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OHADA Report*

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Abstract: The complexity of transnational sources is approached in this paper through the analysis of a regional report prepared through national reports of the member countries of the *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA). The report contains the summary of the answers given by national reporters to nine questions prepared with the aim of investigating the difficulties related to the interaction of overlapping laws at a regional level.

First, the problem of fragmentation related to both national/international and regional/interregional sources of law and jurisdictions is considered, and the major actors in the detection of the conflict of laws are listed. Then, several responses (both only proposed or already implemented) to cope with the fragmentation issue are presented, according to the differences in each country. In addition, a number of monitoring mechanisms put in place by the executive powers of each country in order to avoid superimposition of laws and regulations at different levels are enumerated. Additionally, the issue of judiciary organization, training, and functioning is addressed in relation to transnational sources and specialized judicial institutions. The emerging strategies used by the judges in order to avoid the complexity due to the overlapping legal rules are studied, but no specific strategies are actually identified.

Finally, a tentative evaluation of the efficiency of the national courts in dealing with superimposition of laws is proposed to national reporters. However, the general problem of the lack of information and the scarce accessibility to the jurisprudence emerges and makes the aforementioned evaluation difficult.

Zusammenfassung: Die Komplexität transnationaler Rechtsquellen wird in dem vorliegenden Beitrag mittels der Analyse eines regionalen Berichts, erstellt durch die Mitgliedsländer der Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), eruiert. Der Bericht enthält eine Zusammenfassung der von nationalen

* This report does not include the national reports from Cameroun, Central African Republic, and Guinea Conakry, who did not answer to the call for the national reports; however, it includes the report from Democratic Republic of the Congo (DRC), whose process to join the Organization for the Harmonization of Buisness Law in Africa (OHADA) is underway and is expected to be completed in the very near future.

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Berichterstattern gegebenen Antworten auf neun Fragen, die mit dem Ziel, die Schwierigkeiten im Zusammenhang mit der Interaktion sich überschneidender Rechtsordnungen auf regionaler Ebene zu untersuchen, erstellt wurden.

Als erstes wird das Problem der Rechtszersplitterung sowohl im Verhältnis nationaler/internationaler als auch regionaler/interregionaler Rechtsquellen und Rechtsordnungen untersucht und die wesentlichen Akteure im Auffinden von Kollisionsrecht aufgelistet. Danach werden eine Reihe von Antworten (darunter sowohl Vorschläge als auch schon umgesetzte Maßnahmen) für den Umgang mit den Zersplitterungsproblemen, in Bezug auf die Unterschiede in den jeweiligen Ländern, vorgestellt. Zusätzlich wird eine Anzahl an Kontrollmechanismen, die durch die Exekutive der jeweiligen Länder eingeführt wurden, um Gesetzesüberschneidungen und Regulierungen auf unterschiedlichen Ebenen zu verhindern, aufgeführt. Des Weiteren wird das Problem der richterlichen Organisation, Ausbildung und Funktionsweise in Zusammenhang mit transnationalen Rechtsquellen und spezialisierten Gerichtsinstitutionen angesprochen. Die Notfallstrategien, die von den Richtern angewandt werden, um die aus einander überschneidenden Rechtsregelungen erwachsende Komplexität zu meiden, werden studiert, allerdings ohne tatsächlich spezielle Strategien zu identifizieren.

Schließlich wird den 14 Länderberichterstattern eine vorläufige Einschätzung hinsichtlich der Effektivität der nationalen Gerichte bezüglich Gesetzesüberschneidungen vorgeschlagen. Dabei taucht allerdings das allgemeine Problem der fehlenden Informationen und des schlechten Zugangs zu Gerichtsurteilen auf und macht eine solche Einschätzung schwierig.

1. 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 *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) member countries immediately appeared. 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 an idea is a result of the stratigraphic analysis of African law applied to the current development of African law. Indeed, at the beginning of this new century, a new layer seems to have emerged in African law. It is the law made by the Westerners (mostly Europeans) for the Africans. It is the law that follows the general pattern in terms of present legal development, 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 favourable to investments; it shall be affordable and predictable in terms of its application, avoiding the intervention of a state (through legislation or judicial decisions) that could render null any investment. Moreover, the costs related to the application of the law should be minimized for the investor to give greater economic scale, and therefore, if the law is harmonized at the supranational level, the same law can give to the investor the possibility of entering into more than one market. The OHADA law represents the most advanced example of this new layer of African law.

As it is today well known, 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 OHADA Treaty calls for the preparation 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, Contracts for the Carriage of Goods by Road, and Co-operative and Mutual Aid Companies Law.[1] More uniform acts are expected in the areas of Contract Law, Labour Law, and 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 *Cour Commune de Justice et d'Arbitrage* (Common Court of Justice and Arbitration (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 all the member countries, who then share a common legal experience, the strengths and weaknesses of the system, the problems related to its implementation, and the need for its improvement. All these reasons justify – we all believe – the possibility to consider all the member countries together with regard to a subject strictly interrelated with the themes of the same OHADA law.

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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 No. 205, 13 Oct. 2004; J. ISSA-SAYEGH, 'L'intégration juridique des Etats africains dans la zone franc', 823. *Rev. Penant* 1997, p. 5, and 824. *Rev. Penant* 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. (Uniform Law Review)* 1999, p. 5; B. MARTOR *et al.*, *Le droit uniforme africain des affaires issu de l'OHADA*, Lexis Nexis Litec, Paris 2009; A. MOULOUL, *Comprendre l'OHADA*, 2nd edn, Conakry 2009; P. TIGER, *Le droit des affaires en Afrique*, Presses Universitaires de France, Paris 1999; as well as the collections on the OHADA law, one published by Presses Universitaires d'Afrique in Yaoundé, 1999, and the other by Bruylant in Brussels, 2002.

2 P. MEYER, 'La sécurité juridique et judiciaire dans l'espace OHADA', 855. *Rev. Penant* 2006, p. 151.

3 J. ISSA-SAYEGH, 'Quelques aspects techniques de l'intégration juridique: L'exemple des actes uniformes de l'OHADA', 4. *Unif. L. Rev.* 1999, p. 5 at p. 12.

2. The Concern about Fragmentation of International Sources and the Actors Involved

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

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 charter 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 pre-existing texts have 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 *Communauté Economique et Monétaire des Etats de l'Afrique Centrale* (CEMAC) (Economic and Monetary Community of the Central African States) and the *Union Economique et Monétaire Ouest Africaine* (UEMOA) (West African Economic and Monetary Union), of the *Conférence Interafricaine du Marché d'Assurances* (CIMA) (Inter-African Conference of the Insurance Market), and of the *Organisation Africaine de la Propriété Intellectuelle* (OAPI) (African Organization of Intellectual Property), which all cover areas of law related 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 so that step-by-step progress toward harmonization can be made since for the implementation of the Treaty 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, must be included as falling within the definition of business law.[4]

4 Article 2 OHADA Treaty, 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.

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

Moreover, it shall not be forgotten that the attempt from OHADA to go for the harmonization of banking law encountered strong resistance at the level of the regional organizations governing the banking sector, and the 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, a possible conflict between supranational jurisprudence, a conflict that the CCJA tries to avoid by applying the principle of subordination and therefore deciding cases involving 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 the Democratic Republic of the Congo (DRC) once its process of membership to OHADA is completed since the DRC is also a member of the Southern African Development Community (SADC). The two organizations pursue – in principle – different objectives, with that of OHADA being legal integration and that of SADC, economic integration. At any rate, SADC does not exclude – in principle – the adoption of 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 the DRC in the organization requires it – for example – to comply with the payment system in force in the Community, while the OHADA system is hinged on the CFA franc. This is the reason the two organizations started to have informal talks and a project to study the possibility of legal harmonization within the SADC zone, where one of the pillars is the study of how OHADA can contribute to a possible process of legal harmonization (as a model or be transplanted), 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 Article 10 of the OHADA Treaty, uniform acts are directly applicable and overriding in the Member States notwithstanding any conflict they

5 Mozambique is also a member of Southern African Development Community and has started to get interested in the OHADA process of legal harmonization.

may give rise with respect to previous or subsequent enactment of municipal laws.[6] Two possible interpretations of such a principle are possible. A first possibility is to interpret Article 10 in the sense that only the national laws or the rules contained therein that are effectively contrary to the norms of a uniform act are repealed, being thus 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. A second interpretation gives to Article 10 a wider meaning in the sense of abrogating every norm of national laws having the same object of a uniform act, thus avoiding the necessity to proceed to a detailed analysis of every single norm 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 and thus allow a greater simplicity and uniformity in the application of the uniform laws.[7]

After an initial period of uncertainty in the doctrine,[8] the CCJA has clarified that the repealing effect set forth in Article 10 of the Treaty refers both to the annulment and to the prohibition to enact any norm of domestic law or regulation, present or future (whether it is an article, a norm, a paragraph, or a phrase of a paragraph), having the same object of a rule of a uniform act and being contrary to it. The Court has moreover established that when only part of the domestic rules is contrary to the uniform act, those not contrary remain applicable.[9] This interpretation, if it has the advantage of preventing the creation of legislative gaps, is hardly compatible with the objective of simplicity set forth in Article 1 of the Treaty, and it creates a fragmentation of the sources of law (international versus domestic) that may represent a potential source of disharmony and conflict in the

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

7 B. MARTOR *et al.*, *Business Law in Africa*, GMB Publishing, London 2007, p. 9; *id.*, *Le droit uniforme africain des affaires issu de l'OHADA*, Lexis Nexis Litec, Paris 2004, pp. 19 *et seq.*

8 For the first solution, see D. ABARCHI, 'La supranationalité de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)', 37. *Revue Burkinabé de Droit* 2000, pp. 9 *et seq.*; for the second, F.M. SAWADOGO, *Présentation de l'OHADA: Les organes de l'OHADA et les Actes Uniformes*, paper presented at the conference *Afrique, intégration économique et juridique*, organized in Cairo on 6 Apr. 2006 by the Faculty of Law of the University of Cairo, Institute of International Business Law, and by Club OHADA Egypt, p. 26.

9 See *Opinion No. 001/2001/EP of 30 Apr. 2001* rendered by the Common Court of Justice and Arbitration (CCJA) upon request of the Ivory Coast in <www.ohada.com> and J. 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', 850. *Rev. Penant* 2005, pp. 6 *et seq.* For the application of such a principle by the jurisprudence of the Member States, see *Cour d'Appel* Port-Gentil, 9 Dec. 1999 and 28 Apr. 1999, No. 60/98-99; *Cour d'Appel* Niamey, 8 Dec. 2000, No. 240, all in <www.ohada.com>; and *Cour d'Appel* Douala, 15 May 2000, No. 81/ref.; this last in 12. *Revue camerounaise de droit des affaires* 2001, commented on by Gaston Kenfack Douajni.

interpretation and application of the norms of the uniform acts since the domestic norms that are not contrary to the rules set forth in the uniform acts remain in 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 to the possible 'contractual' fragmentation of the sources of law by the operators of international commerce whenever they are called to determine the law applicable to an international contract and also through international arbitration, 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 highlighting the cases of fragmentation and conflict of the sources of law. Where the issue of fragmentation of sources has occurred (Benin, Burkina Faso, Comoros, Equatorial Guinea, Gabon, Ivory Coast, Mali, Niger, Senegal, Togo), the judges are the subjects who are faced with the problem, often not having the full knowledge of the multitude of texts to be applied. In Niger and Togo, there is evidence showing how the other legal practitioners are also facing 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, who are only marginally involved in the application of the transnational sources of law.

3. The Lack of Specific Measures against the Fragmentation of Transnational Legal Sources

This discourse brings us consequently to the issue of determining if any proposals have been put forward in the OHADA member countries to cope with the problem of the complexity and fragmentation of the transnational sources of law. Here, not one of the national reports has referred to specific instruments adopted in his/her jurisdiction to cope with this problem.

The issue tends to be solved on a case-by-case basis, and here, the doctrine has played again a fundamental role making a basic distinction between the cases where the conflict of international sources is a horizontal conflict between rules of different international legal instruments having the same hierarchical level and the cases where there is a 'vertical' conflict between an international rule and a domestic rule. The first case of horizontal conflict has been solved by 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 norm and a domestic norm has been solved by 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 creating a database of the international law treaties and conventions signed by the country and in force therein in order to investigate the existing overlaps among the different international legal instruments to which the country is part at international, regional, or subregional level.

It has to be pointed out that initiatives of legal harmonization, like that of OHADA, have been put in place also to cope with the issue of the fragmentation of sources of law at regional or subregional levels 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 with the objective, among others, to reduce the economic efforts requested by 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.

4. The Role of the Executive Power

Another question is to identify the role of the executive power in every country and, in particular, if it kept a strict monitoring of all international engagements that were undertaken and made use of clauses of exemption or reservation (to preserve previous international engagements) when signing new instruments or not. Again, the situation seems to be slightly different in the different OHADA member countries.

In Congo, the Ministry for Foreign Affairs, that 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 to have its opinion and for a constitutionality check to determine if the new instrument imposes an abandonment of sovereignty of the Congolese state in a field that it regulates. A similar process operates in Senegal, where such control is under 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 also reserves the task of monitoring all international engagements that were undertaken by the executive power, but there is no evidence that this work has really been done. In Gabon and Togo, the executive power does not seem to make use of this authority.

In Burkina Faso, Comoros, Equatorial Guinea, and Guinea-Bissau, the position of the executive power is not known. In this last country, Guinea-Bissau, it

is not known because most of the international agreements that are signed by the country are not published in the *Boletim Oficial* (Official Journal); while in the Comoros, the lack of any systematic knowledge of the conventions to which the country is part prevents the executive from exercising its prerogatives. In the Ivory Coast, the power to carry out the compliance check with the former texts is given to the *Conseil Constitutionnel* that can be resorted to by the other state authorities.

This issue has been substantially taken care of in the OHADA system since after the preliminary control has been made in order to determine the possibility of joining the organization and then with the adhesion of the country to the system, the possibility of making reservations to the Treaty is expressly forbidden.[10]

5. The Role of the Judiciary

The judiciary is definitely involved in managing the fragmentation of transnational sources. Nevertheless, do the judges have the tools, especially in Africa, to do this work? An answer to this question necessarily requires that the judiciary in the countries involved provide special training for judges to increase their ease and proficiency in dealing with sources of law that were not generated in their legal systems.

The situation in terms of the scenario related to the training of the judges varies with regard to sources of law that are not generated in the legal system of each country, in general, and that of OHADA, in particular. Burkina Faso, the DRC, Gabon, Guinea-Bissau, Ivory Coast, Senegal, and Togo do not have any kind of training activity for the judges with regard to this source of law.

In the other countries, the training of the judges is organized by the state through a specific training school dedicated to judges, called *Ecole Nationale de la Magistrature* in Benin and Niger, where the activities considered therein are performed during the initial period of training of the judges, and the *Institute 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 also provide them with 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 to make up for the insufficient level of specialization of the judges, the absence of a system of continuous formation, and the lack of sufficient legal formation in the member

10 Article 54 OHADA Treaty: *Aucune réserve n'est admise au présent Traité.*
11 Article 41 OHADA Treaty.

countries.[12] The school is dedicated to the training 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 training of legal professionals on OHADA law.

All judges, bailiffs, and court clerks of Member States can be admitted to the training course. The selection of trainees is carried out at the national training schools on the basis of the candidates' professional responsibilities, their backgrounds, their professional experience, and the nature of the legal functions of the candidates. There shall be an equal number of trainees for every Member State. The teachers are legal professionals and scholars having deep knowledge and experience with OHADA law.[13]

The case of the OHADA member countries is also very peculiar with reference to another aspect involving the judiciary and the fragmentation of transnational sources: the fact that in some countries a specialized judicial institution deals with international commercial cases, and this has important consequences on the functioning of justice.

When developing 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 was thought that in order to realize these objectives, the better solution was 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 levels and to entrust the third degree of judgment to a superior jurisdiction common to all the Member States.

Therefore, the *Cour Commune de Justice et d'Arbitrage* was established, composed of nine judges (seven in the old version of the Treaty), with the possibility 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 State having a professional experience of at least fifteen years can become CCJA judges, but at least, one-third of the members of the Court must be appointed among the lawyers

12 See MOULOUL, 2009, *supra* n. 1, p. 42.

13 On the training activity done by *École Régionale Supérieure de la Magistrature*, see T. SOMÉ, 'A formação dos magistrados africanos pela OHADA', 6. *Boletim da Faculdade de Direito de Bissau* (supplement) 2004, p. 9.

and the university law professors;[14] every state can present two candidates,[15] but only one can be elected.[16]

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

Article 14 paragraph 2 of the Treaty frames the advisory role of the Court, providing for the Court to be consulted 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, and 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 International Chamber of Commerce rules.

However, what is really important with regard to the issue at stake is the jurisdictional role of the Court, which 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, a matter that remains within the competence of the national judges.[18] The national jurisdictions remain therefore competent to judge in the first and in the second instances on the cases related to the application of the uniform

14 Article 31 OHADA Treaty. It shall be 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 Apr. 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 offices of the other four judges, to Chad, Guinea-Bissau, Mali, and Niger; the office of the Head Registrar, to Congo after the withdrawal by the Comoros. 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 Article 32 OHADA Treaty. On the composition of the CCJA and the appointment procedure of the court judges, see E. NSIE, 'La Cour Commune de Justice et d'Arbitrage', 828. *Rev. Penant* 1998, p. 308.

16 Article 31 para. 5 OHADA Treaty in its new version.

17 See, *amplius*, F. 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, intégration économique et juridique*, organized in Cairo on 6 Apr. 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 R. SOCKENG, *Droit pénal des affaires OHADA*, Minsi Le Competing, Douala 2007, pp. 32 *et seq.*

acts.[19] Consequently, the CCJA exercises the function of judge of appeal against the judgments of the Courts of Appeal of the Member States, as well as against the judgments of first instance of the national courts that 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 a 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 asked to judge a case that implies the application of any OHADA rule will have to declare itself incompetent in favour of the CCJA, and such incompetency must also be noted ex officio.

The CCJA can dismiss or receive the appeal. In the first case, the CCJA judgment closes the case if the national judge has correctly applied the uniform norm. When the appeal is received, then the Court quashes the appealed judgment and keeps the case to be judged 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 the CCJA to be considered as the third level of the national jurisdictions placed at supranational level.[22] The CCJA judgments are final and close the case definitely.[23] They are not subject to any appeal.

There is a general understanding that the CCJA is 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

19 Article 13 OHADA Treaty.

20 Article 14 paras 3 and 4 OHADA Treaty.

21 Article 14 para. 5 OHADA Treaty.

22 See MOULOUL, 2009, *supra* n. 1, p. 37; G. KENFACK DOUAJNI, 'L'abandon de souveraineté dans le traité OHADA', 830. *Rev. Penant* 1999, p. 125; M. MAÏDAGI, 'O funcionamento do Tribunal Comum de Justiça e de Arbitragem da OHADA', 6. *Boletim da Faculdade de Direito de Bissau* (supplement) 2004, p. 27; NSIE, 1998, *supra* n. 15, p. 308; G. NZET BITEGUE, 'Les rapports entre la Cour Commune de Justice et d'Arbitrage et les juridictions nationales', 406. *Hebdo informations*, Libreville 21 Aug. 1999; the reason should be found in the need to assure speediness and certainty to the judgment, setting up a certain end for any judgment and avoiding an erroneous application of the principles of the uniform acts from the national judges that can provoke a series of returns of the judgments from the CCJA to the national courts that renders it practically impossible to arrive at a final judgment.

23 Article 20 OHADA Treaty. Any decision contrary to a CCJA decision can never be enforced in any Member State.

of the related norms, even if their area of competence is definitely more limited than that of the CCJA.

Other than these two cases, there are no specific jurisdictions within the OHADA member countries that deal with international commercial cases. When they should arise, they are solved by the ordinary courts or by the commercial courts where they exist (Congo, DRC, Guinea-Bissau,[24] Mali).

The discourse on the relation between the judiciary and the transnational sources requires then to ascertain if there is a difference in attitude towards transnational sources among administrative courts (where they exist), courts dealing with civil law matters, criminal law, and commercial courts.

Most of the Francophone country members of OHADA have administrative jurisdictions. They are not present in the DRC, Guinea-Bissau, Equatorial Guinea, and Niger, while in the Comoros, administrative courts have never really worked.

Not one of the national reporters referred to any differences in attitude towards transnational sources among administrative courts, courts dealing with civil law matters, criminal law and commercial courts.

Another issue that might influence the efficiency of judges in dealing with cases raising complex interaction of sources is represented by the fact that the same judge has to find the applicable law (*iura novit curia*). However, this issue could be – in principle – facilitated in the situation in which the parties themselves have to plead and prove the law to the court.

It must be mentioned that all the OHADA member countries belong to the civil law legal tradition (with the only exception being 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 the Central African Republic,[25] Comoros, or Guinea-Bissau, there is a serious difficulty even with the information and knowledge of the national law, but even where such information exists, the lack of documentation about the different sources of law (scarcity of libraries, lack of 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

24 In Guinea-Bissau, the commercial court was created in July 2008, but there is no record yet of its activity.

25 With no national report from that country, this observation is the result of the author's direct experience in the country.

judge to know in a reasonable amount of time or to even have access to legal materials different from those 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 from 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 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 lawyer from supporting pleadings by inserting in the case file a copy of the law whose application is claimed to the benefit of the judge.

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

6. Judicial Strategies against Complexity of Transnational Sources

The analysis made above shows how the judges are the ultimate subjects dealing with the issues of complexity and fragmentation of transnational sources. Therefore, research to determine if common strategies that the judges seem to use to elude complexity are detectable could be extremely important.

There is a general difficulty in dealing with this issue in the regional area being considered 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 analysed, no specific strategies that 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 the national law and therefore of immediate application (this is the case in Equatorial Guinea, Ivory Coast, and Togo). In the Comoros, the judge tends to apply the law that it knows better due also to the serious problems about knowledge of legal materials present in that country. In Niger, there is a tendency of the judges to apply the national law over the international convention mainly because they know their 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 other laws in many domains.

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.

Most of the reporters underlined the necessity of having better sources of information and proper training for the judges (Benin, Equatorial Guinea, Niger) and that the efficiency of the courts should be subject to an evaluation (Ivory Coast).

Where the suggested strategies are used, as 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 how often these strategies are used, how useful they are to the daily work of legal practitioners, and what the benefits coming out from their eventual use are.

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