Common Court of Justice and Arbitration: A Supranational Institution for the Administration of Commercial Disputes in Africa

by

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1. Introduction

Due to the expansion of business transaction across the globe, the private sector demands an adequate legal framework that is sufficiently clear, modern, predictable and transparent to permit investment with a sense of security. The Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'harmonisation en Afrique du Droit des Affaires*) is generally known by its French acronym OHADA. As long-standing idea, the foundation of the OHADA Treaty was first laid during a meeting of finance ministers of the members of the franc CFA[1] area held in Ouagadougou, Burkina Faso, in April 1991. A group of experts, led by Senegalese Justice Keba Mbaye, was appointed to conduct a feasibility study on a form of legal collaboration designed to promote economic integration and attract investments.[2] Identifying low investment as a major obstacle to economic growth, Keba Mbaye presented his report to the French-speaking African summit in Libreville, Gabon, in October 1992, recommending the creation of a supranational organization comprising the entire franc area. The recommendation was adopted and a steering committee of three experts were appointed and tasked with drafting an international instrument as well as identifying the areas of law to be harmonized.

The OHADA was established through the treaty of Port Louis in Mauritius on 17th October, 1993[3] The treaty is open to any Member State of the Organization of African Unity (AU) as well as any other non-member of the AU invited to join with the common agreement of all the Member States.[4] The OHADA has progressively become the common business law in anglophone and francophone African countries, taking the best from the civil law and the common law systems.[5] The OHADA provides its Member States with

> 1) a single, modern, flexible and reliable business law adapted to each country's economy;
>
> 2) arbitration as an appropriate and trustworthy way to settle disputes; and

[1] CFA is the acronym for the *Communauté Financière Africaine*. The CFA franc is the name of two currencies used in Africa that are guaranteed by the French treasury: the West African CFA franc (XOF) and the Central African CFA franc (XAF).

[2]Martin Kirsch, "*Historique de l'OHADA," Revue Penant* 827 (1998) at 129; Barry Walsh, In Search of Success: Case Studies in Justice Sector Development in Sub-Saharian Africa (Washington, DC: World Bank, 2010), 44.

[3] The OHADA Treaty has been amended once, in Quebec (Canada), on 17th October, 2008.

[4]The Treaty creating the "Organization for the Harmonization of Business Law in Africa", was signed by14 African Heads of State in Port Louis, Mauritius on 17 October, 1993 and entered into force on 18 September, 1995, and amended in Quebec- Canada, on 17th October, 2008 came into force on 21st March, 2010. It now numbers 17 Member States. (Note that the provisions of the Revised treaty is applicable in the course of this research irrespective of the use of the term " treaty or revised treaty")

[5]Martha Simon Tumnde, *et. al*, *Unified Business Laws for Africa: Common Law Perspectives on OHADA*, London: GMB Publishing Company, 2009, at 69-70

3) an opportunity for training judges and judicial staff and ensuring their specialisation.

In May 2003, the uniform OHADA business law came into force in the sub-Saharan African States of Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo and later the Democratic Republic of the Congo. The OHADA Treaty secures a legal framework for the conduct of business in Africa.[6] Pursuant to Article 53 of the OHADA Treaty, any member State of the African Union may become a member, if it wishes to do so.[7] Many countries are currently giving active consideration to joining the OHADA common system of business law.[8] Most of the countries have a French colonial heritage, with the exception of the Democratic Republic of the Congo (former Belgian colony), Guinea-Bissau (former Portuguese colony), Equatorial Guinea (former Spanish colony), and Togo and Cameroon (formerly under partly British and partly French colonial rule). French is also an official language in most of the countries and many OHADA sources are only available in French. [9]

It is interesting to know that the Council of Ministers of the OHADA organisation which is the legislative organ of the organisation have adopted the following uniform business law: the general commercial laws, corporate laws and rules concerning different types of joint ventures, laws concerning secured transactions, debt recovery and enforcement laws, bankruptcy laws, arbitration law, accountability law, and law regulating contract for the carriage of goods by

[6]The seventeen member states are: Benin, Burkina Faso, Cameroon, Comoros, Congo, the Democratic Republic of the Congo, Ivory Coast, Gabon, Guinea-Bissau, Guinea, Equatorial Guinea, Mali, Niger, the Central African Republic, Senegal, Chad and Togo, available at: http://www.ohada.com/etats-membres.html, accessed 20 July, 2013

[7]Under Article 52(2) of the treaty, it was provided that the treaty shall enter into force sixty (60) days after the date of deposit of the seventh instrument of ratification. The instruments of ratification and accession shall be deposited with the Senegalese government, which is the Depositary Government, and which issues a copy to the Permanent Secretariat. The depositary Government will register the treaty with the Secretariat of the African Union and with that of the UN in accordance with Article 102 of the United Nations Charter and issue a registered copy to the Permanent Secretariat. On 18 September, 1995, the number of ratifications required for entry into force of the treaty was fulfilled after the deposit by the Niger of its instrument of ratification, thus the OHADA Treaty entered into force in accordance with Article 52.

[8]M.T. Ladan., Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security, Kaduna: Ahmedu Bello University Press Limited, 2009, at 34

[9] Alexa Tiemann , "OHADA Membership and Business Reforms:a Driver for Growth?" University of St. Gallen Draft Version as of December 2012", at. 3. Available online at http://dial2013.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf, accessed 11 June, 2013

roads.[10] The OHADA treaty established the Common Court of Justice and Arbitration (CCJA) which is a supranational[11] judicial institution based in Abidjan, Ivory Coast.[12]

2. The CCJA as an Arbitral Institution

2.1 History of Arbitration as a Means of Dispute Settlement

Arbitration is a method of dispute resolution involving one or more neutral third parties, agreed upon by the disputing parties and whose decision the parties recognize as binding.[13] Arbitration is an alternative to litigation which dates back to the 13th century where English merchants sought to have their disputes resolved according to their own customs rather than by public law. In contemporary arbitration, the parties turn over the decision-making power to a private individual with stature, experience, and standing who can exercise authority similar to a judge in a court room. The decision is final, the proceedings are private, and decisions are typically made at a faster pace than in the court system with lower costs to all involved.[14]

Though, according to Song and Samassekou, private arbitration predates the establishment of modern economic courts and arbitral tribunals. Arbitration began as an extrajudicial mechanism for resolving disputes. The ancient Sumerians, Persians, Egyptians, Greeks and Romans all had a tradition of arbitration. In Roman law, arbitration agreements were admissible as a reflection of the recognized principle of freedom of contract. In arbitrations dating back to the Oxyrhynchus Papyri from 427 AD, merchants accepted as final the decisions of fellow merchants with knowledge and expertise in the related field. Arbitration has, for that

[10] *Ibid*. These OHADA Uniform Acts came into force between January, July, 1998, January 1999, January 2001 and January, 2004. Available online at http://www.ohada.com/fichiers/newsletters/811/ohada-and-Ecowas-treaties-as-tools-for-final.pdf, accessed 22 July, 2013

[11] Supranationalism is a politico-legal concept which embodies but is not limited to the following core elements: decisional autonomy (in particular the rule of the voting majority as opposed to consensus), the binding effect of the laws of international organisations (where member states are precluded from enacting contradictory laws), the institutional autonomy of an organisation from its member states, and the direct binding effect of laws emanating from regional organisations on natural and legal persons in member states. (see B. Fagbayibo, "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" (2013) PER 3,at. 33. See also Hay, "Federalism and Supranational Organisation", 69 and Pescatore Law of Integration 51-52.)

[12]Antonia Menezes, "The Last Frontier Arbitrating in Africa where shall we go?, "Geneva, 13 April, 2012, at 10. The Organization for the Harmonization of Business Law in Africa (Ohada) was created by the treaty on the Harmonization of Business Law in Africa signed on October 17th, 1993 in Port-Louis and amended in Quebec-Canada, on 17th October, 2008. Available online at http://www.uihj.com/en/ressources/21548/50/newsletter_janvier_2011_-_en.pdf, accessed 13 June, 2013

[13]Bryan A. Garner (ed), *Black's Law Dictionary*, St Paul MINN: West Publishing CO., 7th edn 2000, at. 62.

[14] Rozdeiczer and Alejandro Alvarez de la Campa, *Alternative Dispute Resolution Manual Implementing Commercial Mediation,* Washington DC: The World Bank Group, 2006

reason, historically functioned as an independent adjudicative dispute resolution mechanism. It is characteristic that arbitration was perceived as superior for resolving price or damages disputes. Trade exchanges compel states to modernize their legal system. It has become vital for states to develop an appropriate legal framework for an open economy and competitive market by establishing patterns of prevention and effective resolution of disputes.[15]

As regards to the CCJA it does not settle disputes itself, but instead, like other international arbitration centres, provides the institutional procedures for arbitration.[16] It controls the proceedings by appointing or confirming the arbitrators. In order to resolve the dispute, the parties may appoint a sole arbitrator or three arbitrators who will be confirmed by the CCJA. It also intervenes in the appointment of arbitrators where the parties have agreed to appoint a sole arbitrator but fail to agree on the person of the arbitrator within thirty days from the date of notification of the request for arbitration to the other party. In that case the arbitrator shall be appointed by the CCJA and where the parties have agreed that the dispute shall be decided by three arbitrators: each party shall appoint one, and the third, who shall chair the arbitral tribunal, is appointed by the court, unless the parties have agreed that the arbitrator will be designated by the two other arbitrators. However, failing agreement between the two arbitrators on the third person, and at the expiration of a time limit fixed either by the parties or by the court, the third arbitrator is appointed by the CCJA.[17]

2.2 Establishment of the Common Court of Justice and Arbitration (CCJA)

The OHADA Treaty provided for the creation of four institutions to carry out the Treaty's objectives:

> 1) the Common Court of Justice and Arbitration (CCJA);
>
> 2) the Council of Ministers of justice and finances, which meets once a year to adopt "the uniform acts" applicable in each internal law of the Member States;
>
> 3) the permanent Secretariat, attached to the Council of Ministers and responsible for the preparation of all the acts and the annual program of harmonization of business law, with its headquarters is in Yaoundé, Cameroon; and

[15]Lianbin Song and Mamoudou Samassekou, "Effectiveness and Remedies of Arbitral Awards in OHADA (1)'s System and in the People's Republic of China", *Journal of Politics and Law*, Vol. 4, No. 1; March 2011 at 63.

[16] Paige Berges and Robert Sentner, "Doing business in Africa — new regional institutions bring international arbitration to Sub-Saharan Africa", International Arbitration Alert, A Publication of Nixon Peabody LLP, 4 February, 2013 at 5

[17] Alhousseini Mouloul, "Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.)", 2nd edn, June 2009, at 37-46, available online at http://www.ohada.com/fichiers/newsletters/1556/Comprendre-l-Ohada-en.pdf, accessed 26 of July, 2013.

> 4) the Higher Regional School of Judges (ERSUMA) as the regional training centre for legal officers of the CCJA.[18]

The CCJA could be described as both an arbitration institution and a judicial court, with jurisdiction covering all the OHADA states. The treaty revisions signed in Québec on October 17, 2008, completed the institutional framework with a fifth component, the Conference of Heads of State and Government. The revised treaty came into force on March 21, 2010. [19]

The preamble to the OHADA treaty provides its vision:

> "Determined to accomplish new progress on the road to African unity and to establish a feeling of trust in favour of the economies of the Contracting States in a view to create a new centre of development in Africa; mindful of the fact that the realisation of those objectives demands an application in the contracting states of a business law which is simple, modern and adaptable; in order to facilitate companies' activities..., desiring to promote arbitration as an instrument to settle contractual disputes; determined to participate in common new efforts to better the training of Judges and representatives of the law. "....[20]

Those who drafted the Treaty firstly elected to lay down known, uniform and modern laws and secondly to create the CCJA in order to respond to concerns in relation to the reliability of the legal system. The CCJAfacilitates the administration of disputes among OHADA Members .[21]Under Article 14 of the OHADA Treaty: "The Common Court of Justice and Arbitration will rule on, in the Contracting States, the interpretation and enforcement of the present treaty, on such regulations as laid down for their application and on the Uniform Acts". The OHADA

[18]Leo Netten, The OHADA: An Example of Harmonization, Newsletter – January 2011, available online at http://www.uihj.com/en/ressources/21548/50/newsletter_janvier_2011_-_en.pd, accessed 15 June, 2013.

Establishment of the CCJA; On 4 April, 1997, Installation of the official CCJA, Abidjan (Ivory Coast), from 4 to 10 April 1997: First session of the CCJA; Approval of the Uniform Act on general commercial law.

[19]*Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, *Can OHADA Increase Legal Certainty in Africa?* , Justice and Development Working Paper Series17/2011, Washington, DC: The International Bank for Reconstruction and Development / The World Bank, 2011, at 10. See OHADA Newsletter, available online at http://www.ohada.com/newsletter.php?newlang=english&news=04032010-848#. accessed 26 of July, 2013.

[20]Treaty on the Harmonisation of Business Law in Africa, signed on the 17th October, 1993 and entered into force on the 18th October, 1995. On 17 October 2008, the Conference of Heads of State and Government of the OHADA revised the Treaty of Port Louis and the conditions under which the OHADA Treaty may be revised. See Articles 61 and 63.

[21]Norton Rose, "Managing the Successful Reforms of the Business Environment in Africa", The Regional Consultative Conference in Africa, Accra, Ghana, 5 - 7 November, 2007, at. 4

Treaty provides for two routes to arbitration: institutional arbitration under the auspices of the CCJA; and private arbitration under the Uniform Act on Arbitration.[22]

It is pertinent to state that the OHADA was established through a treaty with the objective of improving the abidance to rule of law in the private sector. In many Member States, business and commercial laws dated back to colonial times without major revisions, the legal frameworks were outdated and not suitable for modern business, and were often fragmented or after limited amendments even contradictory in themselves. The CCJA, in view of the importance of economic growth and investments, sought to develop and adopt a common framework for business law in order to promote growth and development in West and Central Africa and also building on enhanced regional integration to uniformly interpret the treaty and its Uniform Act for Arbitration.[23] Accordingly, the CCJA started functioning in line with the provisions in Chapters III and IV of the OHADA treaty with the official adoption of Rules of Procedure by the Council of Ministers at N'Djamena, Chad on the 16 April, 1996 and the Rules of Arbitration adopted in Ouagadougou, Burkina Faso on the 11 March, 1999 respectively.[24]

2.3 Composition and Election of the Judges of the CCJA

The CCJA is composed of nine judges;[25] however, the Council of Ministers might, taking into account the needs of the service and the financial possibilities, set a higher number of judges. Judges of the Common Court of Justice and Arbitration are elected for a non-renewable term of seven years, from among the nationals of the Contracting Parties through a secret ballot by the Council of Ministers.[26] The Court sits in chambers of three judges.[27] The operating procedures of the CCJA are to first ensure guarantee of judicial independence and security. The treaty did not specify that there must be a judge from a Member State. In addition, the

[22]Benefits of Uniform Act : harmonized approach to arbitration., especially if parties are from different countries, each of them may prefer disputes to be handled by a neutral body rather than by the national courts of the other party Gives parties unfettered access to the benefits of arbitration, including: Lower costs, avoidance of unnecessary publicity, neutral and impartial adjudication, access to the expertise of arbitrators in specific fields and certain level of control over the procedure.

[23]Alexa Tiemann , "OHADA Membership and Business Reforms: a Driver for Growth?" University of St. Gallen Draft Version as of December 2012", at. 3-4. Available online at http://dial2013.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf, accessed 11 June, 2013

[24]Boris Martor, "Business Law in Africa: OHADA and the Harmonization Process", London: Kogan Page Publishers Ltd, 2002, at.11

[25]Article 31(1) of the Revised Treaty on the Harmonisation of Business Law in Africa, adopted on the 17 of October, 2008 in Quebec, Canada. Available online at http://www.ohada.com/traite-revise.html accessed 23 July, 2013

[26]See also Alhousseini Mouloul, above note 16 at 37-46. See also, Boris Martor, above note 24

[27] See Norton Rose, above note 21, at. 8

CCJA has set itself the internal regulation that a judge must withdraw if the decision against which the appeal is brought was returned in his State of origin.[28]

Before the election of the judges of the CCJA, the Permanent Secretary invites each state to submit its candidates[29]. One state cannot have two justices seated in the court but can nominate or submit two candidates out of whom one could be selected. Under Article 31 of the OHADA Treaty,the personal requirements for candidates can be divided in three categories: Judges with at least fifteen years of professional experience who possess the qualifications required to occupy the highest judicial office in their respective countries;[30] lawyers that are members of the lawyer's association or Professional Legal body or Association of one of the States Parties and with at least fifteen years of professional experience; and law professors with at least fifteen years of professional experience. One third of the judges of the CCJA must belong to the categories of lawyers and law professors.[31] Following the reception of the application, the Permanent Secretary lists all the candidates in alphabetical order, and communicates that list to all member states at least one month before the election[32]. The Council of Ministers, before proceeding to the election, will take into account that the court cannot include more than one national of any Member State [33]. Once elected, members of the CCJA enjoy diplomatic privileges and immunities,are irremovable and cannot hold any political or administrative function. However, they can have gainful activity after having been authorized by the court. In case of vacancy of a seat, for death or resignation of a judge, the judge will be replaced according to the renewal procedure. The members of the Court elect among themselves a President and two Vice -Presidents for a term of three years and six months.[34]

[28] *Ibid.*

[29] This must be done at least four months before the date fixed for the election.

[30]Article 31(2) of the Revised Treaty on the Harmonisation of Business Law in Africa, adopted on the 17 of October, 2008 in Quebec, Canada

[31]Martha Simon Tumnde, *et. al*, above note 5, at 49

[32]The election of the members of the court are made according to the Articles 1st and following of the rule of procedure of the CCJA.

[33]Article 31(3) of the Revised Treaty on the Harmonisation of Business Law in Africa, adopted on the 17 of October, 2008 in Quebec, Canada

[34]The elections are made according to the Articles 37 and 38 of the treaty and 6, 7, 8 of the Rule of Procedure.

3 The Powers of the CCJA

3.1 Jurisdiction and Powers of the CCJA

The CCJA is both an arbitral institution and a judicial court, with jurisdiction covering all the OHADA states.[35] One of the particularities of CCJA institutional arbitration is the double role of the CCJA: administrative and jurisdictional. The administrative function consists of that of an arbitration centre. In its jurisdictional function it is a Supreme Court which rules on appeals made against arbitration decisions (review, third party proceedings, request for enforcement of foreign decisions, opposition to foreign decisions).[36] The jurisdiction of the Court can be traced to the provisions of Articles 13-18 of the OHADA treaty which grants the CCJA three main areas of jurisdiction.[37] The CCJA performs the judicial functions of interpretation and review as a supranational court, consults and advises on draft uniform acts that the permanent secretariat has submitted for comments and administers and monitors arbitral proceedings within provision of Article 21 of the Treaty.[38]

First, the CCJA is the supra-national court of the OHADA states. It ensures the common interpretation and application of the OHADA Treaty and the Uniform Acts that harmonize African commercial law (including the Uniform Act on Arbitration). As part of its judicial function, it has the power to review the decisions rendered by the High Courts and Court of Appeals of member states in cases involving the application of the OHADA treaty. After enshrining the supranationality and the primacy of OHADA law, those who drafted the Treaty created judicial supranationality within its geographic area.[39]

Second, the Preamble of the OHADA Treaty shows that the signatory states are willing to promote arbitration as a means of resolving contractual disputes. Hence, the Uniform Act on Arbitration Law and the Rules of Arbitration of the CCJA was adopted.[40]

[35]OHADA January 2010 Arbitration in Africa, available online at www.nortonrose.com, accessed on 20 July, 2013

[36] See Norton Rose, above note 20, at. 7. For a detailed examination of OHADA arbitration, see Mbaye Mayatta *Ndiaye, L'arbitration OHADA : réflexions critiques , memorandum prepared under the supervision of Professor Fadlallah Ibrahim, June 2001, BEDA, Bibliothèque de Droit Africain.*

[37]See Articles 13-18 of the Revised OHADA Treaty.

[38]Martha Simon Tumnde, *et. al*, above note 5, at 49

[39] D. Abarchi, La supranationalité de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) , Revue Burkinabé du Droit, No. 37, 2000, OHADATA D-02-02 ; Eugène Assepo Assi, La Cour Commune de Justice et d'Arbitrage de l'OHADA : un troisième degré de juridiction ?, Revue internationale de droit comparé, 4-2005, OHADATA D-06-23. See Norton Rose, above note 20 at.8

[40] By the Council of Ministers of OHADA, at a meeting in Ouagadougou (Burkina Faso) on 11 March 1999. Nanette PILKINGTON and SØbastien THOUVENOT "the Innovation of OHADA in the Field of Arbitration" , *La Semaine Juridique n* 44 of 28 October 2004, Supplement no 5, at 28 . See also Alhousseini Mouloul, above note 16 at 43-44.

According to Beauchard and Vital Kodo, "the CCJA also acts as an arbitration forum but there is a difficulty, in distinguishing between the CCJA as an arbitration tribunal and an *ad hoc* arbitration body subject to the uniform act dealing with arbitration. As an institutional arbitration tribunal, the CCJA plays the occasional role as an arbitration center. [41]The CCJA conducts, controls the procedure to be conducted before the arbitral tribunal, and administers the arbitration procedure in accordance with the treaty and the Rules of Arbitration. As an *ad hoc* arbitral body, the CCJA is governed by the Uniform Act on Arbitration Law, however, when the parties are allowed to derogate from these provisions, they are allowed to determine the proceedings.[42]

However, CCJA arbitration must be specifically agreed on between the parties, with the consequence that the proceedings are subject not to the uniform act on arbitration but to CCJA rules; in addition, the parties must use the CCJA to administer the arbitration proceedings. CCJA arbitration, wherever the seat of the arbitration proceedings is located, is institutional arbitration."[43] The CCJA also plays a role in arbitrations governed by the CCJA Arbitration Rules subject to the provision of Article 21 which provide that, "in applying a arbitration clause or an out of court settlement, any party to a contract may, either because it has its domicile or its usual residence in one of the Member States, or if the contract is enforced or to be enforced in its entirety or partially on the territory of one or several Member States, refer a contract litigation to the arbitration procedure provided in this section. The CCJA does not itself settle such disagreements. It names and confirms the arbitrators, is informed of the progress of the proceedings, and examines decisions in accordance with Article 24".[44] The CCJA does not act as an arbitral tribunal *per se* and does not settle disputes itself. The CCJA's decisions are administrative (in its arbitral capacity). It is not required to provide reasons for its decisions and they cannot be challenged by the parties.[45] Only contractual disputes with a sufficient link to one or various OHADA states can be referred to the CCJA.[46]

[41] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above note 19 at 12

[42]Alhousseini Mouloul, above note 15 at 43-44. Joseph ISSA-SAYEGH, Jacqueline LOHOUES-OBLE, OHADA *Harmonisation du droit des affaires*, Ed. BRUYLANT JURISCOPE, 2002, no 492, at 198-199

[43] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above note 19

[44] Title IV, Arbitration, Article 21 of the Revised Treaty on the Harmonisation of Business Law in Africa, adopted on the 17 of October, 2008 in Quebec, Canada. Article 24 provides that, "before signing a partial or final award, the arbitrator shall submit the proposed decision to the Common Court of Justice and Arbitration, which may suggest any formal amendments to such a decision".

[45]Reference Arbitrating Across the Regions Norton Rose Group, at 15, Available online at www.nortonrosefulbright.com/files/arbitration-reference-26054.pdf accessed 23 July, 2013

[46] *Ibid.*,

3.2 Contentious and Advisory Jurisdiction of the CCJA

As a supranational court, it has both contentious and advisory jurisdiction. At the contentious level, the CCJA is the court of cassation for all the disputes related to the uniform law. National courts are familiar, at first instance and on appeal, with disputes relating to the application of the Uniform Acts. By way of appeal, the court shall rule on the decisions pronounced by the appellate courts with the exception of decisions applying criminal sanctions.[47] It is seized either directly by one of the parties to the proceeding or on referral of the national court.[48] The seizing of the court suspends all judicial proceedings before a national court with the exception of the enforcement procedures on penal sanction. The CCJA may also be seized by the government of a State Party or by the Council of Ministers of OHADA. This in summary means that, on jurisdictional matters, the CCJA gives its opinion on decisions taken on appeal in Member States on any affair bordering on the application of Uniform Rules and Regulations (except decisions involving penal sanctions). This is because the CCJA has equaljurisdiction to recall and give a ruling when a dispute is brought to its attention. Its decisions are binding on the entire territory of the Member State.[49]

Article 14(1) of the revised treaty provides that, "the CCJA is responsible for the uniform interpretation and uniform application of the Treaty, of the regulations promulgated to further the Treaty's implementation, of the Uniform Acts, and of other actions". That is the CCJA ensures the interpretation and application of the treaty and the regulations taken for its implementation, the uniform acts and the decisions". The Article 14 specifically provides that: "the CCJA will rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts. The Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court, as herein before mentioned, is recognised by the national courts hearing a case or litigation regarding the implementation of Uniform Acts [50] is settled in the first instance and on appeal within the courts and tribunals of the Contracting States."[51]

By virtue of Article 20 of the OHADA treaty, the judgments of the CCJA are final and conclusive and their execution and enforcement shall be ensured by the Member States on their respective territories. In no case may a decision contrary to a judgment of the CCJA be lawfully executed in a territory of a Member State. Therefore the decisions of CCJA have the

[47]Article 14(3) of the Revised treaty

[48]Article 15 of the Revised treaty

[49] West African Power Sector Regional Regulation Project Diagnostic Report on the Institutional and Regulatory of the ECOWAS Regional Electricity Regulatory Authority, July 2008 at 15-16 Available online at www.erera.arrec.org/ExplainerDCTemplateSite/.../DownloadFile.aspx?...accessed, 19 July, 2013

[50]Council of Ministers of OHADA, meeting in Ouagadougou (Burkina Faso) on 11 March, 1999 adopted the Uniform Act on Arbitration Law and the Rules of Arbitration of the CCJA.

[51]Article 14(1) of the Revised OHADA Treaty of October, 2008

flavour and authority of a final judgement of an international judiciary capable of immediate enforceability in each Member State.[52] The CCJA therefore has the final and ultimate power as far as interpretation and application of the Uniform Acts are concerned, with the exception of judgements applying criminal sanctions of penalties which are governed by national laws of member states.[53] Though once a judgement is delivered, it is *res judicata* and no counter ruling on the matter may be executed in the territory of a contracting state.[54] This means that the domestic authorities tasked with enforcement cannot go beyond the verification of the authenticity of the instrument presented for enforcement.[55] It is observed that since the CCJA decision is final, there is loss of judicial sovereignty by the member states. Undeniably the Supreme Courts of the member states are technically bypassed in OHADA matters when parties leapfrog from the Courts of Appeal to the CCJA. Indeed the national supreme courts have not taken this phenomenon kindly as evidence have it that some OHADA cases are taken to the national supreme courts and neither these courts or the parties to the litigation are systematically referring such cases to the CCJA.[56]

Regarding the modality of the seizing of the CCJA, an author wrote that, "it is through the preliminary ruling mechanism that national courts should seize the court".[57] The CCJA has jurisdiction of final appeal with regard to all matters of business law falling within OHADA's scope of application except for criminal penalties, for which the national courts retain exclusive jurisdiction. This jurisdiction can be exercised only once the regular appeal proceedings have been exhausted before the national or domestic courts. An appeal to the CCJA can be made in three different situations: The parties can directly file an appeal before the CCJA against a decision of a domestic court once the regular appeal proceedings available in the domestic legal order have been exhausted. The appeal must be lodged within two months of service of the challenged decision. If the CCJA overrules the decision of the national court, the case is remanded for de novo review(*evocation a de novo*). The parties can apply to the CCJA to annul a decision of a domestic court that they suspect fell within the exclusive jurisdiction of the CCJA. If the CCJA decides that the domestic court lacked jurisdiction, its decision will be annulled by the CCJA. The supreme court of a Member State can stay the proceedings and refer the case to the CCJA for a decision on subject-matter jurisdiction.[58] If the CCJA finds that it has no

[52]In each State party the enforcement seal is affixed to the judgments of the CCJA, after checking the authenticity of the title, by an authority designated by the state government concerned. However, extraordinary remedies may be exercised against the judgments of the CCJA; it concerns the third-opposition, the request for interpretation of the ruling or the request for review of the ruling.

[53]Martha Simon Tumnde, *et. al*, above, note 5, at 49

[54] *Ibid*

[55] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above note 19 at 12

[56]*Ibid*, at 50. See also Revised OHADA Treaty, Articles, 14, 15 and 18 relating to the authority of the CCJA.

[57]Tristan Gervais de LAFOND., "The Treaty on the Harmonization of Business Law in Africa", G. P. 20, and 21/09/1995, at. 2

[58] Articles 14, 18 and 15 of the Revised OHADA Treaty

jurisdiction to hear the case, the proceedings will resume before the domestic court but if the CCJA quashes the decision of the national court, it performs through a process known as *evocation a de novo* review over the case meaning that the case will have to start all over under the CCJA jurisdiction and issues raised will be considered afresh on it merit.[59]

The CCJA, like many other regional judicial institutions, also provides advisory opinions upon request. The CCJA can be seized for advisory opinions in three situations. It reviews draft Uniform Acts before the Council of Ministers votes on them. Any Member State or the Council of Ministers may request it to review the interpretation or an application of the Treaty, regulations for applying the treaty or the Uniform Acts. Again, a lower national court hearing a case regarding the application of OHADA law or its interpretation can request an advisory opinion to assist it.[60] Article 14(2) of the Treaty establishes the advisory role of the court.

4. Challenges for the CCJA

The CCJA has been described as unique in the world and no other court, not even the European Union Court of Justice has as many powers and prerogatives as the CCJA.[61] On the African continent, such powers have been theoretical in nature and have not always translated into reality or practical application. In its judicial function the CCJA is unique in this regard as well, while its arbitral function has been less successful.[62] There are however significant problems that may undermine the exercise of its powers.

First, the CCJA is said to be severely understaffed despite a constant increase in its caseload[63]. As a result, the Court has to deal with a significant backlog of cases hence the CCJA, the Council of Ministers at its meeting in June 2011 tasked the Permanent Secretariat with finding external financial assistance and consulting with the National Supreme Courts to find a solution to the backlog problem.[64] OHADA institutions still face considerable budgetary constraints that hamper their ability to fulfill their function to apply the treaty's uniform laws.

[59] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above note 19 at 13-14

[60] African International Courts and Tribunals (AICT), "OHADA CCJA: Court of Justice of the Organization for the Harmonization of African Business Law", Available online at http://www.aict-ctia.org/courts_subreg/ohada/ohada_home.html, accessed 20 July, 2013

[61] Project of International Courts and Tribunals, "The Common Court of Justice and Arbitration (CCJA) of the Organization for the Harmonization of Business Law in Africa (OHADA)", available online at, http://www.pict-pcti.org/courts/OHADA.htm, accessed 27 July, 2013

[62] *Ibid*

[63] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above, note 19, at 19

[64] *Ibid.*, See Minutes of the meeting of the Council of Ministers of 16–17 June, 2011, available online at http://web.ohada.org/actualite-cm/fr/cmfj/actualite/3574,compte-rendu-de-la-reunion-du-conseil-des-ministres-de-lohada-juin-2011.html. accessed 22 July, 2013

The total budget of OHADA institutions for the year 2011 for example amounted to 4,257,612,181 CFA francs (about US$9.3 million), a budget that appears insufficient to fully support the existing bodies including the CCJA across the board.[65] The increase in caseload should also lead to a reconsideration of the budgetary procedures within OHADA, taken in the aggregate, the fact that the court has rendered 500 to 600 judgments in the 12 years that the uniform acts have been in existence, also suffers from backlog issues points to some significant organizational flaws and performance problems that should be addressed by means other than simply requesting external assistance.[66]

Second, making the CCJA the *Cour de Cassation* instead of the Member States' Supreme Courts on all OHADA issues has led to difficulties in administrative manageability and made backlogs an unavoidable problem. This choicedid remove the final interpretation of OHADA law from the national judiciaries, which are often accused of capture by political forces and extractive interests, and of solving conflicts of interpretation of OHADA provisions even before states review the matters. There is however a risk of causing jurisdictional conflict with domestic supreme courts which hampers the CCJA's manageability, and given the scarcity of resources becomes a critical problem.[67]

Third, the Rules of Procedure contain no provision for fast-tracking or disposing off a case by a nonreasoned decision if it were to deem that the appeal, which is limited to a matter of legal interpretation, did not raise interpretative issues requiring a CCJA decision. Instead, Article 26 of the Rules of Procedure requires that as soon as an appeal is lodged, the CCJA President must appoint a judge to follow up the case management and report to the court. This is a provision under the rules of procedure that will encourage a build-up of large backlogs of cases instead of quick dispensation of such cases.[68]

Fourth, according to Beauchard and Vital Kodo, another problem regarding the success of the CCJA may lie in the geographical origins of the appeals before the court, since an overwhelming number of appeals come from Ivory Coast, the seat of the CCJA. For example, from its inception in 1998 to August 2003 the CCJA in its supranational guise received 162 cases, with 57 from one year alone. In that time, the Court issued 44 decisions and seven opinions. Of the 162 cases, 116 were from the Ivory Coast.[69] This can be explained in part by the consideration that Côte d'Ivoire is the most important economy among the member countries, with the likely corollary that business activity is a more important source of litigation there than in other Member States. However, this statistics also suggests that many other potential litigants may be reluctant to pursue their claims due to the perceived cost of removing

[65] *Ibid*

[66] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above, note 19, at 20

[67] *Ibid*

[68] Ibid

[69] Project of International Courts and Tribunals, above, note. 59

the final appeal to the CCJA in Abidjan.[70] Beauchard and Vital Kodo further criticize that the procedure before the CCJA is essentially a written and an oral hearing is very rare.[71] Appealing before the CCJA requires residence in Abidjan for the duration of the proceedings, including possibly for the attorney representing a non-Ivorian party and/or a ***pro hac vice***[72] representation by an Ivorian attorney.[73] Apart from the problems linked to its location the Member States' national courts are at times reluctant to accept the CCJA's supranational jurisdiction.

Lastly, the reluctance of attorneys to bring cases to the CCJA from their home jurisdictions, is also due in part to the inadequate legal understanding of the workings of the OHADA treaty, the CCJA and the Uniform Act. Therefore there is the need to educate attorneys and others in the legal community of the workings of the CCJA, the Uniform Acts and the Treaty. In dealing with this challenge, the OHADA has also created a Regional Training Center for Legal Officers (ERSUMA).[74] ERSUMA trains judges and other legal officers, including lawyers, notaries and bailiffs, as well as academics and businessmen in OHADA law. With this training, the use of the CCJA should be expanded as members of the legal communities outside of the Ivory Coast become more familiar with the CCJA and its jurisprudence and this has become a significance of the CCJA in developing awareness about the OHADA law.[75]

[70] See Claire Moore-Dickerson, "Harmonizing Business Laws in Africa, OHADA Calls the Tune," Columbia Journal of Transnational Law 44, no. 1 (2005): 57–58

[71] See Article 34 of the regulation organizing the proceedings before the CCJA, available online at http://www.institut-idef.org/-CHAPITRE-III-DE-LA-PROCEDURE-ORALE-.html. Accessed 22 July, 2013

[72] *Latin* for "this time only," the phrase refers to the application of an out-of-state lawyer to appear in court for a particular trial, even though he/she is not licensed to practice in the state where the trial is being held. The application is usually granted, but sometimes the court requires association with a local attorney. (See the Free Dictionary, Available online at http://legal-dictionary.thefreedictionary.com/Pro+Hac+Vice, accessed 23 July, 2013). It is a *latin* phrase "for this occasion" or "for this event" (literally, "for this turn"), is a legal term usually referring to a lawyer who has not been admitted to practice in a certain jurisdiction but has been allowed to participate in a particular case in that jurisdiction.

[73] Article 23 Section 1 Rules of Procedure provides that representation by an attorney is mandatory. Article 28(3) provides that the parties must elect domicile where the court has its seat.

[74] Article 41, Revised Treaty on the Harmonisation of Business Law in Africa, adopted on the 17 October, 2008 in Quebec, Canada. Available online at http://www.ohada.com/traite-revise.html accessed 23 July, 2013

[75] *Renaud Beauchard and Mahutodji Jimmy Vital Kodo*, above, note 19, at 20

5. The Role of the CCJA in Africa

5.1 The Significance of the CCJA

Despite the challenges encountered by the CCJA in its almost two decades of existence, the court has also made some significant progress in advancing the concept of regional integration in Africa. The Court have assisted in the development of uniform business law among the contracting state parties through OHADA treaty; it has served as an alternative avenue for the settlement of commercial disputes apart from the national court and serves as the supreme court in all cases involving the interpretation and application of OHADA treaty among the contracting state parties.

The interpretation of the OHADA treaty and Uniform Act of Arbitration have led to the development of uniform business in law in OHADA member states. The decisions of the court will help to encourage uniformity in the law applicable in member states as regards private business investment and contract law. This is exemplified in the court's advisory opinion No. 002/99/EP of October 13, 1999, where the CCJA confirmed the principle of direct applicability and the repealing effect of the Treaty and Unified acts over domestic law by asserting that *Article 16 of the Malian Bill derogates from article 39 of the Unified Act because it enacts new, compulsory and restrictive requirements for the debtor to benefit from the grace period and is therefore contrary and inconsistent with article 39* of Unified Act on Simplified Recovery Procedures and Enforcement Measures. The court has been able to assert the supremacy of OHADA law over national law in order to ensure uniformity in its application in member states.

The CCJA has afforded and opportunity of an alternative arbitration avenue for settlement of Commercial disputes apart from relying on national courts of justice. This is because the parties to a contract have the opportunity to choose to submit their dispute to the CCJA provided at least one of them is domiciled in an OHADA member state, or the relevant contract provides for its partial or entire execution within one or several OHADA Member State(s). In this case, the seat of the arbitration must not necessarily be located within an OHADA member state. This reinstates confidence among business men and investors as to legal security and certainty of their transactions in member states of OHADA. As a follow up to the above advantage, when acting in it arbitral capacity, the CCJA will for instance be in charge of appointing or revoking arbitrators and examining arbitration awards, and of verifying the compliance of the arbitration with the OHADA Arbitration Regulation. Arbitral awards rendered accordingly are

enforceable in any OHADA member state subject to the granting of an execution judgement by the CCJA which has sole competence in this matter.[76]

One of the greatest successes of the CCJA, is that it serves as the Supreme Court in supranational capacity and as the court of final arbiter or last resort for the CCJA members states after which no further appeal will lie on the interpretation and application of OHADA business law. In describing the function of the CCJA, Article 14(1) and (2) of the OHADA Treaty states: «the Common Court of Justice and Arbitration will rule, in the Contracting States, on the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts"...., to realize such a function: the Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court, as herein before mentioned, is recognised to the national courts" "when hearing a case in first or second instance where the application of OHADA law is concerned.[77] With reference to the authority of the CCJA jurisprudence; Article 20 states: the judgments of the Common Court of Justice and Arbitration are final and conclusive. In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State. "The most significant characteristic of the CCJA can be found in the last paragraph of Article 14 which state, "While sitting as a court of final appeal, the Court can hear and decide points of fact".[78] As stated earlier, the CCJA has been described "as unique in the world and that no other court, not even the European Court of Justice has as many powers and prerogatives as the CCJA".[79] The CCJA is a supranational judicial body with jurisdiction over the Courts of Appeal in member States, its decisions overriding even those of national Supreme Courts. It is, moreover, the final authority on the interpretation and enforcement of the OHADA Treaty. The CCJA therefore plays a vital role in the uniform application of OHADA laws.[80]

[76]Norton Rose Fulbright, "The Democratic Republic of Congo joins OHADA July," http://www.nortonrosefulbright.com/knowledge/publications/69441/the-democratic-republic-of-congo-joins-ohada, accessed 23 July, 2013

[77] Mancuso, Salvatore, "The New African Law: Beyond the Difference Between Common Law and Civil Law," *Annual Survey of International & Comparative Law*: Vol. 14: Iss. 1, Article 4. 2008, at 50-51. Available online at:, http://digitalcommons.law.ggu.edu/annlsurvey/vol14/iss1/4 accessed 26 July, 2013

[78] Ibid.

[79]Project of International Courts and Tribunals, above, note 62

[80]Sherif El Saadani, "Communication : OHADA, a Continent-wide Perspective", at 487, available online at http://www.unidroit.org/english/publications/review/articles/2008-1&2/485-488.pdf, accessed 26 July, 2013

5.2 Innovative Modes of Appeal Not Common to Other Regional Judiciaries

The CCJA has an enviable three avenues of appeal not common with other sub regional economic court. An appeal to the CCJA can be made in three different situations: first, the parties can directly file an appeal before the CCJA against a decision of a domestic court once the regular appeal proceedings available in the domestic legal order have been exhausted.[81] Secondly, the parties can also apply to the CCJA to annul a decision of a domestic court that they suspect fell within the exclusive jurisdiction of the CCJA.[82] If the CCJA decides that the domestic court lacked jurisdiction, its decision will be annulled by the CCJA. Thirdly, the supreme court of a Member State can stay the proceedings and refer the case to the CCJA for a decision on subject-matter jurisdiction.[83] If the CCJA finds that it has no jurisdiction to hear the case, the proceedings will resume before the domestic court. These modes of appeal are innovative and truly rare.[84]

With the adoption of OHADA treaty and the creation of the CCJA, legal professionals have propagated OHADA norms to the applicable African society essentially through the intermediary of the legal profession. The mechanisms through which lawyers have brought the knowledge and changes of OHADA law to the society have to do with the regular application of law namely through consulting clients in their contractual relations and through preparing legal briefs based on OHADA law for presentation on behalf of the clients at the CCJA. Finally both of these have led to a general formalisation of business relations that entails an increase in legal certainty and business trust.[85]

The creation of the CCJA has led to the stability of the judicial system among the OHADA member states because the courts of first instance and courts of appeal have primary responsibility in application of OHADA treaty while the CCJA has the supreme responsibility of supervising the interpretation and application of community laws uniform acts, on which the national supreme courts cannot rule. Moreover, the possible over ruling or upturning of the judgements handed down by national Courts of Appeal by the CCJA will discourage these national courts of member states from derogating in applying treaty provisions and its Uniform

[81] Article 14 of the Revised OHADA Treaty

[82] Article 18 of the Revised OHADA Treaty

[83] Article 15 of the Revised OHADA Treaty

[84] *Renaud Beauchard* and *Mahutodji Jimmy Vital Kodo*, above, note 19, at 11-12

[85] Gustav Kalm , Building Legal Certainty Through International Law: OHADA Law in Cameroon, The Roberta Buffett Center for International and Comparative Studies Northwestern University Working Paper Series No. 11-005 October 2011at. 18. Available online at http://www.cics.northwestern.edu/documents/workingpapers/Buffett_11-005_Kalm.pdf, accessed 24 July, 2013

Act. The OHADA therefore ensures a certain reliability of the judicial system in member states through the activism of the Judges of CCJA.[86]

Apart from the general assertion that the CCJA has helped in the development of Uniform Business Law in Member States, Akin Akinbote has noted a positive impact on arbitration among OHADA and ECOWAS[87] States, which also fills the gap created by the absence of an ECOWAS Arbitration Tribunal. He suggested that the harmonisation of the functions of these judicial institutions is achievable and should be part of harmonisation process of Business Laws in ECOWAS States. Co-operation between the various institutions of the two organisations is essential if any meaningful achievement is to be made in this regard. Even where the functions overlap, it should not lead to usurpation of the functions of one by the other.[88]

6. Conclusion

Since its adoption the OHADA treaty has worked to realise the unification of business law in the member states and removed fear of uncertainties from business investors. Also the several Uniform Acts which have been adopted and entered into force, have set new rules of law for economic activities among OHADA states and have also formed what is now part of the legal corpus of each member state. The CCJA is very important and innovative mechanism which lies at the heart of the OHADA system. The supranational nature of the court has made it to play an invaluable role in realising the aims and objectives of the founding fathers of the organisation. The adoption of modern, known and unified laws, as well as the creation of a common supreme court, has certainly made it possible to considerably improve the legal and judicial environment for business within the OHADA zone in favour of international investors. National persons before the courts are also benefiting considerably from this improvement.[89] Since its establishment, the court has passed through several challenges but these challenges

[86]See Norton Rose, above note 20, at.8.The reliability of the judicial system under the CCJA can for example be illustrates by the protection given by OHADA to international investors. In a civil case decided by the Court of Appeal in Ndjamena, the national creditors had carried out debt seizures on the bank account of a foreign investor. These accounts had previously been secured in favour of international financial institutions. The seizures therefore threatened the financial equilibrium of a major project. By application of the provisions of the uniform act on securities law, the Court of Appeal upturning the ruling by the Court of First Instance ordered the reversal of these seizures by virtue of the principle that duly registered pledge contracts are opposable vis-à-vis third parties The court hence applied the uniform act on securities in favour of international investors and financiers over the uniform act on enforcement measures, the application of which would have benefited the nationals. (see the *Civil Decision of the Court of Appeal of Ndjamena, No. 001/05 of 28 January 2005*).

[87] Economic Community of West African States currently with 15 Member States available at http://www.ecowas.int/?lang=en, accessed 2 January, 2014.

[88]Akin Akinbote, "OHADA treaty and law by Anglophone states", available online at, http://www.nigerianlawguru.com/articles/international%20law/OHADA%20TREATY%20AND%20LAW%20BY%20ANGLOPHONE%20STATES.pdf, accessed 27 July, 2013

[89]See Norton Rose, above note 21, at.10

have been surmounted by the successes recorded as a result of foresight and wisdom of the treaty drafters and the vibrant activities of the judges appointed to adjudicate over disputes instituted in this court over the years. To sum it up, out of the four institutions established by the OHADA treaty, the CCJA is the one that best encapsulates the organisations ambitious goals by virtues of the scope and specificity of its jurisdictional powers. It occupies a strategic position in the overall process of legal and judicial reforms for business development among the Member States.[90]

[90]Rudolf V. Van Puymbroeck, (ed), *Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century*, Washington DC: World Bank, 2001, at. 419