



Can OHADA Increase Legal Certainty in Africa?

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Legal Vice Presidency
The World Bank

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Acronyms

AUA	Acte Uniforme relatif au Droit de l'Arbitrage
AUCTMR	Acte Uniforme relatif aux Contrats de Transport de Marchandises par Route
AUDCG	Acte Uniforme relatif au Droit Commercial Général
AUHCE	Acte Uniforme portant Organisation et Harmonisation des Comptabilités des Entreprises
AUPCAP	Acte Uniforme portant Organisation des Procédures Collectives d'Apurement du Passif
AUPSRVE	Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution
AUS	Acte Uniforme portant Organisation des Sûretés
AUSCGIE	Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique
BCEAO	Banque Centrale des Etats d'Afrique de l'Ouest
BOAD	Banque Ouest Africaine de Développement
CCJA	Cour Commune de Justice et d'Arbitrage
CEMAC	Communauté Economique et Monétaire de l'Afrique Centrale
CFA	Communauté Financière Africaine
CIMA	Conférence Internationale des Marchés d'Assurances
CIPRES	Conférence Interafricaine de la Prévoyance Sociale
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
ERSUMA	Ecole Régionale Supérieure de la Magistrature
IDEF	Institut de Droit d'Expression et d'Inspiration Française
IFRS	International Financial Reporting Standards
OAPI	Organisation Africaine de la Propriété Intellectuelle
OCAM	Organisation Commune Africaine et Malgache
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
RCCM	Registre du Commerce et du Crédit Mobilier
SA	Société Anonyme
SARL	Société à Responsabilité Anonyme
UEAC	Union Economique en Afrique Centrale
UEMOA	Union Economique Monétaire Ouest Africaine
UMAC	Union Monétaire en Afrique Centrale
UNIDA	Association pour l'Unification du Droit en Afrique
UNIDROIT	The International Institute for the Unification of Private Law

Foreword

The World Bank Group, along with other international institutions, has sought to support the development of the Organization for the Harmonization of Business Law in Africa (OHADA) since its inception in 1993. This continuing institutional interest is testimony to the view that the OHADA Treaty, whose members now number 16 essentially Francophone countries in Africa, offers the means by which developing countries may adopt common and more efficient means of governing trade and commerce as an essential ingredient of economic growth.

In early 2011, after a seminar speech given in Washington, DC about OHADA, Adjunct Professor Jimmy Kodo agreed to prepare a paper to explain the treaty and its operation in more detail. This paper is the product of that idea, bolstered by further research and drafting work by attorney Renaud Beauchard.

While much has been written about OHADA in French, there is still a paucity of English language material available to explain what the treaty has achieved and the challenges treaty Member States still face. This paper is aimed at making up that knowledge gap in English language literature about an important instrument for the development of international standards in business law that is the OHADA Treaty.

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assess legal preparedness for the influenza pandemic across Europe (PHLaw Flu Project), funded by the European Union.

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Abstract

This paper describes the origins, structure, and practical impact of the Organization for the Harmonization of Business Law in Africa (OHADA). It analyzes the institutional framework created via the OHADA Treaty and the legal, jurisprudential, and functional challenges that OHADA Member States are still grappling with. Details of the nine substantive laws that have so far been ratified as uniform acts by means of the treaty have also been provided. The authors conclude that in making OHADA law effective, Member States face continuing and substantial resource deficits, institutional deficiencies, language ambiguities, and intransigent official attitudes toward the need for appropriate mechanisms for the pursuance and enforcement of OHADA laws and processes.

1. Introduction

Few legal instruments have assigned themselves more ambitious objectives than the Organization for the Harmonization of Business Law in Africa. Known as OHADA, after the organization's name in French,¹ the treaty's preamble proclaims the aim of "making progress toward African unity and creating a climate of trust in the economic systems of the contracting States with a view to creating a new center of development in Africa." OHADA's institutions have been in place for 16 years and its main uniform acts in force for 13; no longer an experimental development, there is now enough history for an assessment to be made. Since the drafters assigned specific objectives to the OHADA Treaty, its achievements can and should be measured against the standards defined within the treaty itself.

It should be stated at the outset, however, that the objective of this paper is not to demonstrate that OHADA has proved to be a remedy for all the region's economic ills and transformed the member countries into successful economies in little over a decade. OHADA Member States are all lower-tier countries crippled by structural problems and most of them have experienced numerous calamities since the creation of OHADA, including humanitarian crises, military coups, and the collapse of democratic governments. Clearly, it would be unrealistic to expect OHADA to be the answer to these sorts of political and other problems.

Nevertheless, a more measured assessment of OHADA and its impact can be made at this juncture in its history. And in order to accurately evaluate this or any other body of regional law, the first step is to establish precise limits to the investigation. With regard to OHADA, rather

¹ In French, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*.

than employ unattainable objectives, particularly given the region's numerous other difficulties, it is perhaps more useful to search for intermediary principles, that is, objectives that are somewhere in between end goals and reality.

1.1. Legal Certainty: the Fundamental Standard

The first place to look for such intermediary principles is the OHADA Treaty itself, where “trust” is cited as among the most important end goals. Defined by Marcel Mauss² as the very foundation of all collective action, trust points to and underlines another central concept articulated in the OHADA Treaty: legal certainty. Because legal certainty connotes more than a simple evaluation of a law's formulation but encompasses also the issues of enforcement and observance, we propose to evaluate OHADA against the critically important objective of legal certainty.

The standard needs to be more clearly defined, however, which is not necessarily an easy task. Taking into account that a definition must be comprehensive but not too far-reaching, we will first use an operational *a contrario* definition of what legal certainty is *not*. And here, there is no better example of what legal certainty is not than the situation found in the Member States in pre-OHADA days. At that time, outdated business laws existed on the books, but without implementing regulation and often in contradiction to existing or prior nonabrogated norms. Having no equivalent of specialized commercial courts (such as those in France) and with negligible business litigation, business law was largely an abstraction in those countries. What is more, judges had no codes, legal reports, or periodicals and they often ignored the issue of which laws applied to which economic activity.³ Without effective legal innovations, such as limited liability companies or secured transactions, which were so essential to the successful advance of industrial revolutions elsewhere in the world, OHADA countries were doomed to remain at the margin of economic development. These were among the ills OHADA hoped to redress.

Is it possible to propose a formulation of the legal certainty standard relative to OHADA's ambitions? We should keep in mind that OHADA law unifies business laws, the main objective of which is the protection of modern property rights⁴ and contract enforcement—and here we find a useful limit to the definition of legal certainty that also limits the scope of our investigation. The protection of property rights and contract enforcement requires, to paraphrase Oliver Wendell Holmes, that “People [...] know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves[,]” which for Holmes

² Marcel Mauss was a French sociologist and anthropologist credited with having had a profound influence on the founder of structural anthropology, Claude Levi-Strauss.

³ See, for example, the dismal description made by Xavier Forneris, “Harmonizing Commercial Law in Africa,” *Juris Périodique* 46 (2001): 77, 81, available at <http://www.ohada.com/doctrine/titre/199/Harmonising-commercial-law-in-Africa-the-OHADA.html>.

⁴ We borrow from Francis Fukuyama the definition of modern property rights, understood as “rights held by individuals, who are free to buy and sell their property without restrictions imposed by kin groups, religious authorities or the State.” Francis Fukuyama, *The Origins of Political Order* (New York: Farrar, Strauss and Giroux, 2011), 248.

meant “the incidence of the public force through the instrumentality of the courts.”⁵ And that knowledge presupposes “that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances which a given action may entail.”

For us this means that with respect to harmonized business laws, 1) laws and decisions must be public and publicly available; 2) laws and decisions must be definite and clear in their applicability; 3) decisions of courts must be enforced and, to the greatest extent possible, reasoned, so as to provide relevant information on the compliance of a conduct with law; and 4) persons or officials associated with the application and enforcement of those laws must be easily identifiable and properly trained and equipped to accomplish their duty.

Having defined our standard, we begin our assessment of OHADA. In doing so, we will distinguish between the *supply* of uniform acts deriving from OHADA institutions, which, in this regard, have delivered measurably good results, and the many challenges facing the respective OHADA actors in the *application* of the acts and other treaty provisions—and in their implementation within the legal orders of the respective Member States. First, however, it would be useful to provide a description of what OHADA is and does. To that end, the first half of this paper presents a brief history of OHADA, a description of its institutions, and a look at its situation with regard to other supranational, regulatory organizations.

2. OHADA: Background and Content

On October 17, 1993, in Port Louis, Mauritius, 14 African heads of state signed a treaty creating the “Organization for the Harmonization of Business Law in Africa.”⁶ The treaty first came into force on September 18, 1995, and now numbers 16 Member States,⁷ soon to be joined by another.⁸ Designed to harmonize business laws to improve legal certainty with an ultimate view to increasing trade and investments, OHADA constitutes a unique experiment involving the legal integration of states participating in different economic, trade, and monetary unions.⁹

A fully fledged international organization, OHADA has produced a series of standardized pieces of legislation on business law, known as “uniform acts,” which are directly applicable in the Member States and preempt any relevant domestic legislation. Thus far, nine uniform acts are in

⁵ Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 10 (1897): 457.

⁶ For an exhaustive presentation in English, see Boris Martor and others, *Business Law in Africa: OHADA and the Harmonization Process* (London: GMB Publishing, 2007).

⁷ In the order of ratification, the OHADA Member States are: Guinea-Bissau (01/15/1994), Senegal (06/14/1994), Central African Republic (01/13/1995), Mali (02/07/1995), Comoros (02/20/1995), Burkina Faso (03/06/1995), Benin (03/08/1995), Niger (06/05/1995), Côte d’Ivoire (09/29/1995), Cameroon (10/20/1995), Togo (10/27/1995), Chad (04/13/1996), Congo (05/28/1997), Gabon (02/02/1998), Equatorial Guinea (04/16/1999), and Guinea (05/05/2000). See the table in Joseph Issa-Sayegh, Paul-Gerard Pourgoue, and J. Michel Sawadogo, *OHADA: Traité et Actes Uniformes, Commentés et Annotés* (Poitiers, France: Juriscope, 2002).

⁸ The Democratic Republic of Congo has officially announced its decision to become an OHADA member and is currently moving forward on the accession process.

⁹ ECOWAS, UEMOA, and CEMAC (outlined in the paper below).

force.¹⁰ Initially received with a combination of wonder that states with such poor governance records could succeed in reaching an agreement of this kind, and caution because of the treaty's strong civil law inclination,¹¹ OHADA's institutions and laws have gradually taken root and matured.

2.1. Historical Perspective

A long-standing idea, OHADA's foundations were first laid during a meeting of finance ministers of the members of the franc CFA¹² area held in Ouagadougou, Burkina Faso, in April 1991. A group of experts, led by Senegalese Justice Keba Mbaye,¹³ was appointed to conduct a feasibility study on a form of legal collaboration designed to promote economic integration and attract investments.¹⁴ Identifying low investment as a major obstacle to economic growth, Mr. 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. Summit members adopted the notion and appointed a steering committee of three experts tasked with drafting an international instrument and identifying the areas of law to be harmonized.

There were several ways integration could be attempted. It could take the shape of a common frame of reference or a model law, which the states could then use as a point of reference, without any obligation.¹⁵ Another, more constraining approach would establish objectives to be pursued and leave substantial latitude to the states at the implementation level.¹⁶ A still deeper form of integration could be attained through unification, that is, by replacing preexisting national laws with uniform laws directly applicable.¹⁷ Unification would thus substitute new legislation for current domestic laws in relevant areas of business.

¹⁰ The uniform acts cover: General Commercial Law, Companies, Secured Transactions, Bankruptcy, Arbitration, Simplified Debt Collection and Enforcement Measures, Accounting, Carriage of Goods by Road, and Cooperative Companies.

¹¹ The OHADA Treaty and the uniform acts came into force around the same time as the legal origins movement, which involved the attempt by economists to establish a correlation between a country's economic development and its legal system. The movement questioned the merits of French civil law relative to common law, with the latter being judged more conducive to economic growth by the tenets of the new doctrine.

¹² 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). Although theoretically separate, the two CFA franc currencies are effectively interchangeable.

¹³ Keba Mbaye died in 2007 after having occupied the offices of Chief of Justice of the Senegalese Supreme Court, Chief Justice of the Senegalese Constitutional Council, and Vice President of the International Court of Justice.

¹⁴ Martin Kirsch, "Historique de l'OHADA," *Revue Penant* 827 (1998): 129; Barry Walsh, *In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa* (Washington, DC: World Bank, 2010), 44.

¹⁵ For example, United States Model Codes or the *Association Capitant and Société de Législation Comparée's* Draft Common Frame of Reference on European Contract Law.

¹⁶ For example, European Commission (EC) Directives.

¹⁷ Comp. E.C. Regulations. For more details, see J. A. Yakubu, "Community Laws in International Business Transactions," in *Unified Business Law for Africa: Common Law Perspectives on OHADA*, ed. Claire Moore-Dickerson (London: GMB Publishing, 2009), 4. Although OHADA in fact unifies business law, the (French) word "harmonisation" was used instead of "unification" consciously and for political reasons.

In the end, OHADA framers chose the path of unification,¹⁸ although the treaty expressed this goal by using the all-encompassing—though perhaps more ambiguous—word “harmonization.” As part of the process, a new set of unified laws or acts were created that preempted all conflicting domestic provisions—and tacitly abrogated them, as will be described in greater detail below. The treaty was opened to all African states, whether or not members of the African Union (AU), the successor to the Organization of African Unity (OAU) mentioned in the treaty.¹⁹ Even non-AU countries are explicitly eligible to join if existing members approve.

Uniform acts are adopted

The first three uniform acts (General Commercial Law, Commercial Companies and Economic Interest Groups, and Secured Transactions) were adopted on April 17, 1997, and entered into force on January 1, 1998. Amendments to the acts on Secured Transactions and General Commercial Law were adopted on December 15, 2010, and entered into force on May 15, 2011. At that same meeting, a draft dealing with employment law was submitted for adoption but did not manage to secure a unanimous vote of the states present.

A second set of uniform acts (Simplified Debt Collection Procedures and Enforcement Measures, Bankruptcy) was adopted on April 10, 1998, and entered into force on January 1, 1999. The Uniform Act on Arbitration was adopted on March 11, 1999, and entered into force on June 11, 1999; Accounting on March 23, 2000, and entered into force in phases on January 1, 2001 and January 1, 2002; Carriage of Goods by Road on March 22, 2003, and entered into force on January 1, 2004; and Cooperative Companies on December 15, 2010, and entered into force on May 15, 2011.

At its meeting in Bangui, Central African Republic, in March 2001, the Council of Ministers of OHADA decided that the harmonization program would also embrace “[...] competition law, banking law, intellectual property, the law relating to mutual and cooperative companies, the law of civil partnerships, contract law, evidence.”²⁰ Thus far, two preliminary drafts have been prepared. The International Institute for the Unification of Private Law (UNIDROIT), appointed by the Permanent Secretariat, issued an initial draft on contract law that was submitted to the secretariat in September 2005;²¹ however, that draft was never adopted. Similarly, a preliminary draft on consumer protection was submitted by the secretariat to the Member States on October 27, 2003, but no further action was taken.²²

¹⁸ See Keba Mbaye, “L’Histoire et les Objectifs de l’OHADA,” *Les Petites Affiches* 205 (2004): 6.

¹⁹ Referring to the OHADA Treaty, hereinafter referred to in the footnotes as “Treaty,” art. 53.

²⁰ See Marcel Fontaine, *OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft* (Rome: UNIDROIT, 2004), 4, available at <http://www.ohada.com/bibliographie/titre/940/The-draft-ohada-uniform-act-on-contracts-and-the-UNIDROIT-principles-of-International-commercial-contracts.html>.

²¹ *Ibid.*

²² See Minutes of the meeting of the Council of Ministers of June 16–17, 2011, available at <http://web.ohada.org/actualite-cm/fr/cm/fj/actualite/3574,compte-rendu-de-la-reunion-du-conseil-des-ministres-de-lohada-juin-2011.html>.

2.2. Institutional Framework

OHADA's institutional framework consists of five components: the Council of Ministers (*Conseil des Ministres*), the Permanent Secretariat (*Secrétariat Permanent*), the Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* [CCJA]), and the Regional Training Center for Legal Officers (*Ecole Régionale Supérieure de la Magistrature* [ERSUMA]). 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, 2010.²³

The Council of Ministers (Art. 27(2)–30)

Even with the Conference of Heads of State, the Council of Ministers remains the highest decision-making body among OHADA's institutions and is composed of the ministers of justice and finance of the Member States. The chair rotates among members in alphabetical order every year. The council meets at least once annually; meetings are called by the chair or at the request of at least one-third of the Member States.

The Council of Ministers has administrative, regulatory, and legislative functions. In its administrative and regulatory functions, the Council of Ministers *inter alia*:

- Approves the annual budget of the CCJA and the Permanent Secretariat
- Decides the amount of annual contributions of the Member States
- Elects the members of the CCJA
- Appoints the permanent secretary and the general director of ERSUMA
- Appoints auditors to certify the accounts of OHADA institutions
- Approves the accounts
- Regulates the organization, operation, resources, and services of ERSUMA
- Adopts the rules of procedure of the CCJA
- Adopts any regulation needed to implement the treaty

The Council of Ministers may also request advisory opinions from the CCJA on any issue pertaining to the uniform acts or the interpretation or implementation of the treaty and related regulations. Any decision of the Council of Ministers requires a majority vote by Member States present at the meeting, with each state having one vote. As part of its legislative functions, the Council of Ministers adopts the uniform acts and amendments.

The Permanent Secretariat (Art. 33, 40)

Headed by a permanent secretary, headquartered in Yaoundé, Cameroon, and independent from the Member States, the Permanent Secretariat performs a technical and coordination role. It is

²³ See OHADA Newsletter, <http://www.ohada.com/newsletter.php?newlang=english&news=04032010-848#>.

tasked with the preparation of the meeting agenda of the Council of Ministers and the annual program for the harmonization of business laws. Above all, the Permanent Secretariat prepares draft uniform acts in coordination with the Member States and the CCJA and introduces the drafts at the Council of Ministers' meetings. Once an act or an amended act has been adopted, the Permanent Secretariat is responsible for its publication in the *Journal Officiel*.

The Permanent Secretariat enjoys certain privileges and diplomatic immunities to guarantee its independence from Member States and thereby facilitate its functioning.

The Common Court of Justice and Arbitration (CCJA) (Art. 31–39)

Headquartered in Abidjan, Côte d'Ivoire but able to convene at any place on the territory of the Member States, the CCJA is composed of nine judges elected by the Council of Ministers to a nonrenewable term of seven years. If needed, the Council of Ministers can increase the number of judges elected to the CCJA. Six seats must be filled by judges with senior judicial experience, while the three remaining seats are open to law professors and practicing attorneys. The court is chaired by a chief justice who is assisted by two associate justices, all enjoying terms of 3.5 years. Once elected, the judges' tenures are irrevocable and they enjoy diplomatic status for the duration of their term. Judges are prohibited from engaging in political or administrative functions and must obtain the authorization of the CCJA for any other remunerated activities. The CCJA is assisted by a chief registrar, who is appointed by the chief justice for a once-renewable period of seven years and performs administrative and secretarial functions.

The CCJA fulfills a dual purpose, as it serves both as a forum for international arbitration and as the court of last resort for judgments rendered and arbitral awards issued within Member States. In its judicial attributions, the CCJA is tasked with achieving a uniform judicial interpretation of the treaty, uniform acts, and regulations, and it is consulted by the Member States or the Council of Ministers on questions of interpretation of these three entities or during the process of elaboration or revision of the acts. These opinions have only a persuasive authority, however.

Of greater importance is that the CCJA has jurisdiction of last resort with regard to all matters of business law falling within OHADA's scope of application (with the notable exception of 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 domestic courts, which means that the CCJA supplants the jurisdiction of the domestic supreme courts for matters of interpretation of OHADA.

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.²⁴ The appeal must be lodged within two months of service of the challenged decision. 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.

²⁴ Treaty, art. 14.

- 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.²⁵ 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.²⁶ If the CCJA finds that it has no jurisdiction to hear the case, the proceedings will resume before the domestic court.

Any lawyer entitled to appear before the courts of the Member States is authorized to appear before the CCJA. However, if the lawyer is not resident in Abidjan, s/he must elect domicile there for the duration of the proceedings through any means, including a *pro hac vice* representation. Proceedings before the CCJA are conducted in French. The decisions of the CCJA are final and nonappealable,²⁷ have *res judicata* effect, and are directly enforceable.²⁸ This means that the domestic authorities tasked with enforcement cannot go beyond the verification of the authenticity of the instrument presented for enforcement.²⁹

The CCJA also acts as an arbitration forum. There is a difficulty, however, in the articulation between a CCJA arbitration and an arbitration subject to the uniform act dealing with arbitration. The distinction resides in the enforcement of awards, with the CCJA award being easier to enforce. The arbitration uniform act supplies the default rule for *ad hoc* arbitration in contracts containing an arbitration clause or arbitration agreement subject to OHADA. 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.

The most important provisions regarding CCJA arbitration of OHADA provide:

Art. 21: In application of an arbitration clause or agreement to arbitrate, any party to a contract domiciled or having its residence in a contracting State, or if the contract is wholly or partially enforced or to be enforced on the territory of a contracting State, may refer the contractual dispute to arbitration pursuant to the arbitration proceedings provided in the present title.

The Common Court of Justice and Arbitration does not itself adjudicate such dispute. It shall name and appoint the arbitrators, be informed of the progress of the proceedings, and examine draft awards pursuant to art. 24.

Hence CCJA arbitration is available only when one of the parties is domiciled or resident in a contracting state, when the contract's enforcement is wholly or partially located on the territory of a Member State, and when the parties agree to arbitrate, either through an express agreement or in application of an arbitration clause incorporated into a contract falling within the scope of application of OHADA.

²⁵ Treaty, art. 18.

²⁶ Treaty, art. 15.

²⁷ Only extraordinary petitions can be filed by third parties whose interests were affected by the judgment (Treaty, art. 47). Alternatively, the parties can apply for a revision if a new and decisive fact is subsequently discovered (Treaty, art. 48) and request an interpretation (Treaty, art. 49).

²⁸ Treaty, art. 20.

²⁹ Treaty, art. 46.

As noted above, the most important advantage of an arbitral award under CCJA rules over an arbitral award obtained through *ad hoc* arbitration subject to the uniform act resides in the ease of enforcement. An arbitral award rendered under the uniform act requires an enforcement order from the national court where enforcement of the award is sought, while an award under CCJA rules merely requires an enforcement order from the CCJA, which is applicable in all Member States.

The Regional Training Center for Legal Officers (ERSUMA) (Art. 41–42)

ERSUMA, headquartered in Porto Novo, Benin, falls under the umbrella of the Permanent Secretariat and like that body, enjoys diplomatic privileges and immunities. It has a board of directors responsible for its administration, an academic council to ensure academic standards, and a management team headed by a general director appointed by the Council of Ministers.

ERSUMA's role is to improve the legal environment in the Member States by providing adequate training to judges, lawyers, notaries, court experts, and so forth on OHADA law and in other regional bodies of law.³⁰

The Conference of Heads of State and Government (Art. 27(1))

Composed of the heads of state and government of the Member States, the Conference of Heads of State and Government's chair coincides with the rotating chair of the Council of Ministers. A meeting can be convened either at the initiative of the presiding country or at the request of at least one-third of the Member States.

The conference has what might be seen as rather vague attributions, as art. 27(1) of the revised treaty provides that it has the authority to decide all questions regarding the treaty.

A vote of the conference can be valid only if at least two-thirds of the Member States are present at the meeting. Once that quorum is reached, decisions are adopted in some instances by consensus and in others by majority vote.

2.3. OHADA in its Regulatory Context

OHADA comes on top of an already complex set of regional organizations, all of which regulate economic activity. Among them, we can distinguish economic integration organizations from other cooperative law initiatives.

In addition to the African Union, OHADA countries adhere to various economic, monetary, and trade unions such as the West African Economic and Monetary Union (*Union Economique Monétaire Ouest Africaine* [UEMOA]), the Economic Community of West African States (ECOWAS), and the Central African Economic and Monetary Community (*Communauté Economique et Monétaire de l'Afrique Centrale* [CEMAC]). UEMOA and CEMAC together form the CFA franc zone, which in turn forms part of the overall franc zone. (Among OHADA

³⁰ For example, UEMOA, OAPI, CIMA, CIPRES, and others (see following section).

members, only the Comoros and Guinea are not part of the CFA franc zone.) All of these organizations interact in some respect with OHADA.

Like OHADA, UEMOA³¹ is a supranational organization composed of a conference of heads of state and government, a council of ministers, a court of justice, a central bank (*Banque Centrale des Etats d'Afrique de l'Ouest* [BCEAO]) and the West African Development Bank (*Banque Ouest Africaine de Développement* [BOAD]). Its objective is to create a common market based on the free circulation of goods, services, and capital. UEMOA regulates the activities of trade, banking, and finance, as well as competition within the UEMOA region. As one would expect, the domains of UEMOA's regulatory power risk overlapping—if not directly conflicting with—some provisions of OHADA, especially if OHADA extends its reach beyond the subject matters currently covered by the existing uniform acts.

CEMAC,³² which is composed of an economic and customs union (*Union Economique en Afrique Centrale* [UEAC]) and a monetary union (*Union Monétaire en Afrique Centrale* [UMAC]), has a purpose and composition similar to UEMOA and regulates trade, finance, and banking, as well as competition.

ECOWAS is composed of nine OHADA members (Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo) and six non-OHADA members (Cape Verde, Gambia, Ghana, Liberia, Nigeria, and Sierra Leone). The purpose of ECOWAS is to promote economic integration in all fields of economic activity through the coordination of economic policy and development projects, with the ultimate goal of establishing an economic union in West Africa. Composed of an authority of heads of state and government, a council of ministers, a community parliament, an economic and social council, an executive secretariat, a fund for cooperation, and a court of justice, ECOWAS has worked toward the reduction of custom duties, the free movement of designated goods and persons, and, to a certain extent, the harmonization of economic and fiscal policies, the facilitation and liberalization of payments, and the standardization of transport legislation.

Member States of OHADA are also members of organizations whose objective is to harmonize legislation in areas such as intellectual property (*Organisation Africaine de la Propriété Intellectuelle* [OAPI]),³³ insurance (*Conférence Internationale des Marchés d'Assurances* [CIMA]), and welfare programs (*Conférence Interafricaine de la Prévoyance Sociale* [CIPRES]).

The juxtaposition of organizations and uniform acts or laws tends to give a rather complex picture. OHADA Member States are not the only nation states that are members of very diverse organizations, but OHADA is the first experiment in establishing a uniform business law among nation states belonging to different economic, trade, and monetary unions. Thus far, the potential

³¹ The member states of UEMOA are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo, all members of OHADA.

³² The member states of CEMAC are Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon, all members of OHADA.

³³ All OHADA Member States but Comoros are members of the OAPI.

consequences of conflicting provisions have been limited, since OHADA is centered on the enterprise level. However, regulatory conflicts are likely to become more frequent if OHADA extends its regulatory scope beyond the current uniform acts to encompass activities touching on the market economy such as distribution, competition, and banking.

2.4. The Uniform Acts

The uniform acts are the core of the OHADA project. The original purpose behind OHADA was the modernization of laws, mostly derived from the Napoleonic commercial code of 1807, which had become outdated, with most provisions unchanged even since decolonization. Nine uniform acts are currently in force, covering general commercial law, commercial companies and economic interest groups, secured transactions, bankruptcy, simplified recovery proceedings and enforcement measures, collective insolvency proceedings, arbitration, carriage of goods by road, and cooperative companies.

Pursuant to art. 10 of the treaty, the uniform acts are directly applicable and binding in the Member States, despite any conflicting provision of domestic law, be it previous or subsequent. A few provisions contained in the acts themselves indicate that the drafters' intention was to abrogate all laws contrary to the provisions of the uniform acts.³⁴ This interpretation was confirmed by the CCJA in its advisory opinion of April 30, 2011.³⁵

The drafting phase is largely supervised by the Permanent Secretariat, which appoints an expert or group of experts to prepare a preliminary draft under its supervision. The secretariat then submits the draft to each government for review and comments, a task accomplished by the national committees that a Council of Ministers' decision institutionalized on February 28, 2003.³⁶ Once the review is completed, the governments submit their observations within 90 days to the Permanent Secretariat, which then calls a plenary session of all the national commissions to reach a consensus on the draft. The proposed act is once again returned to the Member States for their observations. The approved draft is next transmitted for confidential advisory review to the CCJA (thereby responding to the objective of verifying the draft's compliance with treaty objectives), which must render its opinion within 30 days. Finally, a uniform act is adopted by the Council of Ministers by unanimous vote of a quorum of two-thirds of the Member States.³⁷

The nine uniform acts are described in greater detail in the annex to this report.

³⁴ See AUSCGIE, art. 919 and AUPSRVE, art. 336.

³⁵ See Avis No. 001/2001/EP, Apr. 30, 2001, available at <http://web.ohada.org/doctrine-et-jurisprudence/fr/actes/default/3294,avis-n0012001ep.html>.

³⁶ See 12 OHADA J.O. 23. These committees were created to answer the criticism that national institutions, lawyers, and other stakeholders have been insufficiently involved in the legal elaboration process of the uniform acts. On this, see Forneris, "Harmonizing Commercial Law," 83 (see n. 3).

³⁷ Treaty, art. 8.

3. Assessment of OHADA

As outlined in the introduction, this paper's goal is to assess OHADA against the standard of legal certainty. To promote legal certainty, OHADA is based on two pillars: the norms it produces and the institutions designed to produce and apply those norms. As seen in the following section, OHADA has largely been successful in terms of the production of norms; it encounters serious challenges, however, with regard to the application and the reception of the uniform acts (see 3.2). Those challenges will be the main focus of the second half of this paper.

3.1. OHADA's Achievements

In a remarkably short period of time, OHADA has created a new supranational organization—no small feat in and of itself. The principal achievement of this new organization is that it has largely fulfilled its aim in the production of uniform law. OHADA has delivered nine uniform acts; as of now, with the exception of employment law,³⁸ all the subject matters enumerated at art. 2 of the treaty have been codified in a uniform act. Two of the original uniform acts have recently been amended,³⁹ showing a concern of OHADA institutions for the regular review and modification of these acts.

Criteria: scope, precision, and coherence

Three criteria are commonly used to evaluate whether a group of norms promote legal certainty: comprehensiveness, level of precision, and coherence.⁴⁰ Regarding OHADA's comprehensiveness, the treaty provides useful guidelines in its definition of business at art. 2:

For the purpose of the present treaty, enter within the scope of application of business law all the rules regarding companies, the legal status of merchant, debt collection, secured transactions and enforcement measures, bankruptcy, arbitration, employment law, accounting rules, sales and transportation laws and all subjects the council of ministers, unanimously, would decide to cover in compliance with the objectives of the present treaty and the provisions of art. 8 thereafter.

The selection of subjects included in the definition of business law reveals a piecemeal approach centered primarily on the development of the tools needed to support productive activity, thereby establishing the groundwork for the better protection of property and capital formation. A draft on employment law has been in preparation for some time and seems to have gained a consensus among Western African states, though it is still being considered in the Central African Member States.⁴¹

With the aim of further increasing OHADA's comprehensiveness, the definition also leaves open the option to the Member States to gradually integrate other fields more closely associated with

³⁸ A draft was prepared and presented to the Council of Ministers in December 2010, but was voted down.

³⁹ The revised uniform acts on secured transactions and on general commercial law were adopted on December 10, 2010, and are already applicable.

⁴⁰ See Pierre Meyer, "La Sécurité Juridique et Judiciaire dans l'Espace OHADA," *Revue Penant* 855 (2006): 151, available at <http://www.ohada.com/bibliographie/titre/386/La-securite-juridique-et-judiciaire-dans-l-espace-OHADA.html>.

⁴¹ See Minutes of the meeting of the Council of Ministers of June 16–17, 2011 (see n. 22).

the emergence of a consumer society, such as distribution, consumer protection, and competition law. In this respect, the Council of Ministers at its meeting in Bangui in 2001 already decided that the harmonization process would also include competition and banking law, intellectual property, contract law, and evidence. Upon the request of OHADA's Permanent Secretariat and with funding from the Swiss government, UNIDROIT supplied a preliminary draft for a uniform act on contract law.⁴² An initial draft on consumer protection law was also prepared and submitted to the members in 2003 and remains a commitment of OHADA institutions.⁴³

One of the reasons for the slow adoption of uniform acts regulating market activity is the need to coordinate with other integrated institutions, such as ECOWAS or UEMOA, which themselves generate norms. Since there is no rule in any of those treaties giving precedence to laws produced by any of the others, the possibility of passing conflicting norms is very real and should be avoided at all costs, as they are likely to result in legal uncertainties. Such conflicts can be prevented by adequate coordination.

With regard to the precision of the uniform acts, the analysis is more qualitative. Though not within the scope of this paper to analyze in detail all uniform acts using this criteria, there is no shortage of available comments that praise the acts' precision.⁴⁴ It is important to note here that the drafters' design was to prepare uniform acts that could be applicable without implementing regulation (*décrets d'application*).

Coherence is also an important element of legal certainty. The coherence of OHADA law rests primarily on art. 10 of the treaty, which stipulates that the provisions of the uniform acts preempt all domestic statutes for the subject they cover, whether enacted before or after the acts' entry into force. However, in many OHADA countries, some degree of incoherence can be found at the national level in the form of conflicts between OHADA and national legislation, most of which have not yet been fully investigated. The question of whether the uniform acts preempt constitutional provisions of the Member States also remains open. These issues will be discussed in greater detail in the following section.

The institution guaranteeing the overall coherence of OHADA is the CCJA, which is tasked with the interpretation and common application of the treaty, implementing regulations, and the uniform acts (art. 14). Since the launch of OHADA, the workload of the CCJA has steadily increased. By December 31, 2009, the CCJA had rendered 467 decisions, including nine consultative opinions, 400 judgments, and 58 orders. The statistics also show a case law in constant increase, from one decision in 1998 to 77 in 2009.⁴⁵ However, as seen below, the CCJA's efforts to ensure the coherence of OHADA law face challenges, not least the court's lack of resources to process the backlogged cases on its docket.

⁴² See Fontaine, *Contract Law* (see n. 20).

⁴³ Ibid.

⁴⁴ See, for example, Martor and others, *Business Law in Africa* (see n. 6).

⁴⁵ Statistics from ohada.com.

Sign of success: increasing membership

In general, the normative system established by OHADA appears to be making a considerable contribution to the modernization of its Member States' business laws by increasing the critically important element of legal certainty. This assessment seems to be shared by other Sub-Saharan states, as two new countries (Guinea and Guinea-Bissau⁴⁶) have joined the treaty since its creation in 1993, bringing the total to 16 member countries—nearly a quarter of Sub-Saharan states. The Democratic Republic of Congo (DRC) is in the final steps of its accession. In addition to the DRC, other Sub-Saharan states, namely, Burundi, Cape Verde, Djibouti, Ethiopia, Madagascar, Mauritania, Mauritius, Rwanda, and Sao Tome and Principe, have expressed an interest in joining OHADA.⁴⁷ It is significant that OHADA is also making strides among English-speaking countries, with Ghana and Nigeria having expressed some preliminary interest in becoming members.⁴⁸

3.2. Institutional Challenges

Despite the achievements outlined above, many challenges remain if OHADA wants to develop a truly standardized and consistent pan-African business law and create an investment climate sufficiently favorable for an economic development zone in Africa. We have already seen that on a quantitative basis, OHADA institutions have for the most part delivered what they promised. Yet their task is not limited to the production of formal law, a relatively easy undertaking compared to actual application and enforcement.

In the long term, OHADA will be judged by its ability to be uniformly applied, as only then can it be seen as an agent for change in its Member States. But it is in implementing uniform application and enforcement that a number of serious challenges for OHADA institutions are apparent, including with the CCJA and the RCCM, and in coordinating with other supranational bodies of law. OHADA also faces important challenges at the state level. These concerns have unfortunately undermined OHADA's ability to form a genuinely integrated judicial space, in which judgments under OHADA law are enforced as domestic laws, and ultimately impeded the treaty's success.

OHADA institutions are now quite well established. However, they still face considerable budgetary constraints that hamper their ability to fulfill their function to apply the treaty's uniform laws. The total budget of OHADA institutions for the year 2011 amounted to 4,257,612,181 CFA francs (about US\$9.3 million), a budget that appears insufficient to fully support the existing bodies across the board. For example, the Permanent Secretariat, the true "artisan" of legislating and administrative activities, is understaffed and has no autonomous budget for important duties such as the organization of the Council of Ministers' meetings, requiring the secretariat to seek external financial support from donors to carry out this task.

⁴⁶ These countries joined in September 1995.

⁴⁷ See, for example, Walsh, *In Search of Success*, 43 (see n. 14).

⁴⁸ See, for example, Akin Akinbote, *The ECOWAS Treaty as a Legal Tool for the Adoption of OHADA Treaty and Laws by Anglophone Ecowas States* (Yaoundé: OHADA, 2008), available at http://www.ohada.com/infohada_detail.php?article=953.

These constraints will likely only increase with the newly created conference of OHADA heads of state. One possible solution would be for the Permanent Secretariat to use extra-budgetary resources to better coordinate with the national OHADA committees.

ERSUMA's mission is also hampered by budgetary constraints. The Regional Training Center has received substantial funding in the past from the European Union but these funds have ceased; without funds for training from such donors as the World Bank or the U.S.-funded Millennium Challenge Corporation, ERSUMA would likely encounter some substantial difficulties. To be self-sustainable, ERSUMA has proposed offering training programs to private professionals for a fee, but the funds gained in this endeavor will fall short of ensuring self-sufficiency. ERSUMA is also contemplating remote trainings with the help of new technologies, but it is unlikely in the short term that these services can generate enough revenue, as trainings in OHADA countries usually require public funding for such items as travel, lodging, and *per diems*.

The CCJA: facing the most challenges

The institution facing the most important challenges is the CCJA. This court, whose operations have been significantly impeded by the recent violence in Côte d'Ivoire following the refusal of the outgoing president to step down after losing the presidential elections, is also severely understaffed despite a constant increase in its caseload. As a result, the CCJA must now deal with a significant backlog of cases. To assist 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.⁴⁹

The case overload should also lead to a reconsideration of the budgetary procedures within OHADA, which tend to focus on supply-side responses rather than performance-based ones. Taken in the aggregate, the fact that a court that has rendered only 500–600 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. With this in mind, it is likely that an increase in the CCJA's budget will only marginally affect the backlog if it is not tied to performance-based measures.

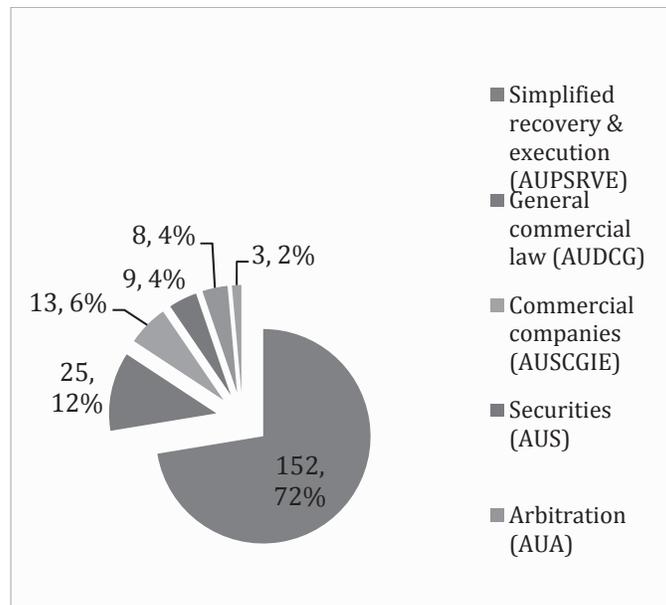
The backlog issue may also be traced back to the choice made by the drafters of the OHADA Treaty, which makes the CCJA the *Cour de Cassation*—instead of the Member States' supreme courts—on all OHADA issues. While this may have appeared sound in theory, it has led to difficulties in administrative manageability and made backlogs an unavoidable problem. Although this did remove the final interpretation of OHADA law from the national judiciaries, which are often accused of cooptation by political forces and extractive interests and of solving conflicts of interpretation of OHADA provisions even before states review the matters, it also risks causing jurisdictional conflict with domestic supreme courts and hampers the CCJA's manageability, as noted above, a particularly critical problem given the current scarcity of resources.

⁴⁹ See Minutes of the meeting of the Council of Ministers of June 16–17, 2011 (see n. 22).

To make matters worse, the *Rules of Procedure (Réglement de Procédure)* contain no provision for fast-track proceedings such as those instituted before the French *Cour de Cassation* in 2001.⁵⁰ These proceedings would give the court the ability to refuse to hear 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, the *Rules of Procedure* (art. 26) require that as soon as an appeal is lodged, the CCJA chief justice must appoint a judge to follow up the case management and report to the court. This was the same procedure used by the French *Cour de Cassation* before the institution of a fast-track option in 2001, a reform motivated by the buildup of large backlogs.

An analysis of the available statistics, which, incidentally, should be made more readily available on the CCJA’s website, indicates additional challenges faced by the court. A general overview of decisions rendered by the CCJA from 1998 until June 30, 2010 (see figure 1) reveals that the AUPSRVE, at 72 percent, has the lion’s share of all disputes. This would indicate a problem with the AUPSRVE and with the simplified procedure of injunction to pay, which by itself, constitutes the largest source of litigation within this act and was designed as a measure to simplify judiciary contract enforcement (see figure 2). That problem, which is directly traceable to the drafting of the AUPSRVE and/or the choice of transplanting the French system of injunction to pay, leads to institutional problems that are particularly acute for the CCJA in view of the backlogs issue.

Figure 1. General Statistics on Decisions Rendered by the CCJA from October 11, 2001–June 30, 2010

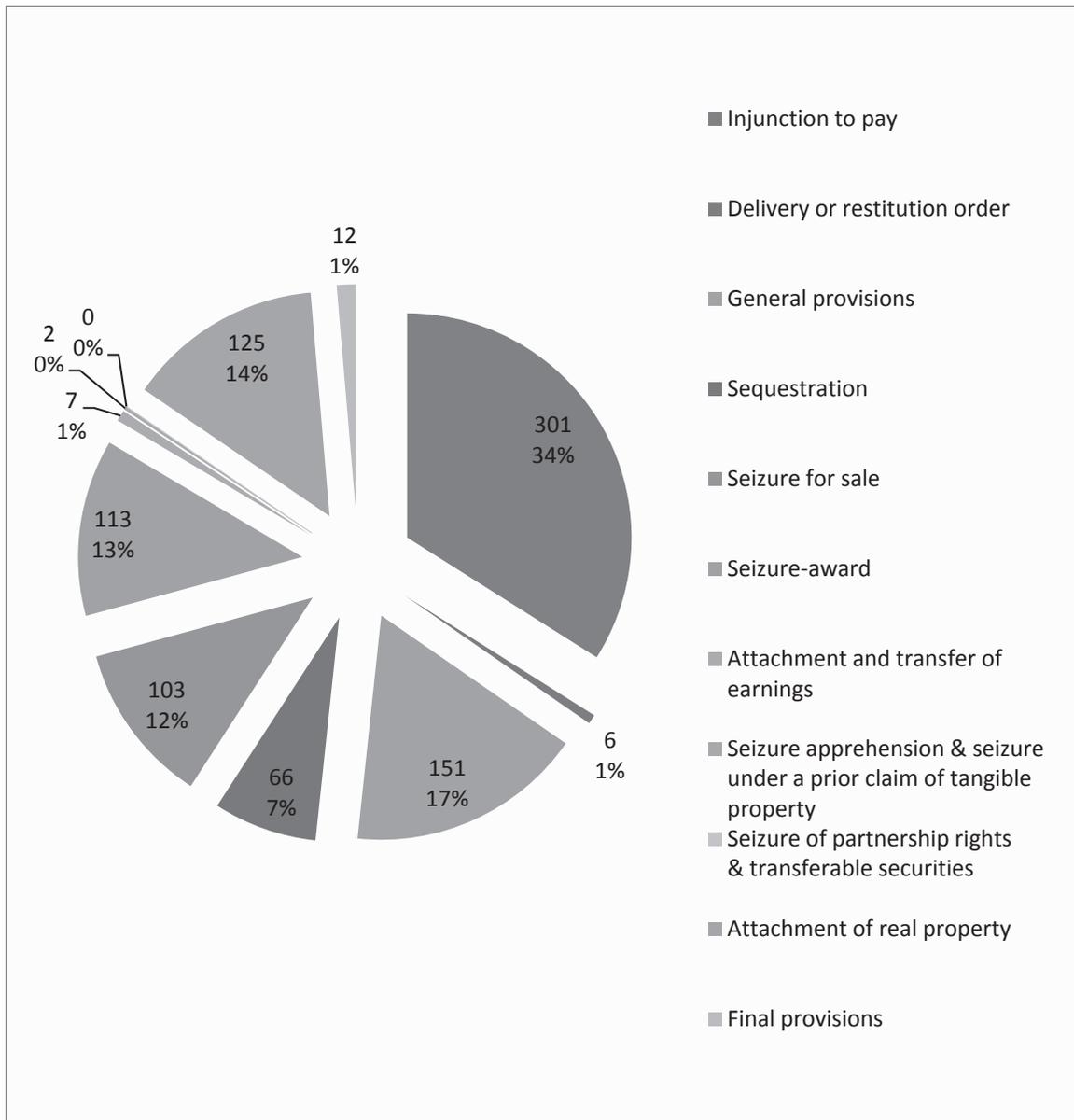


Source: Data provided by Chief Justice Maïnassara Maidagi.⁵¹

⁵⁰ Known as *procédure de non admission du pourvoi*.

⁵¹ Maïnassara Maidagi (1st Vice President of the CCJA), “Les Tendances Jurisprudentielles de la CCJA par Acte Uniforme Appliqué,” *Revue de Droit Uniforme Africain* 3 (2010): 34–36.

Figure 2. Distribution of Decisions according to Topics/Areas of the AUPSRVE⁵²



Source: Database of the IDEF's Annotated OHADA Code as of December 31, 2008

In itself, a large concentration of disputes on the AUPSRVE in general and on the injunction to pay in particular indicates a chronic and structural problem with this act and with the injunction to pay. Little empirical data is available to analyze the reasons for this failure, but the abnormally high litigation on the injunction to pay suggests that it might have been an ill-considered French legal transplant. Among the possible reasons, we could advance the relative complexity of the injunction to pay, which is adapted only for very simple contractual debt collection that presents

⁵² Decisions rendered between 1999 and 2008.

no issue of material facts and fits cases where written evidence⁵³ cannot be contradicted. Considering the very strong oral tradition in OHADA countries, the injunction to pay might not have been the most appropriate legal transplant for that region.

The injunction to pay might also not fulfill its aims in OHADA countries because it is not supported by reliable judiciaries. In European jurisdictions, the availability of reliable judiciaries can act to discourage bad faith debtors since by filing an appeal, they will likely only delay payment and incur more costs. In most OHADA Member States, filing an appeal could mean that a final adjudication might be delayed by several years and possibly never be made, which is why in many OHADA countries, all of which abandoned prison for debt, many creditors prefer to complain to the police, hoping for a quick settlement while the debtor is in criminal custody.

Available statistics also point to another problem regarding the CCJA. Observing the geographical origins of the appeals before the court, overwhelming numbers come from Côte d'Ivoire, the seat of the CCJA (see figure 3). 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 result also suggests that many other potential litigants may be reluctant to pursue their claims due to the perceived cost of removing the final appeal to the CCJA in Abidjan.⁵⁴ Although the procedure before the CCJA is essentially a written one and an oral argument hearing is a very rare and occasional exception,⁵⁵ 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* representation by an Ivorian attorney.⁵⁶ Within an integrated legal system, this might be viewed as an unfair advantage—or even a rent-seeking privilege—granted to Ivorian lawyers, which could generate resistance, if not hostility, to appealing before the CCJA.

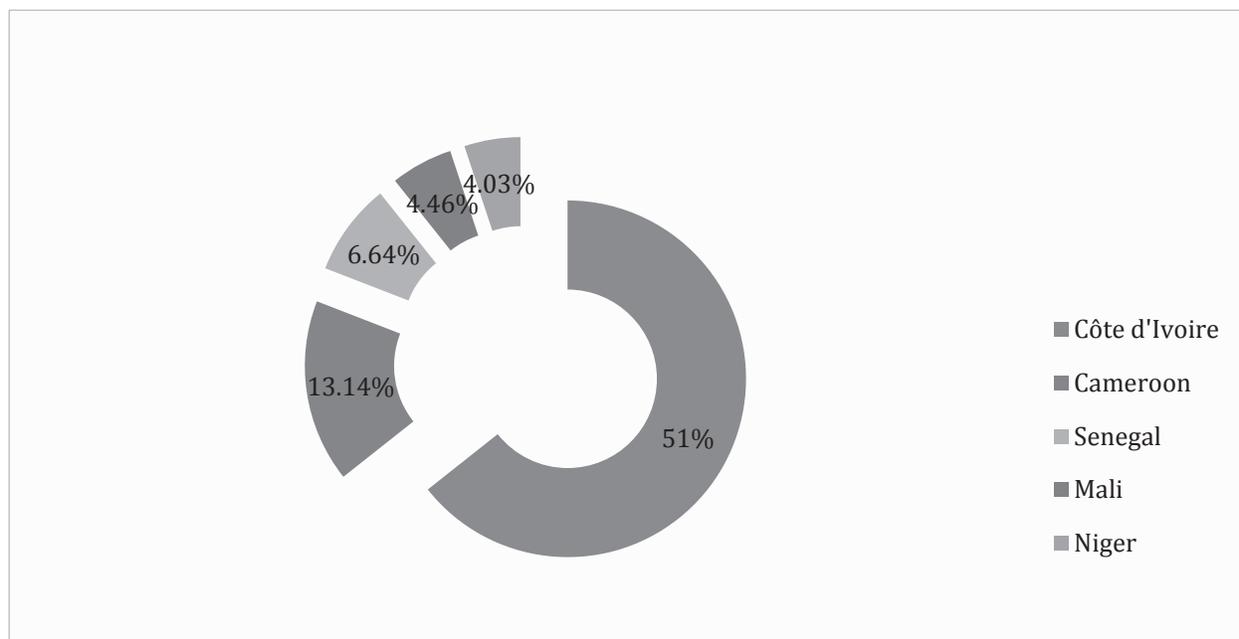
⁵³ Though admissible in commercial law, oral evidence is simply unknown in French civil law in contractual matters.

⁵⁴ See Claire Moore-Dickerson, “Harmonizing Business Laws in Africa, OHADA Calls the Tune,” *Columbia Journal of Transnational Law* 44, no. 1 (2005): 57–58.

⁵⁵ See art. 34 of the regulation organizing the proceedings before the CCJA, available in French at <http://www.institut-idef.org/-CHAPITRE-III-DE-LA-PROCEDURE-ORALE-.html>.

⁵⁶ Art. 23 sec.1 *Rules of Procedure* provides that representation by an attorney is mandatory. Art. 28 sec. 3 provides that the parties must elect domicile where the court has its seat.

Figure 3. Country of Origin of Appeals to the CCJA



Source: Data provided by Chief Justice Flora D'Almeida⁵⁷

Another difficulty with the CCJA's exclusive jurisdiction as a final interpreter of OHADA matters stems from those frequent occasions when the case requires the interpretation of both OHADA and domestic law. Here, the treaty does not help. According to OHADA statutes, the CCJA has jurisdiction to hear the *pourvoi en cassation* for all matters involving the application of the uniform acts and the regulations provided in the treaty, with the exception of decisions applying to criminal sanctions (art. 14, par. 3). The main difficulty, however, is in determining what to do when a matter brought before the CCJA requires the interpretation of domestic law, such as law of obligations or civil procedure. Does the CCJA have jurisdiction over the entire matter? Or are separate appeals required, one before the CCJA on matters of uniform law and another before the domestic supreme court on matters of domestic law?

No clear answer has been provided yet by the CCJA. However, in a case adjudication in Niger that raised issues relating to civil procedure and contract law, CIMA, and the uniform act covering commercial companies, the Niger Supreme Court held that pursuant to art. 18 of the OHADA Treaty, the CCJA's jurisdiction was not always exclusive of the jurisdiction of the highest national courts. That court further ruled that when a case rested primarily on the interpretation of domestic law, the domestic court had jurisdiction to adjudicate the matter, thereby implying that the CCJA has jurisdiction only when the appeal is based solely on the

⁵⁷ Flora D'Almeida Mele, "Tendances Jurisprudentielles de la CCJA par Pays de Provenance du Pourvoi" (talk delivered at the symposium "Les Tendances Jurisprudentielles de la CCJA en Matière d'Interprétation et d'Application du Traité OHADA et des Actes Uniformes Dérivés," Togo's National Commission on OHADA, Lomé, September 24–25, 2010), published in *Revue de Droit Uniforme Africain* 3 (2010): 58–61.

interpretation of an OHADA provision.⁵⁸ However, the Niger Supreme Court also held that a domestic supreme court must refer issues relating to OHADA provisions to the CCJA if the local court finds that the adjudication rests primarily on the interpretation of uniform law.⁵⁹ Unfortunately, this decision still leaves unsolved the problem that occurs when the adjudication rests equally on interpretations of provisions of both domestic and uniform law.

Clearly, OHADA institutions, and particularly the CCJA, continue to confront many challenges. Substantial modification and reform are needed for these institutions to function adequately and thereby strengthen the legal certainty of the CCJA.

Hurdles for the RCCM

The RCCM raises issues regarding both the states and other OHADA institutions. As outlined above, the RCCM is organized on three levels: local, national, and regional. The modernization of the RCCM has mobilized considerable donor attention but without much coordination and with very limited results, apart from the modernization of the AUDCG, which regulates the RCCM, and the AUS, which contains many provisions relevant to the registration of secured transactions.

The modernization of the RCCM has several times been reaffirmed as an important issue, including during the last meeting of the Council of Ministers in June 2011 in Guinea-Bissau. Following the example of countries such as Slovakia and Romania, where the creation of computerized registries allowed the registration of securities to surge by almost 60 percent between 2000 and 2006,⁶⁰ the proposed reform aims to utilize information technologies (IT) to modernize the management of the RCCM. The reform of the AUDCG laid out the legal conditions to prepare for this modernization, regulating electronic signatures to allow for the verification of dematerialized documents and an increasingly secure data exchange with financial institutions, justice officials, and administrations. These reforms should also improve the public's access to information, which in turn should help adjust the current system of access to information, which favors bankers and entrepreneurs.

Any technological innovations must, however, allow for a transition process that ensures the security of RCCM documents. Currently, the reliability and updating procedures of the RCCM's files are insufficient. The registration of securities, essential to making banking and commercial activities more secure, is not consistent and the data are still archived manually. The absence of computerized records at local court registries (*greffes*) and the RCCM, together with insufficient public access to information, hamper the credit environment. An IT system was developed in 2010 with financial assistance from the African Development Bank (AfDB) for the regional RCCM, but the system is not finalized and thus not yet operational, leading the Council of Ministers to call for greater cooperation with other donors, especially the World Bank.⁶¹

⁵⁸ Niger Sup. Ct., Aug. 16, 2001, RBD 2002 at 121 et seq.

⁵⁹ Ibid.

⁶⁰ See Frédérique Dahan and John Simpson, eds., *Secured Transactions Reform and Access to Credit* (London: European Bank for Reconstruction and Development, 2008), 91.

⁶¹ See Minutes of the meeting of the Council of Ministers of June 16–17, 2011 (see n. 22).

The RCCM needs uniform technical norms and protocols for the exchange of data between the local, national, and regional registries. But the AfDB project is focused only on the regional RCCM, where need might not actually be greatest, since all registrations come first from the local RCCM, followed by the national register. In the end, however, reforming the RCCM might turn out to be a very long-term project, in view of the very disparate civil status registers among OHADA members. Without proper coordination of the modernization of civil status registers, the RCCM might prove to be a very illusory tool in the effort to increase legal certainty in OHADA Member States.

3.3. Problems with Implementation

Coherence with other regional regulatory groups

It has been argued above that the uniform acts must be judged against a standard of coherence, both internal and with other normative institutions. Coherence is a key requisite for legal certainty in that it requires that two conflicting norms cannot coexist within the same legal system. For a domestic legal system, it is a matter of both a hierarchy of norms and a recognition of progress; the former maintains that an inferior norm cannot abrogate one deemed hierarchically superior, while the latter requires that a more recent norm abrogate an older one if it is incompatible with the new text. OHADA laws currently deal only with the hierarchy of norms by proclaiming that “the Uniform Acts are mandatory [...] notwithstanding all contrary provisions, whether older or more recent.”

In its language dealing with domestic laws, the situation is rather clear cut, leaving aside the problem of identifying which texts are abrogated by the OHADA uniform acts (see below). The issue of primacy between OHADA and the domestic constitutions, however, has not yet been settled. Similarly, provisions in the uniform acts could also conflict with the norms of other integrated institutions, such as UEMOA, ECOWAS, or CEMAC; in this case, conflict-of-laws rules are not available, nor is it likely that OHADA would attempt to argue that its provisions trump the rules of these three regional organizations—or vice-versa. This is a serious impediment to creating an atmosphere of legal certainty, which can be resolved only if each of these organizations were to ensure that the rules it adopts do not address the same topics as other such organizations, or, at the very least, that their rules do not internally conflict. Here again, coordination is needed at the supranational level, which likely involves an inventory of potentially conflicting rules followed by concerted amendments.

Obstacles and attitudes within Member States

The coordination efforts described above appear to be relatively small compared to those needed to implement OHADA law in each Member State. This points to another important potential source of legal uncertainty: the tension between OHADA and the domestic statutes it is meant to replace or supplement. Without a doubt, OHADA faces many challenges in its bid to be recognized within domestic legal structures.

Generally, in the legal orders of the Member States, a newly adopted decision indicates which provision(s) it abrogates by a mechanism of express abrogation. The uniform character of the OHADA uniform act, however, makes it difficult to use the express abrogation technique and the drafters therefore favored tacit abrogation.⁶² Yet, tacit abrogation causes problems when put side by side with art. 10 of the treaty, which provides that the uniform acts are “directly applicable and mandatory [...] against any contrary disposition in domestic law.”

A controversy arose over the years as to the exact meaning of this provision, raising the question of whether the abrogation outlined in art. 10 concerns all domestic language on the same subject matter as the uniform act or simply the domestic provisions that are contrary to the act. The first interpretation has the advantage of simplicity and clarity, while the second leaves room for the Member States to complete the uniform acts and perfect their integration into the domestic legal order. However, the second interpretation would also require an inventory and subsequent abrogation of all the provisions that conflict with the act, in effect requiring that domestic statutes proceed to an express abrogation.

In 2000, Côte d’Ivoire submitted this question of interpretation to the CCJA, which held that notwithstanding contrary provisions in the uniform acts,⁶³ the abrogation entailed by art. 10 is limited to identical or conflicting provisions in the domestic laws.⁶⁴ This rather sound interpretation nevertheless generates concerns with regard to the standard of legal certainty, since no state has actually fully carried out that process of abrogation and only a handful have conducted an exhaustive study⁶⁵ to identify, for all the uniform acts, the texts needing to be abrogated.⁶⁶

Therefore, though OHADA in itself can be deemed to be sufficiently precise, this quality is considerably weakened by the existence of other OHADA provisions allowing for nonabrogated domestic statutes. If OHADA is to provide the legal certainty it claims to, the Member States must complete the process of abrogating those domestic legal provisions that are identical to, or conflict with, the treaty. This process would have to start with an exhaustive identification, state by state, of all language abrogated by the uniform acts.

Another implementation problem is the resistance— if not outright refusal—of domestic courts to apply OHADA statutes. For example, decisions in some states have made contractual provisions prevail over the mandatory provisions of the uniform acts,⁶⁷ while supreme courts as well as litigants tend to be unwilling to accept the exclusive jurisdiction of the CCJA as *juge de cassation* in matters of adjudication falling within the scope of application of OHADA law.⁶⁸

⁶² See, for example, AUPSRVE, art. 150, 336; AUA, art. 35.

⁶³ Such as AUPSRVE, art. 336.

⁶⁴ CCJA, Adv. Op. Apr. 30, 2001, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-04>.

⁶⁵ Only Senegal, Guinea, and the Central African Republic have conducted such studies. Studies have been commissioned for other countries, such as Benin and Burkina Faso, but they were considered very insufficient.

⁶⁶ See Forneris, *Harmonizing Commercial Law*, 86 (see n. 3).

⁶⁷ See, for example, CA Niamey June 04, 2003, available at <http://www.ohada.com/jurisprudence/ohadata/J-05-181>.

⁶⁸ Several authors have pointed out the refusal of some national judges to apply the uniform acts. According to Mamadou Diakhaté, there are serious difficulties in applying the new legislation, as national judges tend to refer systematically to their national laws in the areas covered by the Uniform Act on Organizing Simplified Recovery

Sometimes this opposition stems from ignorance of OHADA provisions and/or of its direct applicability *in lieu* of tacitly abrogated conflicting language. For example, more than five years after the entry into force of the Organizing Simplified Recovery Procedures and Enforcement Measures Act, some judges still authorize the “*saisie-arrêt*” (attachment) instead of the new proceeding instituted, that is, the “*saisie-attribution*.”⁶⁹ Other judges base the hold harmless legal provisions (“*garantie d’éviction*”) on national law (art. 1626 of the civil code) instead of art. 202–288 of the uniform act relating to General Commercial Law,⁷⁰ or use the expression “*liquidation judiciaire*” (official receivership) instead of “*liquidation des biens*” (liquidation of assets) instituted by the Uniform Act on Bankruptcy.⁷¹ Paradoxically, while some judges fail to apply the relevant uniform acts, others apply provisions of an act to cases that occurred prior to the act’s entry into force.⁷² In still other cases, lower courts simply disregard the rulings of the CCJA.⁷³

These examples reinforce the need for a better integration of OHADA law through the express abrogation of conflicting legislation within the members’ domestic legal systems. It also reveals that judges, legal practitioners, and the business community may not be fully aware of the changes brought by OHADA and that further efforts designed to increase awareness of the uniform laws need to be made. It might also indicate a weakness of ERSUMA in the execution of this task, which in turn raises questions about the promotion and dissemination of OHADA law, which will be discussed below.

The unwillingness of domestic supreme courts to apply uniform law is more deliberate and speaks more to conflicts of sovereignty, attributable largely to the drafting of the OHADA Treaty

Procedures and Measures of Execution, and this trend clashes with the uncompromising position of the CCJA, which is based on the autonomy of OHADA’s new system of execution. Mamadou Diakhaté, “Les Procédures Simplifiées et les Voies d’Exécution: la Difficile Gestation d’une Législation Communautaire,” *Revue Sénégalaise de Droit des Affaires* 2–4 (2010): 11, available at

http://www.ohada.com/bibliographie.php?categorie=&auteur=&ohadata=657&q=&q_boolean=or&inmotscles=on&action=rechercher&type=doctrine. Pascal Nguihe Kante supports this assertion by noting a persistent resistance at the level of local courts, where some judges continue to apply the former company law of Niger, despite the entry into force of the Uniform Act Relating to Commercial Companies and Economic Interest Group (UACCEIG). Pascal Nguihe Kante, “Le Domaine d’Application du Nouveau Droit des Sociétés Commerciales de l’OHADA,” *Annales de la Faculté de Droit de Dschang* 4 (2002), available at http://www.ohada.com/bibliographie.php?categorie=&auteur=&ohadata=486&q=&q_boolean=or&inmotscles=on&action=rechercher&type=doctrine.

⁶⁹ See, for example, TPI Port-Gentil, Feb. 10, 1999, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-150>.

⁷⁰ See, for example, TGI Ouagadougou, March 26, 2003, *Revue Burkinabé de Droit* 43–44 (2003): 149, at <http://www.ohada.com/jurisprudence/ohadata/J-05-42>.

⁷¹ See, for example, CA Ouagadougou, Sept. 14, 1999, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-48>; CA Ouagadougou (Burkina Faso), Apr. 5, 2002, available at <http://www.ohada.com/jurisprudence/ohadata/J-04-14>.

⁷² See, for example, TPI Abidjan, Dec. 13, 2001, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-116>. In this case, the judges applied the Uniform Act on General Commercial Law, which entered into force on January 1, 1998, to a dispute of 1995.

⁷³ See TPI Bangangté, Apr. 8, 2004, available at <http://www.ohada.com/jurisprudence/ohadata/J-05-165>; CA Libreville, Feb. 6, 2002, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-125>; and *contra* CCJA Jan. 10, 2002, available at <http://www.ohada.com/jurisprudence/ohadata/J-02-25>.

itself, which, by removing business law from the supreme courts' review, increases their defiance and hostility toward the CCJA. The reluctance of national courts to accept the jurisdiction of the CCJA is evident in cases where the supreme courts continue to exercise jurisdiction over matters that fall within the exclusive authority of the CCJA.⁷⁴

In conclusion, many implementation challenges remain at the state level. Tackling these challenges requires both a strong lead from OHADA institutions and, more importantly, some serious work at the domestic level, namely, an effective abrogation of all laws conflicting and/or superimposing OHADA provisions.

3.4. Dissemination Constraints

Raising awareness through training

One of the central challenges facing the full application of OHADA involves the law's dissemination among the different agents concerned with OHADA itself: the legal professions and the judiciary. It is certainly beneficial that OHADA's institutions established a regional school, the *Ecole Régionale Supérieure de la Magistrature* (ERSUMA), which provides training for judges and officers from Member States on the topics covered by OHADA legislation. However, as we have seen, ERSUMA lacks resources and certainly cannot provide training for all persons who need it. Even webcast and video-conference trainings are difficult to conduct in the region, considering the lack of reliable connections and budgetary problems inherent in the OHADA region's justice institutions.

The first tier of people concerned with the dissemination of OHADA is composed of a myriad of agents meant to apply the treaty's provisions on a day-to-day basis. These agents might be accountants, court registries (*greffes*), chambers of commerce, business registration units, microfinance institutions, banks, insurance lawyers, arbitration chambers, and small government officials involved in any activities connected with the constitution of capital and the protection of property for businesses. It is very unclear whether these agents have truly integrated OHADA provisions into their daily activities. The minutes of the Council of Ministers meetings on the subject of awareness campaigns in the business communities of three OHADA Member States suggest that awareness efforts move at a relatively slow pace.⁷⁵ Many of these agents know of OHADA, but more as an abstraction than a concrete reality. For example, a U.S. scholar noted in an article in 2008 that "it can even be difficult to ascertain which national authority is responsible for the execution of judgments under OHADA laws."⁷⁶

To guarantee the integration of OHADA into the domestic legal systems, a first and logical step would have been to carry out an inventory of all agents, Member State by Member State, who are impacted by OHADA and conduct targeted trainings and awareness campaigns in order to

⁷⁴ See Jimmy Kodo, *L'Application des Actes Uniformes de l'OHADA*, Publications de l'Institut Universitaire André Ryckmans 5 (Louvain-la-Neuve: Academia-Bruylant, 2010); and D'Almeida Mele, "Tendances Jurisprudentielles de la CCJA," 60 (see n. 57).

⁷⁵ See Minutes of the meeting of the Council of Ministers of June 16–17, 2011 (see n. 22).

⁷⁶ See Moore-Dickerson, "Harmonizing Business Laws," 62 (see n. 54).

ensure that OHADA becomes a concrete reality for them. To our knowledge, no such inventory was ever made in any Member State.

A second tier of the population concerned with OHADA consists of academics, attorneys, bailiffs, and notaries, all of whom are considerably impacted by OHADA in their daily practice. There is some evidence that the members of these groups are more aware of OHADA and its ramifications, but they experience problems associated with its implementation. In her article based on investigations on the ground, Claire Moore-Dickerson found that these legal professionals and academics were familiar with OHADA's content and purpose, indeed frequently praising the law's clarity, but lamented the problems associated with enforcement.⁷⁷

A final layer is composed of judges and judiciary staff. Business litigation represents a very small percentage of all claims compared to civil status cases, traditional disputes, or criminal law. Many judges at the supreme court or appeal level are well-versed in OHADA and often have benefited from training. Among lower ranks, however, it is more inconsistent, as illustrated by Moore-Dickerson's description of a judge from Cameroon who learned for the first time of OHADA from a lawyer pleading a case before her.⁷⁸ Efforts are made, in conjunction with ERSUMA, by the states and OHADA institutions to increase awareness of OHADA law among members of the judiciary, but those efforts vary from state to state, based in part on the involvement of donors in programs designed to increase this kind of knowledge.⁷⁹

Making documents more available

Another dissemination issue involves the availability of OHADA documents in all the official languages of OHADA Member States. Since March 21, 2010, when the revised version of the treaty came into force,⁸⁰ all of the four official languages—French, English, Spanish, and Portuguese—became the working languages of OHADA.⁸¹ This important change made it possible for Anglophone countries from Africa to access the documents and potentially “strengthen the potential impact of OHADA,”⁸² since the treaty is open to all countries. The new art. 42 of the treaty provides that before their translation into English, Spanish, and Portuguese, all documents already published in French are fully enforceable; where there is a difference between the French version and one of the other languages, the former will prevail. Currently, the treaty and most of the uniform acts have been translated into English; however, none of these translated versions—which are of very poor quality—is official, though they are being used widely.⁸³

⁷⁷ Ibid.

⁷⁸ Ibid., 59.

⁷⁹ For example, the Millennium Challenge Corporation (MCC) has recently funded the training of all Beninese judges and an important proportion of *greffiers* at ERSUMA, as well as the purchase of OHADA uniform laws and scholarly analyses for all participants to the trainings.

⁸⁰ See *Newsletter*, ohada.com, 4 March 2010, www.ohada.com/newsletter.php?news=04032010-848#.

⁸¹ Treaty (revised), art. 42.

⁸² See Walsh, *In Search of Success*, 45 (see n. 14).

⁸³ As Martha Simo Tumnde puts it: “Implicitly, any document in English or any other language would be a translation from French to English or Spanish or Portuguese. Most of the texts in translation have been criticised for being literal, inadequate and rather nebulous. They are simply approximations, and in many cases there are no legal equivalents in English. There is a need for co-drafting of future OHADA Uniform Acts in order to avoid translation.

Finally, access to both primary and secondary sources on OHADA is also a matter of concern. Though several online tools, such as the ohada.com,⁸⁴ the Juriscope website,⁸⁵ and the annotated code of OHADA provided at no cost by the *Institut de Droit d'Expression et d'Inspiration Française* (IDEF) on its website,⁸⁶ are a significant improvement, their accessibility is limited not least by the poor Internet connection in many of the OHADA Member States.

Written documentation is expensive. Cash-strapped, OHADA institutions are not in a position to provide documents in published form and still less to distribute them. Although initiatives such as the *Association pour l'Unification du Droit en Afrique* (UNIDA) collect funds to distribute documents and contribute toward the publication of OHADA's *Journal Officiel*, dissemination—referring to both knowledge about the treaty's provisions and access to its related publications—remains an important concern.

3.5. The Absence of a Judicial Space

The enforcement of judgments is a chronic problem in OHADA Member States. Even the enforcement of OHADA law is not an exception, in part because of the apparent sheer disinterest on the part of the treaty's provisions and its institutions in creating an integrated judicial space.

OHADA is a uniform law directly applicable in the Member States. On the enforcement of uniform law, OHADA puts the domestic courts on the front line and gives them an institutional autonomy to enforce the uniform acts' statutes. This autonomy means that the Member States are free to decide which proceedings and which jurisdictional measures to use to authorize OHADA laws, limited only by the overriding force of the CCJA's interpretation of uniform law over domestic courts. But though the treaty provides that CCJA judgments are directly enforceable on the territory of Member States under the same conditions as domestic judgments (art. 20), it does not contain any jurisdictional provision for transnational matters, nor does it regulate how domestic judgments that apply uniform law can be applied in other Member States.

Because of this shortcoming, issues of jurisdiction, recognition, and enforcement within the OHADA judicial space tend to follow national rules, which suffer from the same problems as the laws OHADA replaced: they are frequently outdated, unavailable, unenforced, and/or nonexistent.⁸⁷ Moreover, regional conventions, such as the 1961 Convention on Judicial

Furthermore, it would be desirable to have a co-revision team to work together on the existing Uniform Acts. This team should employ contextual meanings of terminologies and the adaptation approach to translation. Member States should develop an OHADA lexicon of words, phrases and concepts. This would go a long way clarifying the misunderstandings of legal jargons and terminologies." Martha Tumnde, "OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists," in *Unified Business Law for Africa: Common Law Perspectives on OHADA*, ed. Claire Moore-Dickerson (London: GMB Publishing, 2009), 72.

⁸⁴ www.ohada.com.

⁸⁵ www.juriscope.org/infos_ohada/index.htm.

⁸⁶ www.institut-idef.org/-Code-OHADA-annotate-.html.

⁸⁷ Only Senegal, Côte d'Ivoire, Guinea, Burkina Faso, and Gabon have legislation on the recognition and enforcement of foreign judgments.

Cooperation between the member states of the former OCAM (*Organisation Commune Africaine et Malgache*), provide no workable basis for the circulation of judgments within the OHADA zone.⁸⁸ This is an even more paradoxical situation in view of the fact that OHADA does contain quite satisfactory provisions on some issues, for example, the recognition and enforcement of arbitral awards. This lack of a standardized judicial space remains a critical problem for OHADA.

4. Conclusion

OHADA has come a long way since the 1993 Treaty of Port Louis. Few would have expected that the goal of standardizing business laws could successfully federate a group of states whose track record on coordination was decidedly wanting. Initially viewed as a top-down approach with a strong flavor of intervention from the former colonial power, OHADA has been a surprise achievement, as illustrated not least by the commitment of Member States' legal professionals to the treaty and the interest in it expressed by neighboring nonmember states.

However, many challenges persist and new problems have emerged, including resource deficits, institutional deficiencies, language ambiguities, and intransigent attitudes within Member States. Most if not all OHADA institutions face crushing budget shortfalls, which have in turn produced serious understaffing and debilitating case overloads. The problems are particularly acute for the all-important CCJA, which was created without a critical fast-track option that would have enabled it to avoid the considerable backlogs that currently plague it. The CCJA's usefulness also appears to be limited by its geographical location, particularly the provision requiring domicile in country (in this case, Côte d'Ivoire) during proceedings, and by the fact that its jurisdiction continues to be insufficiently outlined and enforced. In addition to the plight of the CCJA, the RCCM is in grave need of technological modernization, and the coherence between OHADA provisions and those from other regional organizations has not been fully established, leaving open the very real potential for conflict in that area.

Significant as they are, all of these problems are overshadowed by the need to effectively and uniformly implement OHADA within the Member States. Indeed, it is the absence of this consistent implementation that most seriously hinders the creation of the legal certainty needed to realize the treaty's ultimate goals. Although sufficiently comprehensive formal laws have been adopted, their overall application and enforcement continue to lag and there are legitimate concerns about whether they ever will be uniformly applied, since the domestic statutes that contradict OHADA have not even been identified, still less removed. This enforcement problem is exacerbated by the frequent refusal, whether out of ignorance or obstinacy, of members' domestic courts to adhere to OHADA provisions, attitudes that are likely themselves exacerbated by the inadequate efforts made to disseminate knowledge about OHADA's statutes, either through training or by making documentation more readily available.

The unmistakable consequence of all of these shortcomings is the absence of an integrated judicial space among OHADA members, a deficiency that strikes at the heart of a key objective

⁸⁸ See Meyer, "La Sécurité Juridique et Judiciaire," 27 (see n. 40).

pursued by the treaty's Member States: to create a climate of trust. If the members want to build this environment of trust to attract foreign investments, they need to establish an effective legal certainty *within* their own borders as well as across them. Judicial certainty and reliability are essential ingredients of this goal. Unfortunately, however, a set of modern uniform laws will not suffice to generate trust among countries with judiciaries crippled by backlogs, corruption, lack of planning, and waste. Being thus unable to generate the essential climate of trust within their own societies, the judicial systems of OHADA members will not likely be judged favorably by those inside or outside the OHADA region.

If well implemented, OHADA could have an exemplary effect throughout Africa by showing the way toward modernization and rationalization. In fact, the same methods used for the proper implementation of OHADA could be applied to other potential areas of integration. For OHADA to be this kind of agent of change for Africa, however, political will is needed first and foremost at the state level. This is where the hard work must begin.

Annex: The Uniform Acts

1. General Commercial Law

Acte Uniforme relatif au Droit Commercial Général (AUDCG)

The AUDCG entered into force on January 1, 1998, and is designed to promote the certainty, transparency, and predictability of commercial transactions. It contains 307 articles articulated under nine books.

Book one deals with the status of merchant (*commerçant*), which it defines as persons whose profession is to engage in commercial transactions (*actes de commerce*),⁸⁹ and with the definition of commercial activity. Art. 3 provides a non-limitative list of commercial transactions that includes, *inter alia*, the purchase of movable and immovable goods with a view to resale; banking; stock exchange; brokerage; insurance and transit transactions; contracts between merchants for the purposes of their business; industrial extractive activities (such as the exploitation of mines, quarries, and all deposits of natural resources); transactions involving the rental of movable goods; manufacturing; transports and telecommunications transactions; transaction by business intermediaries; and acts performed by commercial companies.

The act on general commercial law also contains provisions relating to the capacity of merchants and the limitation of obligations resulting from commercial transactions. The business enterprise is a universality that comprises a series of resources, such as goodwill, trade name, right to the lease, equipment, merchandise, and so on, that enables the business owner or merchant to attract and retain customers. The entirety, though composed of both movable (for example furniture and equipment) and unmovable (patents and licenses) assets, is envisaged as an incorporate property deemed to be a movable that is subject to a right of ownership. The commercial enterprise can be run directly or through a management lease contract (*location gérance*), which gives the manager the status of merchant.

An amendment adopted on December 15, 2010, introduced a new status of *entreprenant*, that is to say, individual enterprise, which corresponds more or less to the *auto-entrepreneur* status introduced in French law by Statute No. 2008-776 of August 4, 2008. Like its counterpart in France, the *entreprenant* is exempted from having to enroll at the Business and Movable Securities Register (*Registre du Commerce et du Crédit Mobilier* [RCCM]) and can operate by virtue of a simple declaration made at no cost and with minimal justification to the local court's register (*greffe*), which enables the applicant to begin operating a business activity. However, when the *entreprenant's* total revenue exceeds a certain amount, it must perform the formalities to operate as a merchant and be registered at the RCCM as such. This status is tailor-made for microenterprise and suits perfectly the economies of the OHADA space.

Books two, three, four, and five deal with the RCCM, which registers individual and corporate structures engaged in merchant activity as well as movable securities. The register is organized at

⁸⁹ AUDCG, art. 2.

three levels: local registries, kept by local courts registrar (book two), national registries, which centralize the information at the national level (book three), and an OHADA register, kept at the CCJA, which centralizes the information contained in each national card index (book four). Book five, introduced with the amendments adopted in December 2010, deals with the consequences of computerization on the RCCM, such as electronic signature, electronic certificates, electronic transmission, archiving, and so forth.

Book six deals with commercial leases and commercial enterprises (*fonds de commerce*). A commercial lease is any agreement, written or oral, between the owner of unmovable property and any individual or corporate structure that allows the latter to carry on any commercial, industrial, handicraft, or professional activity on the premises with the consent of the lessor. The uniform act regulates the obligations of the parties, such as the payment of rent, the conditions for maintenance and repair, assignment, and subcontracting. Leases can be entered into for a specified or unspecified duration. The right of renewal is conditioned on the lessee demonstrating that he carried out the activity stated in the lease for a period of at least two years.

Interestingly, a large number of provisions contained in book six are mandatory, reflecting a tradition inherited from French law in which the commercial lease is considered critically important to the valuation of a business enterprise, thus affording the lessee very favorable protection. In brief, the commercial lessee who operates a business within the leased premises cannot be evicted if he pays the rent and complies with the other contract provisions. As in French law, the commercial lessee under OHADA law has a right to renew the commercial lease, which the lessor can challenge only by paying a substantial—and therefore dissuasive—termination indemnity, or by showing that a lessee has violated the lease agreement or in effect ceased to operate his business on the premises. The lessor can also challenge the renewal if he wants to demolish the building and rebuild it.⁹⁰

Book seven deals with commercial intermediaries. A commercial intermediary, who is deemed a merchant and may be an individual or a corporate structure, has the authority to act on a regular basis and on behalf of a principal for the purpose of entering into commercial sales. The act distinguishes between 1) the *commissionaire*, who acts in his own name on behalf of the principal, 2) the broker, and 3) the commercial agent, who has the authority to enter into sales contracts with third parties on behalf and in the name of the principal.

Book eight deals with contracts of sale of goods between merchants. These exclude consumer sales, auction sales, and sales of chattels, negotiable instruments, currencies, or foreign exchange. The uniform act regulates the rules governing the formation of a sales contract and closely resembles the UN Convention on International Sales of Goods (CISG) with regard to the seller and buyer's obligation and on issues such as the transfer of ownership and risks. The uniform act introduced the institution of the title reservation clause (*clause de réserve de propriété*), which gives the seller the ability to retain title over the goods until complete payment of the contract price, and which has great implications for insolvency situations, since the movable that the transfer of ownership has delayed escapes the buyer's creditors.

⁹⁰ See AUDCG, art. 123 et seq.

2. Commercial Companies and Economic Interest Groups

Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique (AUSCGIE)

The AUSCGIE consists of one preliminary chapter that delineates the act's scope of application and four parts dealing with the general, special (per type of company), criminal, and transitory provisions. This act applies to every commercial company, state or publicly owned, whose headquarters are located on the territory of a Member State.

Part one on general provisions comprises nine books dealing with:

- the formation of a company
- the operation of a company
- the civil liability of corporate management
- complex corporate structures
- the transformation of corporate status
- mergers and acquisitions
- dissolution and winding up
- the nullity of a company and company acts
- formalities/publications

The second part on special provisions per type of company indicates that the act recognizes the following forms of corporate structures:

- Private partnership, a structure in which all the partners are merchants and have unlimited liability for the company's debts. The registered capital is divided down into shares of the same face value.
- Limited partnership, a situation in which one or more partners who are indefinitely—jointly and severally—liable for the company's debts, referred to as “active partners,” coexist with one or more partners who are liable for the company's debts up to the limit of their shares, referred to as “sleeping partners,” and whose capital is broken down into partnership shares.
- *Société à Responsabilité Anonyme* (SARL), a company in which the partners are liable for the company's debts up to the limit of their contributions, and their rights are represented by shares in the capital of a company. In a SARL, shares can be sold or assigned only with the consent of other shareholders. A SARL may be formed by an individual or a corporate body, or by two or more individual or corporate bodies. The minimum registered capital of a private limited company is 1 million CFA francs.
- *Société anonyme* (SA), a company, publicly traded or not, in which the liability of each shareholder—or stockholder for a publicly traded company—for the debts of the company is limited to the amount of shares that can be freely traded by the stockholders without any authorization from other stockholders. An SA may have from one to an

unlimited number of stockholders. The minimum authorized capital of a public limited company is fixed at 10 million CFA francs, with shares of a face value of not less than 10,000 CFA francs.

- Joint venture, an entity without legal personality whose partners agree not to register it in the RCCM. The partners freely agree on the object, duration, conditions of functioning, rights of partners, and termination of the joint venture, as long as there has been no derogation from the mandatory rules of the provisions common to companies.
- *De facto* partnership, a situation that exists when two or more individuals or corporate bodies act as partners without having formed between themselves one of the companies described above.
- Economic interest group, a group that has the exclusive object of putting in place for a specified duration all the means necessary to facilitate or develop the economic activity of its members and to improve or increase income from the said activity. It shall not by itself give rise to the realization or sharing of profits.

The third part of the uniform act on commercial companies defines the various offenses relating to the formation, management, and functioning of companies, general meetings, capital variations, audits, dissolution and winding up, and public offerings. However, it does not fix the amount of penalties imposed, as that remains an attribute of national sovereignty pursuant to art. 5 of the OHADA Treaty. The final part of this uniform act concerns transitory provisions.

3. Secured Transactions

Acte Uniforme portant Organisation des Sûretés (AUS)

The Uniform Act on Secured Transactions provides for various securities protecting creditors against the risk of default of their debtors. This uniform act might be among the most important, as it is designed to spur the flow of credit within the OHADA area and is a prime concern for outside investors. The availability and enforceability of these various types of securities are essential for projects and structured finance in Africa.⁹¹

This uniform act goes hand in hand with the RCCM, as it requires the registration of certain types of securities on the register, which is meant to inform third parties of such securities and to give information on the level of indebtedness of the debtor. This is why it is so crucial to have a working RCCM, which remains an important challenge.

The act provides for various forms of security interests. For example, it distinguishes between personal guarantees and letters of guarantee (or counter-guarantee). The personal guarantee is a contract by which the person stands as surety for a debtor's obligation. The letter of guarantee, also called first-demand guarantee or letter of credit, is an irrevocable primary undertaking under which, upon instructions from the guarantee's beneficiary, the guarantor—usually a bank—will undertake to pay a preagreed-upon sum to the beneficiary, without being able to invoke

⁹¹ See Lionel Yondo Black, "L'Enjeu Economique de la Réforme de l'Acte Uniforme de l'OHADA Portant Organisation des Sûretés: un Atout pour Faciliter l'Accès au Crédit," *Droit et Patrimoine* 197 (2010): 46–52.

provisions of the underlying contract. The letter of counter-guarantee is an agreement under which, at the request or upon instruction of the guarantor's contractor, the counter-guarantor undertakes to pay an agreed sum to the guarantor at the latter's first request. The uniform act also regulates the conditions under which securities over movable assets need to be registered at the RCCM (see art. 51–66). Among those securities, the uniform act regulates the right of retention (art. 67–70), title retention clauses (art. 72–78), assignment as guarantees (art. 79–91), pledges (art. 92–124), *nantissement* (art. 125–178); liens (art. 178–189), and mortgages (art. 190–226).

Since the promulgation of the AUS, the corpus of French legislation that served as its inspiration has undergone considerable modernization, culminating in the promulgation of an ordinance in 2006 that significantly revamped the rules relating to ordinary security interests. It also resulted in a law in 2007 creating the *fiducie*, a concept akin (but not identical) to the trust, permitting the outright transfer of property rights over assets in order to secure debts.⁹²

On December 15, 2010, the Council of Ministers of the Member States of OHADA adopted an amended version of the AUS, which significantly modifies the existing legal framework.⁹³

The new OHADA's AUS brings the OHADA legal framework on security interests in line with the more recent developments in French law, and in some cases even goes beyond it by addressing issues unresolved in the French legislation. Among the most important changes affected by the new OHADA provisions are the following:

- Any security interest or other guarantee of the performance of an obligation may be created, filed, administered, and enforced by a financial or credit institution, whether domestic or foreign, acting as a security agent for the creditors (both present and future).⁹⁴ In the event of the subsequent insolvency of the security agent, the security continues to be available to the underlying beneficiaries of the security and cannot be attached by the creditors of the security agent itself.⁹⁵ This important change in the law means that it is no longer necessary for security in the context of syndicated loans to be granted separately to each of the individual creditors, or for changes in the composition of the lending syndicate to require amendments to the security documents that could trigger additional registration or filing fees.
- Security can henceforth be created to secure both existing and future debt (as long as the future debt is determinable) and can be created over both existing and future assets.⁹⁶
- Physical dispossession of the grantor with respect to tangible pledged assets is no longer required⁹⁷ (although this method of perfection remains optional), and perfection of such security may now also be accomplished without such dispossession by means of a filing

⁹² See Ordinance No. 2006-346, March 23, 2006, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000639090&fastPos=1&fastReqId=1696791847&categorieLien=cid&oldAction=rechTexte>.

⁹³ See entire special issue "Bientôt un Nouveau Droit des Sûretés dans l'OHADA," *Droit et Patrimoine* 197 (2010).

⁹⁴ AUS, art. 5.

⁹⁵ AUS, art. 9.

⁹⁶ See, for example, AUS, art 79, 81.

⁹⁷ AUS, art. 92.

at the RCCM.⁹⁸ Specific provision is made, in the case of fungible assets, for the replacement of secured assets with identical assets, thereby permitting the “rolling over” of secured assets in such cases.⁹⁹

- Where the pledged asset is a cash payment or an asset that is quoted on an official exchange, or, in the case of any other tangible assets (except in the case of the business pledge), where the debtor is a professional, the parties may provide that the creditor may enforce the pledge by self-appropriation of the secured asset, as long as the value of the asset at the date of the appropriation is evaluated by an expert (who can be designated mutually by the parties or designated by the court), with any surplus value being returned to the pledgor.¹⁰⁰
- Pledges of intangible assets now expressly include not only receivables and company shares, but also bank account balances, which was generally understood to be the case under the existing uniform law but has now been clarified.¹⁰¹ Perfection of security over receivables no longer requires formal service of the security on the underlying obligor by *signification*; rather, simple notice (or adherence by the obligor to the pledge agreement) is sufficient. However, in order to be enforceable against third parties, the security must be perfected by filing at the RCCM.¹⁰² Once a pledge of a receivable is notified to the obligor, such obligor must make payment of the receivable directly to the grantee.
- Pledges of shares continue to be possible, but it will henceforth also be possible to pledge “accounts of financial instrument” (*comptes de titres financiers*), that is, all of the securities and other financial instruments that are deposited from time to time in an account.¹⁰³ Such security is created and perfected by a simple declaration of pledge signed and dated by the owner of the account in which the securities are deposited. This important change permits considerable flexibility with respect to security interests over financial instruments, since the composition of the securities account may change over time and no filing with the RCCM is required to perfect the pledge. In practice, however, it is limited for the moment to securities and other financial instruments that are dematerialized and can therefore be deposited in such an account.
- Filings of security interests for perfection purposes at the RCCM are simplified, thereby loosening the requirement to provide a comprehensive summary of the events of default that can lead to acceleration of reimbursement of the secured debt.¹⁰⁴ Plans are also under way within OHADA to provide computerized access to filings at the RCCM, enabling creditors to determine more easily the current situation of security filed against a debtor.
- Property rights over assets can be transferred by way of security for debt, making it now possible to create security assignments over both tangible and intangible assets, provided that the secured debt is granted by a legal entity, domestic or foreign, habitually

⁹⁸ AUS, art. 97.

⁹⁹ AUS, art. 101.

¹⁰⁰ AUS, art. 104, par. 3.

¹⁰¹ AUS, art. 137.

¹⁰² AUS, art. 131.

¹⁰³ See AUS art. 146 et seq.

¹⁰⁴ AUS, art. 53 et seq.

providing banking or credit transactions.¹⁰⁵ A security assignment of receivables is effective against the underlying trade debtor on simple notification to such debtor; however, enforceability against third parties requires filing at the RCCM.¹⁰⁶

- It is permitted to create cash collateral by means of fiduciary transfer of a sum of cash by way of security to a blocked account on the books of a credit institution, going even further in this respect than the analogous French law provisions. Such a transfer is effective upon notification to the bank in question of the existence of the security interest, and no filing at the RCCM is required.¹⁰⁷

4. Simplified Debt Collection Procedures and Enforcement Measures

Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution (AUPSRVE)

The AUPSRVE entered into force on April 10, 1998, and seeks to provide quick and efficient methods of debt collection. It does so primarily through the remedy of an injunction to pay, which is a simplified proceeding whereby the creditor can file an application with the court and must provide sufficient evidence of the merit of his claim. Should the creditor so show, the judge delivers an order to pay or to restitute unpaid goods. Such an order can be challenged by the debtor before the judge who has issued the order through a recourse known as *opposition*. When such recourse is made, the decision can be appealed through the normal appeal procedure.

The second book regulates all means available to enforce civil judgments and preserve rights. It sets out a wide range of enforcement tools such as sequestration of assets, garnishment, seizure of assets, attachment of real property, and so forth.

5. Accounting Rules

Acte Uniforme portant Organisation et Harmonisation des Comptabilités des Entreprises (AUHCE)

The AUHCE entered into force on January 1, 2001, for companies' individual accounts and on the same day the following year for consolidated and combined accounts. It sets out a harmonized accounting system for companies located on the territory of Member States comprising accounting standards, obligation to present annual accounts, rules for the determination and evaluation of net income, auditing, declaratory obligations, and consolidation rules. Its objective is to ensure the transparency and accuracy of financial information through substantial disclosure requirements.

¹⁰⁵ AUS, art. 80.

¹⁰⁶ AUS, art. 82.

¹⁰⁷ AUS, art. 87.

The AUHCE created three sets of procedures (*Système Normal*, *Système Allégé*, and *Système Minimal*) for bookkeeping and the presentation of financial statements, taking into account the size of the business turnover at the end of the fiscal year. The main issue with this act is how it fulfills the purpose of convergence with the International Financial Reporting Standards (IFRS). Though the AUHCE corresponds to the “true and fair view” reflected in the IFRS, noticeable differences exist, for example on the method of presentation of financial statements. More importantly, despite the creation of an OHADA Accounting Standardization Commission in 2008, the OHADA accounting system is currently experiencing harmonization difficulties due to a lack of proper and uniform implementation of the AUHCE.

The institutional financial institutions, such as the World Bank, that are actively involved in the promotion of the IFRS would be the perfect vectors to i) assist with a better implementation of the AUHCE and ii) ensure that the AUHCE itself converges further with the IFRS.

6. Insolvency and Bankruptcy Proceedings

Acte Uniforme portant Organisation des Procédures Collectives d’Apurement du Passif (AUPCAP)

The AUPCAP entered into force on January 1, 1999. It provides three different kinds of bankruptcy proceedings for both corporations and individuals: preventive reorganization (*réglement préventif*), reorganization (*redressement judiciaire*), and liquidation. A business in difficulty is entitled to make a settlement proposal that may either be approved or rejected by the competent court. In the latter case, bankruptcy proceedings ensue. The act lays down a judicial recovery procedure in the case of insolvent debtors and sets out rules with regard to corporate managers’ responsibilities and obligations.

7. Arbitration

Acte Uniforme relatif au Droit de l’Arbitrage (AUA)

The Uniform Act on Arbitration entered into force on June 11, 1999, and offers a comprehensive system for giving effect to agreements that provide for arbitration in any of the Member States. The act lays out basic rules that can be applied to any arbitration where the seat of the arbitral tribunal is in one of the Member States, or to parties outside those states who may wish to arbitrate under the act.

OHADA arbitral rules closely resemble those of the International Criminal Court (ICC). The uniform act requires courts to stay proceedings in favor of arbitration and provides standards for the recognition of arbitral awards. It also provides the principles and procedures for arbitration, including the designation of the arbitrators, rendering of a decision, and recognition and enforcement. An award under the act can be challenged through action for annulment, petition for review, and opposition by a third party.

However, this uniform act contains a number of flaws that could prevent OHADA from being considered sufficiently attractive in the realm of arbitration law. For example, OHADA does not contain any provision on mediation or conciliation. Similarly, there is no fast-track arbitration proceeding under the act.

8. Carriage of Goods by Road

Acte Uniforme relatif aux Contrats de Transports de Marchandises par Route (AUCTMR)

The AUCTMR entered into force on January 1, 2004. Based largely on the UN Convention on the Contract for Carriage of Goods by Road (CMR), this uniform act is applicable to contracts where a carrier undertakes, as a principal obligation, to carry goods by road.

The act requires the shipper to provide certain documents for customs, packaging, declarations, and instructions relating to the performance of the contract, inspection of the goods, delivery, payment, and liability. As in the CMR, there are provisions for successive carriages using the same or different means of transportation. The law also provides for limitation of liability, statute of limitations, jurisdiction, and arbitration.

9. Community-Owned Businesses

Acte Uniforme relatif au Droit des Sociétés Coopératives (AUSC)

The AUSC only recently entered into force on May 17, 2011. It is meant to provide an adapted corporate structure to rural activities and in particular, was designed to spur the flow of credit to rural areas, especially in favor of women. As in all other arrangements, there are no outside investors in the cooperative and shares do not increase in value, but each shareholder receives an amount of shares proportional to his or her contribution to the capital.

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