operators in dealing with this issue has been highlighted through the Malian report. A remarkably lower role seems to be played by the State administrations, which are only marginally involved in the application of the transnational sources of law.

Question 2 Which proposals have been put forward in your legal system to cope with the problem, and by whom?

No one of the national reports has referred to specific instruments adopted in his/her jurisdiction to cope with the issue of the fragmentation of transnational sources.

The issue tends to be solved on a case by case basis, and here the doctrine has played again a fundamental role making an essential distinction between those cases where the conflict of international sources is a horizontal conflict (between rules of different international legal instrument having therefore the same hierarchical level), and the other ones where there is a "vertical" conflict between an international and a domestic rule. The first case is solved making reference to the rules set forth by the 1969 Vienna Convention on the Law of the Treaties and to the rules of conflict provided in the different treaties and conventions. The case of the conflict between an international and a domestic norm is solved considering the highest hierarchical level given in every jurisdiction to the rule set forth by an international legal instrument signed by the country, that prevails over any domestic norm.

In Equatorial Guinea the Supreme Court of Justice deals with the issue of the fragmentation of the sources of international law by choosing the norm of international law that presents the closest relation with the case to be judged.

In Guinea-Bissau the Faculty of Law of the University of Bissau proposed to create a database of the International Law Treaties and Conventions signed by the country and in force therein, in order to investigate on the existing overlaps among the different international legal instruments which the country is part of, being them at international, regional or sub-regional level.

It has to be underlined that initiatives of legal harmonization, like those of OHADA, have been put in place also to cope with the issue of the fragmentation of sources of law at regional, or sub-regional level in different legal domains, where the strong business relations among the different member States rendered this activity of legal harmonization necessary; and following this pathway Equatorial Guinea is promoting the merger of the African organizations of legal and/or economic integration, also to reduce the economic efforts requested to each member country to keep alive all these organizations.

Finally, whenever the fragmentation of the sources of law has contractual origin, if it is not solved by the choice of the parties, then the rules of private international law will be applied.

Question 3 Has the executive power in your country kept a strict monitoring of all international engagements which were undertaken and made use of clauses of exemption/reservation (to preserve previous international engagements) when signing new instruments?

The situation seems to be slightly different in each single OHADA member countries.

In Congo, the Ministry for Foreign Affairs, his collegue of Justice and the ministry concerned with the signature of a new instrument, carry out the compliance check with the former texts and the Prime Minister submits the new text to the Constitutional Court both to have its opinion, and to get a constitutionality check (if the new instrument imposes an abandonment of sovereignty of the Congolese State in the field it regulates). Similarly in Senegal where such control is made by the Ministry of Foreign Affairs.

Also in Niger international or regional agreements are controlled both by the executive and the legislature since they are subject to ratification after authorization of the Parliament, and this procedure can involve an examination of the constitutionality carried out by the Constitutional Court; while in Mali the State adopts all the necessary measures to permit the entering into force of the international or transnational legal instrument.

The Constitution of Benin reserves the task of monitoring all international engagements, which were undertaken to the executive power too, but there is no evidence that this work has been really done.In Gabon and Togo the executive power does not seem to make use of this potential.

In Burkina Faso, Equatorial Guinea and Guinea-Bissau the position of the executive power is not known.In this last country most of the international agreements, that are signed by the country, are not published in the *Boletim Oficial* (Official Journal).

In Ivory Coast the power to carry out the compliance check with the former texts is given to the *Conseil Constitutionnel* that can be resorted by the other State authorities.

Such issue has been substantially overtaken in the OHADA system, since after the preliminary control made in order to determine the possibility to join the organization and then the adhesion of the country to the system, the possibility to make reserves to the Treaty is expressly forbidden[10].

Question 4. Has the judiciary in your country provided special training for judges to increase their ease and proficiency in dealing with sources of law that were not generated in their legal system?

The situation is different with regard to sources of law which are not generated in the legal system of each country in general, and that of OHADA in particular.

Burkina Faso, DRC, Gabon, Guinea-Bissau, Ivory Coast, Senegal and Togo do not have any kind of training activity for the judges with regard to this kind of source of law.

In the other countries the formation of the judges is organized by the State through a specific training school dedicated to judges called *École Nationale de la Magistrature* in Benin and Niger

[10] OHADA Treaty, Art. 54: "*Aucune réserve n'est admise au présent Traité*".

where the activities considered therein are performed during the initial period of training of the judges, and *Institut National de Formation Judicaire* in Mali, or through courses organized directly by the government in the case of Chad, Congo and Equatorial Guinea.

Moreover in Mali the Supreme Court has an agreement with the French *Cour de Cassation* to provide to Malian judges a continuous training that can provide them also a comparative perspective.

In the ambit of the OHADA system the situation is definitely different.

The OHADA Treaty, indeed, established a regional training school for judges (*École Régionale Supérieure de la Magistrature* – ERSUMA)[11].

The idea tinged with the creation of the ERSUMA is that to make up for the insufficient level of specialization of the judges, and also to the absence of a system of continuous formation and to the lack of sufficient legal formation in the member countries[12]. The school is dedicated to the formation and the specialization of judges, bailiffs and court clerks, but it gives also training courses upon payment to lawyers, notary publics and professional accountants.

The school is dedicated to the formation of legal professional on OHADA law.

All judges, bailiffs and court clerks of a Member State can be admitted to the training course. The selection is carried out from the national training schools on the basis of their professional responsibilities, their formation and their professional experience and the nature of the legal functions of the candidates, which shall be in equal number for every member State. The teachers are legal professionals and scholars having a deep knowledge and experience on the OHADA law[13].

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[11] OHADA Treaty, Art. 41.

[12] See Alhousseini MOULOUL, *Comprendre l'OHADA*, 2nd edition, (2009) Conakry, p. 42.

[13] On the training activity done by ERSUMA see Thimotée SOMÉ, *A formação dos magistrados africanos pela OHADA*, in 6 *Boletim da Faculdade de Direito de Bissau*, (supplement) (2004), p. 9.

Question 5 Does the fact that in some countries a specialized judicial institution deals with international commercial cases affect the functioning of justice under this profile? Would you assess the records of these judicial institutions as an improvement?

The case of those countries, which are members of OHADA, is peculiar in this sense.

When elaborating the Treaty, one of the concerns of the heads of State, as well as of the economic operators, and the jurists was the necessity to assure a uniform jurisprudence in the area of commercial law on one side, and to assure a common interpretation of the uniform acts on the other. Therefore it has been thought that in order to realize these objectives the better solution was that to maintain the competence for the disputes on commercial law involving the application of the uniform acts near the national jurisdictions of the first and second level, and to entrust the third degree of judgment to a superior jurisdiction common to all the Member States.

Therefore the Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* – CCJA) was established, composed from nine judges (seven in the old version of the Treaty) with faculty for the Council of Ministers to fix a higher number of judges if needed. The judges are elected through secret scrutiny from the Council of Ministers, for a mandate of seven years not renewable (in the old version they were renewable only once). Only judges, university law professors, or lawyers of every Member States having a professional experience of at least fifteen years can become CCJA judges, but at least one third party of the members of the Court must be appointed among the lawyers and the university law professors [14] ; every State can present two candidates[15], but only one can be elected[16].

[14] OHADA Treaty, Art. 31. It shall observed that with the old version of the OHADA Treaty, although both the Treaty itself and the Rules of Procedure of the Court had defined the rules for the designation of the judges, the President, the two Vice-presidents and the Head Registrar, the formation of this institution was made through the application of the political agreements called "N'Djamena agreements" of 18 April 1996, that shared the different positions among some States: the presidency of the court was assigned to Senegal, the first vice-presidency to Central African Republic, the second one to Gabon, the other four judges to Chad, Guinea-Bissau, Mali and Niger, the Head Registrar

The Court normally meets in plenary session, but from January 2005 two sections have been formed, composed each one by three judges and presided over by the two vice-presidents, to better deal with the increasing number of cases to be solved[17].

Art. 14 paragraph 2 of the Treaty frames the advisory role of the Court providing for the Court being resorted by any national judge, Member State or the Council of Ministers on issues related to the interpretation and the application of the Treaty, the regulations adopted for its application, the uniform actions and the court decisions. The Court functions also as an international arbitration centre dealing with arbitration with its own rules of arbitration basically modelled on the ICC rules.

But what it is really important with regard to the issue at stake, is the jurisdictional role of the Court that has extremely important consequences for the judicial system of the member countries.

The Court has jurisdiction as judge of last instance in all matters related to commercial law in which the application of any OHADA norm is involved, with the only exception related to the application of criminal sanctions, matter that remains of the competence of the national judges[18]. The national jurisdictions remain therefore competent to judge in the first and in the second instance on the cases related to the application of the uniform

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to Congo further to the withdrawal by the Comores. Having the aforesaid agreements being abolished by the approval of the new text of the Treaty in October 2008, Art. 31 has restored the full force of the criteria previewed in the Rules of Procedure adopted under Art. 19 of the Treaty.

[15] Art. 32 Tratt. On the composition of the CCJA and the appointment procedure of the court judges see Etienne NSIE, *La Cour Commune de Justice et d'Arbitrage*, in 828 *Rev. Penant*, (1998), p. 308.

[16] OHADA Treaty, Art. 31 par. 5, in its new version.

[17] See *amplius* Felix ONANA ETOUNDI, *Le rôle de la Cour Commune de Justice et d'Arbitrage de l'OHADA dans la sécurisation juridique et judiciaire de l'environnement des affaires en Afrique*, paper presented at the conference *Afrique, art, intégration économique et juridique*, organized in Cairo on 6th april 2006 by the Faculty of Law of the University of Cairo, Istitute of International Business Law, and by Club OHADA Egypt, p.6.

[18] On the relations between the CCJA and the national supreme courts in criminal matters see Roger SOCKENG, *Droit pénal des affaires OHADA*, (2007) Douala, Minsi Le Competing, , p. 32 ff.

acts[19]. Consequently, the CCJA exercises the function of judge of appeal against the judgements of the courts of appeal of the member States, as well as against the judgements of first instance of the national courts which are not subject to appeal at national level[20].

In the exercise of its jurisdictional function the CCJA is a supranational court whose decisions are considered as *res judicata* and can be enforced in the territory of every Member State. It is a sort of "transnational court" created through the agreement of the OHADA member States to function as Supreme Court in all the cases involving the application of the Treaty and the uniform acts; consequently all the supreme courts of the member States are deprived of their judicial power whenever the application of OHADA law is involved. Any supreme court of a member State resorted to judge on a case that implies the application of any OHADA rule will have to declare itself *ex officio* incompetent in favour of the CCJA.

The Court can dismiss or receive the appeal. In the first case the CCJA judgement closes the case having the national judge correctly applied the uniform norm. When the appeal is received, then the Court quashes the appealed judgment and keeps the case to judge also on its merits[21]. The power granted to the Court to judge also on the merits of the case, avoiding therefore any return of the case to the national jurisdiction for their decision, has brought to consider the CCJA as the third level of the national jurisdictions placed at supranational level[22].

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[19] OHADA Treaty, Art. 13.

[20] OHADA Treaty, Art. 14, par. 3 and 4.

[21] OHADA Treaty, Art. 14, par. 5.

[22] See Alhousseini MOULOUL, *Comprendre l'OHADA* cit., at 37; Gaston KENFACK DOUAJNI, *L'abandon de souveraineté dans le traité OHADA*, in 830 *Rev. Penant* (1999) at 125; Maïnassara MAÏDAGI*, O funcionamento do Tribunal Comum de Justiça e de Arbitragem da OHADA*, in 6 *Boletim da Faculdade de Direito de Bissau*, (supplement) (2004) at 27; Etienne NSIE, *La Cour Commune de Justice et d'Arbitrage*, in 828 Rev. Penant, (1998) at 308; Gabriel NZET BITEGUE, *Les rapports entre la Cour Commune de Justice et d'Arbitrage et les juridictions nationales*, in 406 *Hebdo informations*, Libreville, 21 August 1999 . The reason should be found in the need to assure speediness and certainty to the judgment, being set up a certain end for any judgment, and to avoid that an erroneous application of the principles of the uniform acts from the national judges that can provoke a

The CCJA judgments are final and close the case definitely[23]. They are not subject to any appeal.

There is a general understanding on seeing the CCJA as an improvement in the legal systems of the OHADA member countries, since it gives speediness and predictability to commercial cases involving OHADA law.

Other regional agreements (CEMAC) also have a supranational court dealing with the application of the related norms, even if their area of competence is definitely more limited than that of the CCJA.

Out of these cases there are no specific jurisdictions within the OHADA member countries dealing with international commercial cases. Litigation concerning such cases are dealt by the ordinary courts or by the commercial courts where existing (Congo, DRC, Guinea-Bissau[24], Mali).

Question 6. Is there a difference in attitude towards transnational sources among administrative courts (where they exist), courts dealing with civil law matters, criminal law and commercial courts in your country?

Most of the francophone countries, which are OHADA members, have administrative jurisdictions. They are not present in DRC, Guinea-Bissau, Equatorial Guinea and Niger.

No one of the national reporters referred about any difference in attitude towards transnational sources among administrative courts, courts dealing with civil law matters, criminal law and commercial courts.

series of return of the judgments from the CCJA to the national courts that renders practically impossible to arrive to a final judgment.

[23] OHADA Treaty, Art. 20. Any decision contrary to a CCJA decision can never be enforced in any member State.

[24] In Guinea Bissau the commercial court has been created in July 2008, but there is no record about its activity yet.

Question 7. Do you think that the efficiency of judges in dealing with cases raising complex interaction of sources may be affected by the fact that the judge himself/herself has to find the applicable law (iura novit curia) in opposition to the situation in which the parties themselves have to plead and prove the law to the court?

All the OHADA member countries belong to the civil law legal tradition (with the only exception of the Anglophone part of Cameroun), therefore the *iura novit curia* principle has great influence in these legal systems.

There is a general understanding that the efficiency of judges in dealing with cases raising complex interaction of sources is affected by the fact that the judge has to find the law applicable to the case.

The reasons are different, but most of the reporters refer to the problem –well known in Africa – of the lack of information about the law in force. In countries like Central African Republic[25] or Guinea-Bissau there is a serious difficulty even in the information and knowledge of the national law, but even where such information exist, the lack of documentation about the different sources of law (scarcity of libraries, no law journals or doctrinal commentaries to the laws, poor access to internet resources, difficulty in getting written sources from abroad, poor training of the judges) determines the simple impossibility for the judge to have access to (or sometimes even to know on time) legal materials different from that of the country.

A further consequence of this situation is that even the parties themselves – or their lawyers – sometimes ignore the existence of a rule different to the domestic one that may be applicable to their case.

Sometimes the burden of proof can help: in Benin (but the situation could be similar also in other countries) the application of the *iura novit curia* principle is limited to the national law, and whenever a party invokes the application of a custom, a usage or any foreign law, it has to prove its existence to the judge. Some other times the day by day practice comes to help the judge, since the application of the *iura novit curia* principle does not prevent any

[25] Failing the national report from that country, this observation is the result of my direct experience in the country.

lawyer to support its pleadings by inserting in its file a copy of the law whose application is claimed to the benefit of the judge.

In Congo there is an effort in improving the training of the judges who are appropriating increasingly of the international legal sources, limiting therefore the burden of proof imposed to the parties to prove the law of other countries whose application is claimed in a Congolese case.

Question 8. Are there detectable common strategies that the judges seem to use to elude complexity (e.g. by the presumption that the foreign law is the same as the local law/by a presumed waiver of foreign sources if the party has not pleaded their applicability immediately)?

There is a general difficulty to answer to this question since it presupposes a detailed analysis of the related jurisprudence, while in Africa (including the OHADA member countries) there is a general lack of publication of the judgments and jurisprudence is scarcely accessible.

In most of the countries no specific strategies are used by the judges to elude complexity are reported.

When the complexity is due to the concurrence with sources of international law, then the strategy used is to consider the rules of international law of higher rank than those of the national one and therefore of immediate application (this is the case in Equatorial Guinea, Ivory Coast and Togo).

In Niger there is a tendency of the judges to apply the national law over the international convention, mainly because he knows its domestic law better than the international legal instruments.

The strategy of presuming a waiver of foreign sources if the party has not pleaded their applicability immediately is used in Congo, since under the Congolese jurisprudence the parties are requested to claim immediately the application of a foreign law otherwise the judge will not take it into consideration. More rarely the judges tend to consider the Congolese law similar to the foreign one, due to the differences that Congolese law has with others in many domains.

Question 9. Is it possible to measure the efficiency of courts in dealing with such issues?

Due to the said general lack of publication of the judgments and to the scarce accessibility of the jurisprudence, in general it is extremely difficult to measure the efficiency of the national courts in dealing with such issues.

The accent is posed on the necessity of having better sources of information and a proper training for the judges (Benin, Equatorial Guinea, Niger), being anyway noticed that such efficiency of the courts can be subject to an evaluation (Ivory Coast).

Where the suggested strategies are used, like in Congo, the efficiency is measured through the eventual check done by the superior courts in case of appeal.

An interesting idea – proposed by the Gabonese reporter – is that of circulating a questionnaire to the judges and the lawyers in order to determine in which measure these strategies are used, how they are useful to the daily work of legal practitioners and which are the benefits coming out from their eventual use.