



**UNDERSTANDING THE ORGANIZATION
FOR THE HARMONIZATION OF BUSINESS
LAWS IN AFRICA**

(O.H.A.D.A.)

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By

Alhousseini MOULOUL

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DEDICATION

**In memory of the President Kéba M'BAYE,
the great architect of the legal integration of Africa.**

“The globalization of the economy requires the harmonization of the laws and practices of the law”. OHADA is “both a factor for the economic development and an engine of regional integration.”

M. Aregba Polo

Permanent Secretary of the OHADA

Niamey June 9th and 10th, 1999)

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ACRONYME AND ABBREVIATION

ADB	African Development Bank
AEC	African Economic Community
AMU	African and Mauritian Union
Art.	Article
BAMREL	Bureau Africain et Mauricien de Recherches et d'Etudes législatives
CAR	Central African Republic
CCJA	Common Court of Justice and Arbitration
CEMAC	Central African Economic and Monetary Community
CER	Economic Regional Community
CFAF	Franc of the Financial African Community
CIMA	Inter-African Conference for the Insurances Market
CIPRES	Inter-African Conference for the social Welfare
CM	Council of Ministers
ECOWA	Economic Community of West Africa
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EIG	Economic Interest Groups
ERSUMA	Regional Training Centre for Legal Officers
EU	European Union
FTA	Free Trade Area
GEPGL	Community Economic of the State of Great Lakes
GP	Gazette du Palais
IRCL	International Review of Comparative Law
JORN	Official Journal of the Niger Republic
LAP	Lagos Action Plan
OCAM	African and Malagasy Common Organization
OHADA	Organization for the Harmonization of Business Law in Africa
OUA	Organization for African Unity

PRN	President of the Republic of Niger
RA	Rule of Arbitration
Rev.	Review
UA	Uniforms Acts
UA/AL	Uniform Act on Arbitration Law
UA/CCL/EIG	Uniform Act related to the Commercial Companies and Economic Interest Groups
UA/GCL	Uniform Act on the General Commercial Law
UA/SL	Uniform Act related to the Security Law
UA/CPCD	Uniform Act on the Collective Proceeding for the Clearing of Debt
UA/SRP/EM	Uniform Act on the Simplified Recovery Procedures and Enforcement Measures
UAM	Union of the Arabic Maghreb
UEMOA	West African Economic and Monetary Union
UDEAC	Economic and Custom Union of the Central Africa
UNIDA	Association for the Unification of African Law
UNDP	United Nation Development Program
YAE	Young Africa Economy

INTRODUCTION

For over a decade, international relations have been marked by globalization, or globalization of trade, leading to the building of economic spaces in which geographical boundaries and vestiges of sovereignty have no political meaning. The building of these economic areas that lead often to the economic integration of member states, endeavor on one hand, to promote economic and social development, but on the other hand, promote private investment by making markets more attractive and domestic or communitarian enterprises more competitive. “At a time of globalization of the economy, when the leading countries of the world come together to form economic - and in the case of need monetary union- it was imperative for all countries concerned to adopt a modern business law , really adapted to the economic needs, clear, simple, reassuring relationships and economic transactions”¹. It follows a phenomenon of “globalization of law” which “means:

- A weakening of state sovereignty through the reinforcement of the facilities of establishment, movement of persons, goods, services and factors of production;
- More or less and clear similarity in legal regimes applicable to economic activities, irrespective of the place of accomplishment;
- A set of rights and duties common to all economic actors wherever they perform their activities (Code of Conduct for Business);
- A very clear and constant trend to the denationalization of the settlement of economic disputes (arbitration and non-judicial procedures”²).

African States cannot remain on the fringe of this process, and that is why organizations have been created³ with the aim of achieving economic integration first, at sub-regional and regional levels, and then were created also the African Economic Community (AEC) and the African Union (AU).

¹ Jean PAILLUSSEAU, « *Le droit de l’OHADA. Un droit très important et original* », La Semaine Juridique n° 44 du 28 octobre 2004, Supplément no 5, pp 1 – 5.

² Joseph ISSA-SAYEGH, Jacqueline LOHOUES-OBLE, OHADA – *Harmonisation du droit des affaires*, Ed. BRUYLANT – JURISCOPE, 2002, p. 5 et 6.

³ AMU, ECOWAS and UEMOA in West Africa and the GEPGL CEMAC for Central Africa, etc..

Some of these organizations have had an ephemeral existence for not having at their disposal consistent human and financial resources; others survive with the assistance of the international community, because the member states often find themselves facing financial difficulties. This can be seen through the calls made by those states to the Bretton Wood institutions.

The Regional Economic Communities (RECs) are the plinth upon which the economic integration of the African continent must be based; but it appears that in most cases, RECs do not place the legal integration of member states as a priority whereas the law, as we shall see, is the instrument which permits the achievement of economic integration. The founding treaties of the few RECs have provided the instruments of the legal integration, but in most cases it has not experienced the success expected. Finally, the legal integration, which should serve as a locomotive for the economic integration of the African continent, cannot be achieved through such RECs. This explains, in part, the initiative of African states to launch the process of integrating parts of the law⁴ which did not take into account the geographic and economic spaces; these experiences have often given satisfaction to all States Parties. It is in this context that the experience of unification of business law of the African States was launched through the Organization for the Harmonization of Business Law in Africa (OHADA).

A-Genesis of OHADA⁵

OHADA was not born only from the initiative of the heads of state of the African Franc Zone; it was above all an idea, and even a requirement from African traders who demanded that the legal and judicial environments of businesses should be improved, in order to secure their investments. Indeed, with the slowdown of investments, due to the economic recession, and the legal and judicial insecurity that prevailed in this region during the 1980s, it was necessary to restore investors' confidence, both domestic and foreign, in order to promote the development of entrepreneurship and to attract foreign investments.

⁴ Labor Law, Insurance Law, Banking Law, Intellectual Property Law.

⁵ See Alhousseini MOULOUL, *The Le régime juridique des sociétés commerciales dans l'espace OHADA : l'exemple du Niger*, Phd (University of Paris I Panthéon – Sorbonne), LGDJ – EJA, march 2005, pp13 – 20.

I-The Reason of the Creation of OHADA

In addition to the requirements imposed by the international economic environment, a number of other reasons are usually cited to justify the creation of the OHADA. Indeed, the diversity that prevailed among African laws is not only a handicap for the creation of an integrated economic area, on the one hand, but it is also accompanied by the legal and judicial insecurity, resulting from the dilapidated and obsolete nature of the applicable laws, which discouraged private investors on the other hand. Finally, the legal integration has several advantages because it allows the African continent to enter into the channels of international trade.

1-The state of African Post-Colonial Legislation

The law inherited from colonization is often Balkanized, changeable from one territory to another, because of the rule of “legislative specialty”. Under this rule all the colonial legislation was not applicable and its application to the colonies requires a special extension made by decrees. In the former French colonies the applicable commercial law was often the French Commercial Code of 1807 and subsequent legislation made applicable to the colonies; the general regime of company was governed by the French Civil Code of 1804, the Public Limited Company(SA) and the Limited Liability Company (SARL) were governed respectively by the French law of 24 July 1867 and 7 March 1925; to supplement, modify or clarify these basic texts, and other texts have been prepared by the colonizer to be applied in the colonies⁶. It follows from this colonial legislation that there should be some legal harmonization in the colonies.

However, this pseudo - harmonization concerns only those colonies. In the first decades after the independence, each State has legislated in the areas it considered priorities⁷, awkwardly following adaptations and modernizations achieved in France, which gave rise to the accentuation of the "legal balkanization" of the continent. Finally, the legislation applied in the newly independent states became obsolete because of its failure to adapt to the current socio-economic realities and the investors run in “every country against a

⁶ See Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, *OHADA – Harmonisation du droit des affaires*, op cit, n° 87, note n° 7.

⁷ See Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, *OHADA – Harmonisation du droit des affaires*, op cit, n° 87, notes 4 et 5.

disparate, obscure and outdated law”⁸. Me Kéba M'BAYE wrote: "the law within the fourteen (14) franc zone countries is like a harlequin dress made of fragments and pieces. In addition to this diversity of texts, we can also notice their inadequacy to the current economic context”⁹; He added that “a lot of investments are conceivable at inter – state”. Indeed, the globalization of economic relations now requires the establishment of an integrated economic space with a harmonized legal framework. This international environment will prevail in Africa which is trying to meet new challenges in promoting economic integration through the Regional Economic Communities (RECs). However, the economic integration cannot be conceived in a space characterized by legal diversity. To face these challenges African states are trying, often with mitigated success, the experience of legal harmonization.

2- Legal and Judicial Insecurity

Me Kéba M'BAYE explained at the seminar on OHADA, held in Abidjan (Côte d'Ivoire) on 19 and 20 April 1993, several arguments in favor of harmonization. One argument, among others, was “the fragmentation of our common law is a negative factor of our progress which is common to all of us”, as well as “at the national level, the texts were promulgated while others in the same area, are not repealed. This gives rise to contradiction and the economic operators remain in the uncertainty with regard to the law applicable; this legal uncertainty is a very serious handicap for investment...” As Chairman of the working group who prepared the advent of OHADA, Me Kéba M'BAYE undertook several missions in the member states, and at the seminar in Abidjan, he presented his findings in these terms: “Everyone agreed on the need for harmonization. Indeed, everyone agrees that the law in force is no longer appropriate, that the rules vary from one country to another, that there is an undeniable uncertainty in the legal corpus of each state, that judicial insecurity, due to the inadequate specialized training of judges, lack of continued training system, and to the ethical issues, the paucity of legal information, the total lack of available resources to the judicial services and to many other

⁸ See Boris MARTOR et Sébastien THOUVENOT, « *L'uniformisation du droit des affaires en Afrique par l'OHADA* », La Semaine Juridique n° 44 du 28 octobre 2004, Supplément n° 5, pp 5 – 11.

⁹ See Summary of the work on the seminar on harmonization of African business law in franc zone African states. P. 14 and 15. Abidjan from 19 to 20/04/1993. Regarding the necessity of harmonization, see also Joseph ISSA SAYEGH, Legal integration of franc zone African countries, *Revue Penant* n°823 Janvier – Avril 1997, p. 5 et suiv.

causes....”¹⁰ Analyzing the regulation applicable to company law in countries of the African Franc Zone, Martin Kirsch wrote in turn that “unanimous report of the situation could be summarized by the following formula: legal and judicial insecurity”¹¹.

Legal uncertainty because many texts in business law are outdated, for the most part, they date back to the colonial period and often traders, as legal practitioners, found it difficult to know the applicable rule of law¹². This created a legal uncertainty defined by Philippe TIGER as “an uncertain situation related to the result of an eventual procedure in which the traders could be involved in as a party, and its inability to influence the course of justice in the sense of fairness if necessary”¹³. This situation creates a disabling legal uncertainty for investment.

As to the judicial uncertainty, it is the consequence of inadequate training of judges and judicial officers, particularly in the economic and financial matters, on one hand and on the other hand, the moderateness of the human and material resources at the disposal of the courts. As written by Philippe TIGER, it “manifests itself in different ways: challengeable decisions, decisions under advisement for several years, non performance of the law, various negligence, breach of ethical conduct, admission of the obvious delaying tactics and the indefinite remand of the decision that eventually discourages the plaintiffs in good faith”¹⁴ This has two immediate and unavoidable consequences: unstable and uncertain jurisprudences, and difficulties in implementing the decisions of the courts. It also results in a loss of confidence in the judicial system of African countries and, subsequently, the reluctance of investors.

The Nigerian Minister of Commerce and Industry said at the opening of the seminar on awareness of the harmonized law, held in Niamey on 09 June 1998: “the legal and judicial security is a prerequisite for establishing a sustainable confidence in the national or international investor, to develop a dynamic private sector and promote trade, on one hand

¹⁰ Summary of the Abidjan’s seminar p.18

¹¹ Kirsch « History of OHADA », Revue Penant n° spécial OHADA n° 827 May– August 1998 pp. 129.

¹² About the applicable to the business law of African French countries at the moment of independence, see Georges MEISSONNIER and Jean Claude GAUTRON« *Analyse de la législation africaine en matière de droit des sociétés* » RJPIC 1976 n° 3 pp. 331

¹³ Philippe TIGER, Que sais-je ? « *Le droit des affaires en Afrique – OHADA* ». Ed. PUF, nov. 1999 P. 2.

¹⁴ Philippe TIGER, op. cit. p. 24

and, on the other hand, there is no sustainable economic and social development without a legal framework favorable to investments”¹⁵.

The situation that has been briefly described is not unique only to French-speaking African countries, it is also prevalent throughout the African continent, and therefore the legal harmonization at the continental scale becomes inevitable.

3-Advantages of the Legal Integration¹⁶

The harmonization being largely based, what are its benefits? The advantages are many: they are primarily the establishment of the legal integration, then, as we have already mentioned, the legal integration promotes economic integration, which together are the way to achieve the African Union. These advantages encourage the states to opt for the legal integration.

a-The Benefits of a Legally Integrated Economic Space

On the African continent, as much as it aims to improve the legal environment for business, the legal harmonization should be seen as a “technical tool” of economic integration which has several advantages¹⁷:

- Making available to each State a legal text technically simple and efficient, regardless of its human resources;
- Facilitating cross-border trade and creating conditions of free competition;
- Communication and transfer of modern business management;
- Restoring a climate of trust through the settlement of the problem related to legal and judicial insecurity;
- Encouraging the relocation of large companies in Africa;
- The promotion of arbitration as a quick and discrete mechanism for commercial disputes settlement;
- The elimination of conflicts of laws in the area legally harmonized;
- Finally, strengthening African unity.

It should also be noted that in the current state¹⁸ of company law applicable in the African countries, it is almost impossible to move a company of a State to another without a

¹⁵ The Sahel, n° 5565 of Wednesday 10/06/1998 p.2

¹⁶ See. Kéba MBAYE, « *L'histoire et les objectifs de l'OHADA* », op cit.

¹⁷ See M. KIRSCH, supra p. 1.

¹⁸ Before the enter into force of the uniform acts.

dissolution followed by a recovery¹⁹, an unthinkable situation in the context of an integrated economic area. With the legal harmonization or unification, the existence of Community Company's law helps to overcome this handicap. Moreover, as Jean Paillusseau wrote, "it is clear that for a company that operates in several countries, the unity of the applicable rules facilitates considerably its operations, including its legal organization, its functioning or its financial and commercial trade."²⁰ Finally, the integrated regions are more attractive to international investors and have a range of benefits in terms of infrastructure and institutions that are able to promote sustainable development. They constitute also a safe means for the access to the competition in a global economy. (...). An African business law at the continental level can strengthen the credibility of Africa; improve the flow of investment, and accelerate the development and influence of the globalization of business law in its entirety.²¹

Regarding the specific model of OHADA, "the treaty is undoubtedly conducive to the emergence in the region of a genuine economic law necessary for the sustainable development of the economies."²²

The relevance of the observations and analysis that have been briefly mentioned, are no longer subject to doubt.

b- Law, Technical Tools of Economic Integration²³

Regional integration has been present in the development strategies of African countries since their independence in the 1960s; and has motivated the creation of several organizations, among others: the Monetary Union of West Africa (UEMOA) in 1962; the Organization of African Unity (OAU) and African Development Bank (ADB) in 1963. This option has been regularly reaffirmed, inter alia, through the Customs and Economic

¹⁹ In this case, see E. CEREXHE, op. cit. p. 45

²⁰ See Jean PAILLUSSEAU, « Le droit de l'OHADA – Un droit très important et original », op cit

²¹ See Gilles CISTAC, « L'intégration juridique dans « tous » ses états : SADC et OHADA », op cit.

²² See François GAULME, « L'intégration régionale dans le cadre de la Zone Franc : un mouvement prometteur », Marchés tropicaux du 15/11/1991.

²³ See Alhousseini MOULOUL, « L'intégration juridique des Etats de la SADC et les perspectives d'adoption du droit des affaires de l'OHADA pour l'assainissement de l'environnement juridique des affaires », Act of the « First International Conference about the issues of the regional integration and the SADAC Law SADC », University of Eduardo Mondlane du Mozambique, Maputo from 23 to 25 April 2008 ; Adde Gilles CISTAC, « L'intégration régionale dans « tous » ses états : SADC et OHADA », Act of the « International Conference about the harmonization of the commercial law and its advantages on chinese investment in Africa », University of Macau, Faculty of Law, Macau le 27 november 2007.

Union of Central Africa (UDEAC) in 1964, which became later on Economic and Monetary Community of Central Africa (CEMAC) in February 1998; the Customs Union of the States of West Africa, Abidjan (Ivory Coast) on 3 June 1966; the Community of West African States (COWAS) in Abidjan on 17 March 1973, dissolved on March 14 1994; the Economic Development Community of West African States (ECOWAS) in 1975; the Economic and Monetary Union of West Africa (UEMOA) resulted from the merger of COWAS and the UMOA in 1994. At the continental level the option for the integration has been reaffirmed through the Lagos Action's Plan (LAP) in 1980, the Abuja Treaty of 1991, entered into force in 1994 and established the African Economic Community (AEC), the creation of the Inter-African Conference of Insurances Market (ICIM or CIMA) in 1992 and the Inter-African Conference of the Social Contingency (CIPRES) in 1993, and finally the Syrte Declaration in 1999.

African States have opted for economic integration at the continental level through the Regional Economic Communities (RECs)²⁴. AEC will be achieved in six (6) phases that spread over thirty-four (34) years; the first phase focuses on strengthening the RECs in order to be transformed into free trade areas (FTAs), customs unions and common market. The pursuit of these objectives led to the creation of a multitude and dynamic organizations, among which, one can count ECOWAS, UEMOA, CEMAC and COMESA, to mention only these, with the various institutions they cover.

Is legal integration needed to build a reliable and viable economic space? the Professor Joseph Issa-Sayegh defines a completed legal integration as “the transfer of the powers of two or more states to an international organization with decision-making power and supranational or super-state competences in order to achieve a single and coherent body of law in which national legislation fits into in order to achieve the economic and social objectives that member states have set themselves.²⁵” CEREXHE²⁶ Etienne, speaking of the integration of the economies of states of the EEC, wrote: “the integration of the economies of the nine (9) countries of the EEC through the achievement of community freedoms and the approximation of economic policies could hardly make its effects in a

²⁴ Southern Africa, Central Africa, Eastern Africa, and North and western Africa.

²⁵ Pr. Joseph ISSA-SAYEGH « *l'Intégration juridique des Etats Africains de la zone franc* », Revue PENANT n° 823 Janvier – Avril 1997 pp. 5.

system dominated by diversity or a divergence of law. A minimum of legal unity was needed if we wanted to ensure market fluidity and the uniform application of common policies. In other words, the economic integration, as it is inherent in all integration, requires a legal environment more or less harmonized". Indeed, as written by Jean Paillusseau to achieve the economic integration of African states, it is necessary to have:

a- "Single law,

b- Law appropriated to the particularism of African economies;

c- Law adapted to the real needs of businesses, particularly in the financing and management;

d- Law that ensures the security of creditors, third party and investors;

e- Law that can promote and support the economic growth of the economies of the countries of the entire region.²⁷ According to Professor Gilles CISTAC, "the harmonization of law is not only a condition for the success of a phenomenon of integration, but it can also be an engine of integration and this in two ways: as a tool for approximation of peoples and as a tool for approximation of economies"²⁸. We may agree, finally, with Professor Yves GUYON that "it is not secret that if the law is not a sufficient condition for development, it is a necessary condition."²⁹

The relevance of these observations is no longer subject to doubt in the case of African states. Under the current process of globalization, African states have no choice than to consolidate the integration of their economies, to reduce the extroversion of the economy and create conditions favorable to investments. The current trend being the internationalization of business; legal harmonization becomes an imperative because a properly conducted harmonization promotes trade, free competition, restores confidence and prepares economic integration.

²⁶ E. CEREXHE, « Problématique de l'entreprise et de l'harmonisation du droit des sociétés », RJPIC. 1978 n°1.

²⁷ Jean PAILLUSSEAU, « *Le droit de l'OHADA – Un droit très important et original* », La Semaine Juridique, no 44 du 28 octobre 2004, Supplement no 5, pp 1 – 5. Adde Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, OHADA- *Harmonisation du droit des affaires*, op cit, n° 86.

²⁸ Adde Gilles CISTAC, « *L'intégration régionale dans « tous » ses états : SADC et OHADA* », Act of the « International Conference about the harmonization of the commercial law and its advantages on Chinese investment in Africa », University of Macau, Faculty of Law , Macau le 27 November 2007.

²⁹ Yves GUYON, « Conclusion », in Petites Affiches no205 du 13 octobre 2004, pp 59-63.

In this context and in that perspective, the need for the legal integration is obvious, and the African Heads of State are henceforth convinced and will address the implementation of the old dreams facilitated by several assets.

II-The Benefits of Legal Harmonization:

These benefits³⁰ are a guarantee of success, because the integration cannot succeed unless it is based on solid foundations and is supported by real political will to resolve common problems. Referring to these benefits, Me Kéba M'BAYE wrote: "It is certain that in groups where there are already common legal traditions, a common currency and, to some extent a common history and way of conceiving and building the future, it is easier to achieve economic integration³¹", in addition, "the projects that have the greatest chance of success, again, are those that coincide with an economic, cultural and monetary uniform area"³². For some states, it should be added also the existence of the same official language; the phenomenon of Islam and the African traditional law³³. These are conditions necessary for a successful integration, and in the space that constitutes the African Franc Zone almost all these conditions are met. But these conditions are not sufficient alone because without political will no building of this type can be sustained. Given the speed with which the OHADA's draft has been achieved and the enthusiasm it has generated³⁴, we are entitled to believe that political will is real. Indeed, it took less than two years for the "Treaty of Port Louis" to be signed, less than two years for the treaty to enter into force and less than five years for the first seven Uniform Acts (AU) be adopted³⁵.

This project is also underlined by ambitious programs of economic integration in all African regions, and organizations were established for this purpose (BAMREL, CEAO, ECOWAS, UEMOA, etc.).

Finally, the existence of experiences of unification is also an important asset³⁶.

³⁰ See Philippe TIGER, *Que sais-je ? Le droit des affaires en Afrique*, Editions PUF, juillet 2001, pp 12 – 18.

³¹ In Revue PENANT n° 827, May – August 1998, p. 126 et suiv, N° Spécial OHADA. Adde Alhousseini MOULOUL, *Le régime juridique des sociétés commerciales dans l'espace OHADA : l'exemple du Niger*, op cit, p 12 and 13.

³² Ibidem. See also: Kéba M'BAYE, in summary of the seminar of Abidjan, pp. 14 and 15.

³³ About those aspects see: Philippe TIGER, *Que sais-je? « Le Droit des Affaires en Afrique OHADA »*, Ed. PUF, Nov. 1999, p. 15 and 16.

³⁴ See infra, final report of meeting of the heads of state hold in Dakar during 5 and 6 October 1992

³⁵ See infra.

³⁶ Inter alia EEC, United State, Commonwealth, NAFTA, MERCOSUR.

These are undeniable assets which some groups of States did not have, such as the member states of the EEC, which slowed down or even hindered the harmonization of their laws and their economic integration.

In consideration of these situations, the advent of the OHADA cannot be considered as surprising.

III-The Process that Led to the Birth of the OHADA:

The idea of harmonizing African Law dates back to May 1963 at a meeting of Ministers of Justice led by Professor René David. This idea was taken by eminent African jurists and got its first achievement in the African Union and Mauritius (AUM) and in the Convention of the African and Malagasy Common Organization (AMCO). The Article II of the General Convention of Judicial Cooperation between the states of AMCO, states that: “The High Contracting Parties undertake to take all measures to harmonize their respective trade laws to the extent consistent with requirements that result from the requirements of each of them”, in addition, according to the Article 3 of the Convention of 5 July 1975 establishing the African and Mauritian Bureau for Research and Legislative studies (BAMREL), this institution “aims to help the signatory states, so that the applicable legal rules, can be worked out under conditions that permit their harmonization”. Unfortunately, the OCAM and BAMREL, like many African organizations, have not been provided with sufficient funds and had an ephemeral existence.

It was in 1991 that the idea of harmonizing African Law was reborn again at the meetings of Ministers of Finance of the Franc Zone, held first in Ouagadougou (Burkina Faso) in April 1991 then in Paris (France) in October 1991. At the latter meeting, the Ministers of Finance set up a mission composed of seven (7) members, lawyers and businesses, chaired by Me Kéba M'BAYE.

From March to September 1992, the Mission took an inventory of fixtures by visiting the countries of the Franc Zone. On 17 September 1992, Me. Kéba M'BAYE presented his report at the meeting of Finance Ministers.

On 5 and 6 October 1992, Heads of State of the Franc Zone met in Libreville, at this meeting the President Abdou DIOUF (Senegal) presented the substance of the draft prepared by the expert. The Heads of State decided to extend it to all African States and not only to the states of the Franc Zone. In the final report of this meeting it was stated that

the Heads of State and the delegation “have approved the project on harmonization of business law conceived by the Ministers of Finance of the Franc Zone, and agreed to its immediate implementation and asked the Ministers of Finance and Justice to all States concerned to make it a priority”. The Heads of State adopted the report of the seven (7) personalities; and appointed a board of three (3) members³⁷, to coordinate the preparation of the treaty establishing the OHADA.

The Executive Board prepared the draft of the treaty and submitted it to the meeting of Ministers of Justice, held in Libreville on 7 and 8 July 1993. The project was approved after being amended and improved. It was finalized in Abidjan on 21 and 22 September 1993 by the Meeting of Ministers of Justice and then, by the joint meeting of the Ministers of Finance and Justice, preceded by an experts' report.

Finally, on 17 October 1993 in Port Louis (Mauritius), the Conference of the French-speaking African countries was held. At this occasion the project was submitted for signature to the Heads of State and delegations of French-speaking African countries. The treaty establishing OHADA was signed by fourteen (14) States,³⁸ with two other³⁹ states joining it later, so today there is a total of sixteen (16) member states.

Thus, the main steps leading to the functioning of OHADA can be summarized as follows⁴⁰:

1. Ouagadougou (Burkina Faso), April 1991: Meeting of Finance Ministers: Conception of the “draft for the harmonization of Business Law in Africa”.
2. Paris (France), October 1991: Meeting of Finance Ministers: formation of the “Mission” of seven (7) members.
3. From March to September 1992: The Mission conducted some visits to various countries of the Franc Zone: information and awareness of the authorities and the assessment of the state applicable law.

³⁷ President : M.K. M'BAYE ; members : Martin KIRSCH, Honorary advisor of the French Cour de cassation , Advocate to the lawyers bar association of Paris, and Michel GENTOT, President of the contentious section of French conseil d'Etat .

³⁸ Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Brazza), Cost Ivory, Gabon, Equatorial Guinea, Mali, Niger, Senegal and Togo

³⁹ Guinea-Conakry and Guinea Bissau

⁴⁰ For the complete history see Alhousseini MOULOUL, *Comprendre l'OHADA*, Annex I, Editions NIN April 2000.

4. Yaoundé (Cameroon), 16 April 1992: Meeting of Ministers of Finance; Me Kéba M'BAYE presented his first report.
5. 17 September 1992: Meeting of Finance Ministers of the Franc Zone. Me Kéba M'BAYE introduced the report. The draft was approved.
6. Libreville (Gabon), 5 and 6 October 1992: Meeting of the Heads of State of France and Africa:
 - President Abdou Diouf (Senegal) presented the substance of the OHADA's draft;
 - The draft was adopted by African Heads of State of the Franc Zone;
 - Opening of the project to other states than those of the Franc Zone;
 - Formation of a board of three (3) members, chaired by Judge Keba M'Baye and composed by Martin KIRSCH, and Michel GENTOT
7. Dakar (Senegal), November 1992: Meeting of Ministers of Justice; decision on the establishment in each state, a commission of 5 members.
8. Dakar (Senegal), 18 and 19 December 1992: Meeting of Ministers of Justice. Ministers requested the Executive Board to prepare the future treaty and establish priorities among the matters to be harmonized.
9. Abidjan (Ivory Coast), 19 and 20 April 1993: Seminar on the harmonization of business law in the States of the Franc Zone. The seminar tested the technique of preparing the texts provided by the Board. The national commissions were established.
10. Libreville (Gabon), 7 and 8 July 1993: Meeting of Ministers of Justice. Examination of the treaty draft.
11. Abidjan (Ivory Coast), 21 and 22 September 1993: Meeting of Ministers of Justice followed by that of Ministers of Finance. The treaty draft was finalized.
12. Port Louis (Mauritius) on 17 October 1993: Meeting of the conference of countries sharing the use of the French language. Signature of the treaty establishing OHADA.
13. Ouagadougou (Burkina Faso), 14 and 15 March 1994: First Meeting of National Commissions. Adoption of a common working method. A Central Commission, in which each party is represented, finalized each draft of the Uniform Act.
14. Lomé (Togo), 24 October 1994: Meeting of Chairman of National Commissions. Examination of the preliminary draft of the first Uniform Acts.

15. Lomé (Togo), 25 and 26 October 1994: Meeting of Ministers of Justice of the signatories' states. Examination of the proposal to create of the *Ecole Régionale Supérieure de la Magistrature* (ERSUMA) and the establishment of the institutions of the OHADA.

16. Biarritz (France), November 8, 1994: Meeting of the Heads of state of France and Africa. Signatory states of OHADA Treaty underline its importance and decide to work together to determine the location of the institutions.

17. Bangui (RCA), from 6 to 8 February 1995: Meeting of the Chairman of National Commissions. Adoption of the preliminary draft of the Uniform Act on the General Commercial law (AU / DCG).

18. Bangui (RCA), 21 March 1995: Meeting of Ministers of Justice. The Ministers established the foundations for the location of the institutions of the OHADA.

19. On 11 April 1995: Publication of the Nigerian law No. 95-006 of 4 June 1995 authorizing the President of the Republic to ratify the OHADA Treaty.

20. On 18 September 1995: After receiving the instruments of ratification of the Republic of Niger, by the depositary (Senegal), the number of ratifications required for entry into force of the treaty is fulfilled. "The OHADA Treaty" entered into force.

B-THE TREATY ON THE ESTABLISHMENT OF THE OHADA:

In terms of form, the treaty is composed of 63 articles divided between nine (9) titles. The legal device that it creates is remarkably simple.

In the preamble, the Heads of State and delegations reiterated their determination to achieve progressively the economic integration of their states which requires the establishment and implementation of a harmonized business law to ensure legal certainty for investors. In addition, Article 2 of the treaty determines its object and the areas covered by the business law⁴¹. The Treaty also sets out the instruments by which the legal integration (Uniform Acts) can be carried out and the bodies responsible for overseeing

⁴¹ Regarding the definition of the business law see Henri - Désiré MODI KOKO BEBEY, « *La réforme du droit des affaires de l'OHADA au regard de la mondialisation de l'économie* », p 2, www.ohada.com. Regarding the scope of the business law and the controversy that it raised see Henri – Désiré MODI KOKO BABEY, « *L'harmonisation du droit des affaires en Afrique : regard sous l'angle de la théorie générale du droit* », p 2 and pp 13 – 15. www.ohada.com

the project implementation, monitoring the implementation of the acts and the promotion of the harmonized law.

Compared to other treaties of the same type, the OHADA Treaty has several features⁴²:

- It is planning a general and progressive unification of legislation of the states concerned;
- Unification undertaken concerns “all sectors of business and at the continental level”;
- The community law which the treaty envisages the implementation have a “strong” supranational character as far as it is mandatory, repealing and directly applicable in all member states;
- Originality also with respect to the “means and methods” used for the achievement of the objectives.

I-The Objectives of the OHADA⁴³:

The Preamble of the OHADA Treaty and the Articles I and II set out in general terms its purpose and scope. According to the Article 1, “The present treaty aim is to ensure the harmonization of business law:

- Through the elaboration and adoption of simple and modern common rules adapted to the situation of their economies;
- The implementation of appropriate legal proceedings;
- By encouraging the use of arbitration to settle contractual disputes”. Regarding the Article 2, it lists the matters which fall within the domain of the treaty and which regulation should be harmonized.

OHADA represents a more comprehensive view of “African integration” through an “economic union and a large common market”⁴⁴. This goal could not be achieved in a situation of widespread economic crisis characterized by the slowdown of the foreign investments during the decade 1980-1990. Since then, there has been the necessity to improve and streamline the legal environment for businesses in order to make African markets more attractive by reducing or eliminating the legal and judicial insecurity. In addition, “Africa, like most countries, is concerned by the globalization of the economy.

⁴² See Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, OHADA – *Harmonisation du droit des affaires*, op cit, n° 198.

⁴³ Me Kéba MBAYE, « *L’historique et les objectifs de l’OHADA* », Petites Affiches, n° 205, from 13 October 2004, pp 4-7. Adde Jean PAILLUSSEAU, « *Le droit de l’OHADA. Un droit très important et original* », op cit ; Boris MARTOR et Sébastien THOUVENOT, « *L’uniformisation du droit des affaires en Afrique par l’OHADA* », La Semaine Juridique n° 44 du 28 octobre 2004, Supplement no 5, pp 5 – 9.

Its consequence is the need for regional integration, with and everywhere the same company law, which significantly facilitates investments”⁴⁵. Africa cannot escape from the phenomenon of globalization, which implies a continuous adaptation of rules to govern economic activities⁴⁶.

II-Member States:

Under Article 53 of the OHADA Treaty the adherence to the new organization is open to any Member State of the African Union (AU) and to any State not a member of the AU, invited to join by mutual agreement of States parties. The generality of this opening suggests that joining the OHADA is open to non-African States. This generality is good because in the context of the construction of economic areas, states may join even if they are not members of the African Union, even if they are not located in the African continent. However, it is hardly conceivable that states outside the African continent may join OHADA. We must also understand that the opening concerned African states not members of the African Union.

The number of OHADA’s member states will increase in the coming years or even months to come because the Democratic Republic of Congo (DRC) has begun the process of its imminent accession and Sao Tome and Principe has announced its forthcoming accession. Finally, Madagascar and Ghana have announced their interest in OHADA. The accession of a new State shall be as provided by the Treaty, following the procedure prescribed by the constitution of that state. Indeed, some national constitutions provide that the national parliament must authorize adherence.

It should also be noted that OHADA is not restricted to French-speaking countries⁴⁷, already two states, Spanish and Portuguese, are part while Cameroon, a member state of OHADA is a bilingual country. Some English-speaking countries, including Ghana, have

⁴⁴ See Kéba MBAYE, « *L’historique et les objectifs de l’OHADA* », op cit.

⁴⁵ See Jean PAILLUSSEAU, « *L’Acte Uniforme sur le droit des sociétés* », Petites Affiches, n° 205 from 13 october 2004, pp 19-29.

⁴⁶ See in that regard Jean PAILLUSSEAU, « *Le droit de l’OHADA – Un droit très important et original* », op cit.

⁴⁷ See Alhousseini MOULOUL, « *L’intégration juridique des Etats de la SADC et les perspectives d’adoption du droit des affaires de l’OHADA pour l’assainissement de l’environnement juridique des affaires* », Act of the « First International Conference about the issues of the regional integration and the SADAC Law SADC », University of Eduardo Mondlane du Mozambique, Maputo from 23 to 25 April 2008 ; Adde Gilles CISTAC, « *L’intégration régionale dans « tous » ses états : SADC et OHADA* », op cit.

expressed interest in OHADA. To promote the adherence of states non-francophone, the Conference of Heads of the State and Government of OHADA, gathered in Quebec on 17 October 2008, proceeded to revision of the treaty and introduced a provision according to which “the working languages of OHADA are: French, English, Spanish and Portuguese”⁴⁸. From now on, the documents of the OHADA will be translated into different languages, but in case of discrepancy between translations, the French version shall prevail.

The growing number and diversity of member states of OHADA will make this organization the real tool for legal integration in Africa.

III-The Entry into Force of the Treaty Establishing OHADA:

Under Article 52 para. 2 of the treaty, it shall enter into force sixty (60) days after the date of deposit of the seventh (7th) instrument of ratification. The instruments of ratification and accession shall be deposited with the Senegalese government, which is the Depositary Government⁴⁹, and which issues a copy to the Permanent Secretariat. The depositary Government will register the treaty with the Secretariat of the African Union and with that of the UN in accordance with Article 102 of the United Nations Charter and issue a registered copy to the Permanent Secretariat.

On 18 September 1995, the number of ratifications required for entry into force of the treaty was fulfilled after the deposit by the Niger of its instrument of ratification⁵⁰, thus the OHADA Treaty entered into force in accordance with Article 52 al.2.

No reservation to the Treaty is allowed⁵¹, and concluded for an indefinite period, it cannot be terminated before ten (10) years from the date of its entry into force⁵².

In the case of accession of a new State, the treaty will be applied to it sixty days after the deposit of its instrument of accession⁵³.

⁴⁸ See the revised Article 42 of the Treaty.

⁴⁹ See the revised Article 57 of the Treaty.

⁵⁰ Rép. Of Niger law n° 95-006 from 4/4/1995 (published in the JORN from 15/04/1995 p. 341) authorized the PRN to ratify the establishing OHADA

⁵¹ Art. 54 of the Treaty.

⁵² Art. 62 al.1 of the Treaty.

⁵³ See Boris MARTOR and Sébastien THOUVENOT, « *L'uniformisation du droit des affaires en Afrique par l'OHADA* », op cit.

On 17 October 2008, the Conference of Heads of State and Government of the OHADA revised the Treaty of Port Louis and the conditions under which the OHADA Treaty may be revised⁵⁴. Any state party to OHADA may address the request to the Permanent Secretariat; the latter will notify the request to the Council of Ministers, which will assess the application and scope of the suggested change. The revision or amendment is adopted by the Council of Ministers, under the same conditions as the treaty. The revised or amended treaty is drawn up in two copies in each of the working languages of the OHADA and deposited in the archives of the Government of Senegal which shall transmit a certified copy to each member state.

IV-The Choice of the Legal Technique:

The experiences of legal integration have varied between two main techniques: harmonization and standardization.

1 - The Option for Standardization:

For the preparation of legal instruments of the new organization, it was necessary to choose between standardization and harmonization. Professor Joseph ISSA-SAYEGH⁵⁵ defines these two methods as follows: “harmonization or coordination ... is the process of bringing the legal systems with different (even divergent) origin and inspiration in order to ensure consistency between them by reducing or eliminating their differences and contradictions in order to achieve results consistent with each other and with the objectives sought”, while “the standardization or unification of law is first of all, a brutal but more radical legal integration. It consists to establish in a given legal matter, a single regulation, identical in all respects for all member states, in which there is no deal in principle for differences”.

At the seminar in Abidjan, Me Kéba M'BAYE explained in his introduction the choice of the Board: “...a unifying convention may be applicable without the obligation to repeal the domestic law since the latter is not contrary to the convention,” and the “uniform laws contain substantive rules that need to be introduced in each State in order to be applicable. This is the technique that the political authorities seem to favor in our country ... the

⁵⁴ See articles 61 and 63

⁵⁵ See Joseph ISSA –SAYEGH, « *L'intégration juridique des Etats africains de la zone franc*, » Revue. PENANT n° 823 January – April 1997, p. 5 and following. Adde Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, OHADA, *Harmonisation du droit des affaires*, op cit, n° 92

uniform laws must become national laws and be as comprehensive as possible in order not to give rise to divergent interpretations”⁵⁶. Analyzing the integration model chosen, Gaston KENFACK DOUAJNI wrote that the OHADA Treaty “aims to provide the States Parties a uniform law in each of the disciplines⁵⁷ listed in Article 2 of the treaty. This assessment is also that of Georges TATY who wrote that “the authors of the treaty ... directed their course towards a unified law⁵⁸”. In spite of the qualification given by the eminent Jurists, the Article 1 of the treaty stipulates that the “treaty for the harmonization of business law of states parties” ... on the one hand and, on the other hand, the organization itself, is called “Organization for the Harmonization of Business Law in Africa” and finally, Mr. Keba Mbaye, head of the expert mission and the Board then wrote: “Finally, the option chosen was harmonization, although the analysis of the current system within the OHADA, i.e. the adoption by the Council of Ministers of Justice and Finance, of the uniform acts which are immediately applicable in the territory of each state party, is truly a work of unification”⁵⁹. After the examination of the uniform acts already adopted, there is reason to conclude that it is rather unification or standardization, hence the term “Uniform Acts”. This unification is achieved through these acts and the establishment of a Common Court, which enforces the unified law in all member states. However, it is an incomplete unification because each Uniform Act contains loopholes that the states have to address, particularly with regard to criminal sanctions. At the end of this process, disparities may appear, and on the one hand, we can speak about the legal harmonization, and on the other hand the legal environment of each State will be appreciated.

⁵⁶ Summary of the seminary in Abidjan p. 20.

⁵⁷ G. KENFACK DOUAJNI, « *L’abandon de souveraineté dans le Traité OHADA* », Revue PENANT n° 830, May – August 1999, p.125 and following. Adde Henri – Désiré MODI KOKO BEBEY, « *L’harmonisation du droit des affaires en Afrique : regard sous l’angle de la théorie générale du droit* », op cit, pp 13 – 15.

⁵⁸ G. TATY, « *Brèves réflexions à propos de l’entrée en vigueur d’une réglementation commune du droit des affaires des Etats membres de la zone franc* », Revue PENANT n° 830, May –August 1999, p. 227 and following. Adde Yves GUYON, « Conclusion », Petites Affiches n° 205 from 13 October 2004, pp 59-63 ; Jean PAILLUSSEAU, « *Le droit de l’OHADA : un droit très important et original* », La Semaine Juridique, n° 44 from 28 October 2004, Supplement no 5, pp 1 – 5.

⁵⁹ In « *L’histoire et les objectifs de l’OHADA* », op cit.

2 - The Preparation and Adoption of the Uniform Acts⁶⁰:

1. In November 1992, Ministers of Justice gathered in Dakar (Senegal) decided to create in each member state a National Commission⁶¹ composed by five (5) members and charged at the national level to contribute to the study of the Uniform Acts. These commissions held their first seminar in Ouagadougou (Burkina Faso) on 14 and 15 March 1994. This seminar provided for the adoption of a common working method.

The Uniform Acts are intended to establish a common legislation for member states in order to regulate matters identified as part of “business law”. The Permanent Secretariat prepares the draft of the Uniform Acts which is proposed to the Governments of States Parties, which have a period of ninety (90) days to transmit their observations to the Permanent Secretariat. Under Article 7 para 2 of the revised treaty, this period “may be extended to an equivalent period depending on the circumstances and the nature of the text to be adopted at the diligence of the Permanent Secretariat”. After the deadline the Permanent Secretary shall prepare a report and attach the above- referred comments and the draft of the Uniform Acts, and the whole is sent to the CCJA for advice. The latter have sixty (60) days to issue their opinion. After this period, the Permanent Secretariat shall prepare the final draft of the Uniform Acts that will be put in the agenda of the next session of the Council of Ministers.

However, a procedure not covered by the treaty is often used: each government is reviewing the project by “its” own National Commission which makes comments or proposes amendments which will be transmitted to the Permanent Secretariat. After receiving the comments of National Commissions, the Permanent Secretariat organizes a session of the Commission⁶² before the project is transmitted to the CCJA for advice.

⁶⁰ Regarding the procedure, see Joseph ISSA – SAYEGH, Jacqueline LOHOUES - OBLE, OHADA – *Harmonisation du droit des affaires*, op cit, n° 279 to 288, pp 123-126

⁶¹. In Niger, the decision n°15/MJ du 1er/04/1993 related to the establishment and composition of the ad - hoc national commission in charge of harmonization business law in the Franc Zone. According to the article 2 of the decision the commission is chaired by the vice-president of the appeal Court and include 5 other members. This article was modified by another decision (n°21/MJ/GS/SG) from 11/06/1993 which was also modified by the decision n°27/MJ//GS of 2/08/1995. According to the article 2 of the new decision, the ad - hoc commission is chaired by the General Secretary of the Ministry of Justice and composed by eight (8) members including one vice president representing the Ministry of Finance and Plan.

⁶² Bamako (Mali) 11 and 17 October 1995: Session of the national Commissions for the adoption of the draft of the Uniform act on Commercial Companies and the Economic Interest Grouping (AU/DSC/GIE). Dakar (Senegal), 11 and 16 December 1995: Session of the National Commissions for the examination of

With regards to the procedure⁶³ described above, all the states will participate in the elaboration of Uniform Acts and the specificities of each member state shall be taken into account through the incorporation of comments made.

Thus, although this is not explicit in the treaty, three bodies intervene in the preparation of the Uniform Acts: the Permanent Secretariat, National Commissions (states) and CCJA before they are adopted by the OHADA Council of Ministers.

This procedure removes from the parliaments and executives their legislative and regulatory power because the Uniforms Acts determine not only the general principles but also their implementation⁶⁴. From now on, the legislative power is exercised in the OHADA space, for all matters involved in the harmonization, by the Council of Ministers of the Organization.

2. For the adoption of the Uniform Act, two-thirds (2 / 3) at least of the member states must be present or represented, and that act must be adopted unanimously by the States Parties present and voting. It follows from this provision that, first, the abstention of a state does not preclude the adoption of an act, because only a negative vote can be an obstacle, and, secondly, each state has a power similar to the veto to oppose by a negative vote, the adoption of an act.

3. Once adopted, the act is published by the Permanent Secretariat in the London Gazette of OHADA within sixty (60) days of such adoption. The Uniform Acts are applicable to the States Parties, unless there is a special provision in the act, which may specify ninety (90) days from the date of the publication mentioned above. The Uniform Act must also be published in the Gazette of each member state and this advertising can be done “by any other appropriate means”⁶⁵, as long as it does not affect the entry into force of the act.

4. The Uniform Acts may be amended at the request of a member state or the Permanent Secretariat, following the procedure provided by the Articles 6 and 9 of the new treaty.

Henceforth, the Uniform Acts are part of the legal system of each State Party, and the national courts, as well as legal professionals, must take into account this new reality.

the draft of the Uniform act on the Security, Simplified Recovery Procedure and Enforcement Measure and the accounting Law .

⁶³ Regarding the elaboration of the Uniform act see Jacqueline LOHOUES-OBLE, « *L'apparition d'un droit international des affaires en Afrique* », RIDC-3 – 1999, p. 542 and following.

⁶⁴ See G.KENFACK DOUAJNI, op. cit.

⁶⁵ Article 9 of the treaty.

V-Features of legal instruments of the OHADA:

1 - The provisions of the treaty and those of the Uniform Acts are mandatory. However, while most of the provisions are mandatory, some acts may contain “supplementary or optional provisions”⁶⁶.

When a Uniform Act enters into force, it becomes directly applicable and binding “notwithstanding any contrary provision of the domestic law, be it anterior or posterior”⁶⁷; it replaces the domestic law. The direct applicability is enshrined in Article 10 of the treaty which states: “The Uniform Acts are directly applicable and mandatory in the States parties, notwithstanding any contrary provision of the domestic law, be it anterior or posterior”. The direct applicability and the repealing and mandatory characters distinguish the Uniform Acts from the European Directives whose implementation depends on the willingness of states, which must transpose them into domestic law; however, the Uniform Acts are closer to the European regulation because they are directly applicable in the member states⁶⁸.

2 - The Treaty and the Uniform Acts have a supranational character. This supranational character is a manifestation of the partial abandonment of sovereignty by each state party to the OHADA for the matters involved in the harmonization⁶⁹. The procedure of adoption of the Uniform Acts and the repealing and mandatory character consecrate also the supranational character of the legal instruments of OHADA.

The repealing effect and the supranational nature are supported by an opinion rendered by the CCJA and according to which Article 10 of the treaty contains a “supranational rule because it provides for a direct and mandatory application of the uniform acts and establishes, moreover, their supremacy over the domestic law be it anterior or posterior”⁷⁰

3 - If the supremacy of the community law on national standards with legislative or regulatory nature does not appear to pose any difficulty, the question is rather controversial with regard to the primacy of this law (OHADA) on the constitutions of

⁶⁶ See Boris MARTOR and Sébastien THOUVENOT, « *L'uniformisation du droit des affaires en Afrique par l'OHADA* », op cit.

⁶⁷ Article 10 of the treaty

⁶⁸ See Georges A. CAVALIER, « *L'environnement juridique des affaires en Afrique noire francophone* », contribution to the International Conference on the « harmonization of the commercial law in Africa and its advantages for the Chinese investments in Africa », University of Macau, 27 November 2007

⁶⁹ See Gaston KENFACK DOUAJINI op. cit.. Adde Philippe TIGER, op. cit. p. 32.

⁷⁰ Opinion no 001/2001 PC, Meeting of 30 April 2001.

member states. In Europe, the supra constitutionality of the treaties is far from reaching unanimity⁷¹, while in the case of OHADA⁷², the founding treaty implicitly seems to recognize the superiority of national constitutions.

What about the possible conflicts between the rule of community law of OHADA and another norm of international law?

Da Cruz Rodrigues proposes the criteria to be considered in resolving conflicts between international norms. He wrote that “in general, this conflict is seen as equivalent to the conflict between norms of the domestic law, it is decided according to the usual rules (*lex superior*, *lex posterior*, hierarchy of values, any grievance, proportionality and harmonization of the interests involved) when one does not reach an interpretation that succeeds in harmonizing standards”⁷³, while Filiga Michel SAWADOGO and Luc Marius IBRIGA⁷⁴ suggest also “to take account the universal character of the convention or treaty, the effective number of signatories and especially members having ratified the treaty”; According to the same authors “M. Carreau affirms the superiority of universal law on regional international law, on the law from bilateral as well as the superiority of the constitutive charter of the international organizations on their secondary law.”⁷⁵

Finally, what about the conflicts between norms of international community law, namely between the Uniform Acts of OHADA and UEMOA norms?

In this case, there are two possibilities:

- In the case of a conflict between an A U and UEMOA norm adopted in the form of Uniform Law (e.g. a directive) by the national parliaments, which are domestic norms, “it is the Uniform Acts that will prevail according to their superiority over the domestic laws”⁷⁶;
- Regarding the conflicts between norms of direct application, namely UEMOA Regulation and Uniform Acts of OHADA, we cannot apply the chronological test, therefore the rule *lex posterior derogant priori*, or the test of specialty in order to apply the

⁷¹ For the « supra constitutionality » of the community Law, see Filiga Michel SAWADOGO and Luc Marius IBRIGA, op cit.

⁷² See Article 52 para1st and article 116 of the OHADA Treaty

⁷³ In Filiga Michel SAWADOGO and Luc Marius IBRIGA, op cit.

⁷⁴ Op cit.

⁷⁵ Ibidem.

⁷⁶ Filiga Michel SAWADOGO and Luc Marius IBRIGA, op cit0

rule *specialia generalibus derogant* or rule *generalia specialibus not derogant*⁷⁷. To solve this conflict, Filiga Michel SAWADOGO and Luc Marius IBRIGA suggested to take into account some considerations which show that UA of OHADA prevails: the purpose of communities organizations whose standards are in conflict, “the number of states participating in each constitutive treaty” and “judicial mechanism for monitoring the implementation of norms”⁷⁸.

Finally, in both cases, the Uniform Acts prevail over the norms of the UEMOA.

C-INSTITUTIONS OF THE OHADA:

The various institutions of OHADA, after the revision of treaty intervened in Quebec on 17 October 2008, are:

- The Conference of Heads of State and Government;
- The Council of Ministers;
- The Permanent Secretariat;
- The Common Court of Justice and Arbitration (CCJA);
- And the Regional Training Center for Legal Officers (ERSUMA).

The treaty and regulations set out the general rules that determine the organization and functioning of these institutions⁷⁹.

At the meeting of the Council of Ministers of Justice held in N'Djamena (Chad), on 8 April 1996, followed by the joint meeting of Ministers of Justice and Ministers of Finance, the headquarters of the institutions were distributed as follows:

- CCJA: Abidjan (Ivory Coast)
- Permanent Secretariat: Yaounde (Cameroon)
- ERSUMA: Porto Novo (Benin)

On 26 September 1996, Ministers of Justice and Finance, gathered in Paris (France), proceeded to the allocation of seats of the institutions and the appointment of the first responsible and members of the CCJA.

⁷⁷ Filiga Michel SAWADOGO and Luc Marius IBRIGA, op cit.

⁷⁸ Ibidem.

⁷⁹ See. Boris MARTOR et Sébastien THOUVENOT, « *L'uniformisation du droit des affaires en Afrique par l'OHADA* », op cit.

To enable OHADA to select its staffs with more competence and integrity, the Conference of Heads of State and Government of OHADA, gathered in Quebec on 17 October 2008, adopted a declaration ending transitional measures defined by the “N’djamena Arrangements,” allocating the positions between some member states. In addition, Article 49 of the revised treaty provides further clarification than the original Article 49 regarding the privileges and diplomatic immunities enjoyed by the OHADA personnel. Indeed, not only the judges of the CCJA enjoy diplomatic immunity, but also “the officials and employees of the OHADA ... As well as the arbitrators appointed or confirmed by (the Court)”. However, the privileges and immunities may be waived by the Council of Ministers, according to the circumstances.

I-The Conference of Heads of State and Government:

The “Treaty of Port Louis”, in its original version, did not provide the “Conference of Heads of State”. The Quebec Summit of 17 October 2008 has addressed this failure by providing a Conference of Heads of State and Government as the supreme institution of OHADA.

The conference “is composed of Heads of State and Government of the States Parties. It is chaired by the Head of State or Government whose country chairs the Council of Ministers”⁸⁰.

It has jurisdiction in all matters relating to the treaty and, like other multinational organizations, the meeting is organized at the initiative of its President or from two thirds of member states. The conference is validly gathered when two thirds of the States parties are represented, and decisions are taken by consensus or, failing that, by an absolute majority of states present⁸¹.

II-The Council of Ministers:

The Council of Ministers of OHADA, compared to the Councils of Ministers of other multinational organizations, is original in both its composition and its functions.

⁸⁰ Art. 27/1 of the revised treaty.

⁸¹ Art. 27/1 of the revised treaty.

1 - Composition of the Council of Ministers:

It is composed of the Ministers of Justice and Finance Ministers of the member states. This is an original composition because in general the Council of Ministers of the sub-regional or regional organizations is composed of the ministers of the same department. Three reasons may explain this joint composition:

- First, a historical reason, because on the one hand, it is question of judicial matters and, on the other hand, the idea of harmonization was an initiative of Ministers of Justice, which was taken by Ministers Finance;
- Then, the areas of business law have an economic and financial predominance;
- Last but not least, in our view, to make responsible the finance ministers regarding the future of the OHADA. Indeed, many organizations have ceased to exist for lack of funds; the finance ministers are often reluctant to unblock credits for the contributions to sub-regional or regional organizations, even though there are other emergencies or priorities. This reluctance is easily understandable when we know the financial difficulties that these countries are facing.

Beyond these considerations, the “mixed” character of this composition may be indicative of the commitment of Heads of State to make this organization technically efficient and well conducted as an instrument for integration. Indeed, the presence of the Minister of Justice is a guarantee of compliance with legal norms for the elaboration of the acts, while the presence of the Ministers of Finance is a guarantee of the compliance with economic and financial commitments made by member states in the context of their integration; all of this constitutes a coherent whole.

2 - Functioning of the Council of Ministers:

1 - The Presidency of the Council is held in rotation and according to alphabetical order, by each member for a one year term. However, the acceding states will hold for the first time the presidency of the Council of Ministers in order of their membership after the turn of the signatories' state of the treaty⁸². When a state is unable to chair, when it is its turn, it is replaced by one that comes immediately after it in alphabetical order; when the cause of the impediment ceases, the state can seize in due time, the Permanent Secretariat of

⁸² Art. 27/2 para 4 of the revised treaty.

OHADA which will seize the Council of Ministers in order for the latter to make a decision regarding to its presidency.

The OHADA Treaty does not mention which of the Ministers, Finance or Justice of the state must chair the council. In the silence of the text it should be considered that the Presidency is assured following the practice in each member state; also, the council will probably be chaired by one or the other depending on whether the chairing State gives more priority to legal, economic or financial issues.

However, we must admit that this is a theoretical debate because in general, regarding the judicial matters, the council is chaired by the Minister of Justice.

2 - The Council of Ministers shall meet at least once a year when convened by its President on his own initiative or at the initiative of one third (1/3) of States Parties. The agenda for the meeting is decided by the Chairman of the council on the proposal of the Permanent Secretary of OHADA.

3 - When the council is gathered or (convened), its deliberation is valid when the two-thirds (2 / 3) of the States parties are represented. Each state has one vote and decisions shall be validly adopted by an absolute majority of states present and voting. However, the decisions related to the adoption of the Uniform Acts are taken by unanimous vote of the states present and voting.

3 - Duties of the Council of Ministers:

According to the Article 4 of the revised treaty, “regulations shall be taken by the Council of Ministers to implement this treaty and the decisions, when it is necessary”. It is competent to:

- Adopt and amend the Uniform Acts;
- Determine the area of business law;
- Decide the annual contributions of States Parties;
- Adopt the budget of the Permanent Secretariat and the CCJA;
- Approve the annual accounts of the OHADA;
- Appoint the Permanent Secretary and Director General of ERSUMA;
- To elect the members of the CCJA;
- Take the necessary regulations for the implementation of the treaty;
- Approve the annual program of harmonization of business law.

Finally, the Council of Ministers exercises administrative and legislative functions. Indeed, it is a legislative body because it approves the annual program of harmonization of business law and adopts the Uniform Acts instead of Parliaments of the States Parties⁸³.

In the context of carrying out of this mission, the Council of Ministers of OHADA has adopted to date, eight (8) Uniform Acts⁸⁴:

- The Uniform Act on the Law of Commercial Companies and GIE (AU / DSC / GIE), which entered into force on 1st/01/1998;
- The Uniform Act on the General Commercial Law (AU / DCG), which entered into force on 1st/01/1998;
- The Uniform Act on the Security Law (AU / DS), which entered into force on 1st/01/1998;
- The Uniform Act on Simplified Procedures for Recovery and enforcement (AU / PSR / VE), which entered into force on 10th/07/1998;
- The Uniform Act on Collective Proceedings for the Clearing of Debts (AU / PCAP), which entered into force on 1st/01/1999;
- The Uniform Act on the Arbitration Law (AU / DA), which entered into force in accordance with Article 9 of the treaty on 11 June 1999;
- Uniform Act on the Organization and Harmonization of Accounting of the Enterprises (AU / HCE)⁸⁵, which entered into force in two phases:

⁸³ Cotonou (Benin) on 17 April 1997: Meeting of the Council of Ministers of OHADA: adoption of the draft of the Uniform Act. (AU / DSC / GIE, AU / DCG, AU / DS) and the Rules of Procedure of the CCJA. On 1 October 1997: Publication in the Official Journal of the OHADA AU follows: AU / DCG, AU / DSC / GIE, AU / DS; 1 January 1998: entry into force of the AU mentioned above.

Lomé (Togo), 30 January 1998 meeting of the Council of Ministers of OHADA: Adopted texts dated 30/1/1998 below:

- Financial Regulation of Institutions of the OHADA;
- Regulations regarding the status of the Staff of OHADA;
- Regulation regarding the reform applicable to non-permanent staff of OHADA.

Libreville (Gabon), 10 April 1998: meeting of the Council of Ministers of OHADA where several decisions were taken: adoption of two UA (AU / AU and OCAP / PSR / VE); creation of a Committee of Coordination and Monitoring (CCM). ; Fixing the seat of the ERSUMA in Porto-Novo (Benin). On 10 July 1998: Entry into force of the AU / PSR / VE and 1st January 1999: entry into force of the A. U. / PCAP.

Ouagadougou (Burkina Faso), 11 and 12 March 1999: meeting of the Council of Ministers of OHADA: adoption of the UA. on the Law of Arbitration (AU / DA) and decisions on the costs of arbitration (decision No. 004/99/CM, 12/03/1999). On 11 June 1999: Entry into force of the A. U. / D. A.

Yaounde (Cameroon), 24 March 2000, adoption of the U. A. on Accounting Law of OHADA. The exclusion of national parliaments in this process, see Joseph ISSA - SAYEGH, Jacqueline-Lohou OBLE, OHADA - Harmonization of Business Law, op cit, 287 and No. 288, p. 125 and 126.

- . The personal account of the enterprises 1st January 2001;
 - . The consolidated accounts and the combined: 1st January 2002.
- The Uniform Act on Contracts of Carriage of Goods by Road (AU / CTMR), which entered into force on 1 January 2004.

Other Uniform Acts are under construction and it concerns namely the Uniform Act on contracts law and the Uniform Act on the Labor Law.

III-The Permanent Secretariat:

It is the executive body of the OHADA. On 30 July 1997, the Government of Cameroon and OHADA signed Headquarters Agreement under which the seat of the Permanent Secretariat is established in Yaoundé (Cameroon)⁸⁶.

1 - Organization of the Permanent Secretariat:

It is headed by a Permanent Secretary appointed by the Council of Ministers for a term of four (4) years renewable once. The Permanent Secretary is assisted by three Directors responsible for following tasks:

- Legal affairs and relations with institutions;
- Finance and Accounting;
- General Administration and the Official Journal of the OHADA.

The Directors are appointed by the Permanent Secretary as provided by Article 40 Paragraph 2 of the treaty.

2 - Duties of Permanent Secretary:

The Permanent Secretary represents the OHADA and assists the Council of Ministers; his main functions are⁸⁷:

- 1 - The assessment of the areas where unification of the law is necessary, and proposes to the Council of Ministers for approval, the annual program of harmonization.

When the Executive Board was established by the Heads of State, it proceeded first to the listing of all matters that could be harmonized⁸⁸. The retained matters are consecrated by

⁸⁴ Regarding the date and place of adoption of those, see supra.

⁸⁵ To this U.A. is added the system of accounting of OHADA (SYSCOHADA)

⁸⁶ Address: B.P 10071 Yaoundé (Cameroun). Tél. (237) 22 21 09 05; Fax. (237) 22 21 67 45 ; www.ohada.org

⁸⁷ For the duties of the Permanent secretary see also the articles. 6, 7, 11, 29, 40 and 61 of the treaty.

the Article 2 of the Treaty, but it is not a static list because the Article 2 provides that: “fall in the field of business law, all matters that the Council of Ministers will unanimously decide to include in accordance with the purpose of the Treaty”. Thus, on the proposal of the Permanent Secretariat, several other matters have been added by the 23 March 2001⁸⁹ decision of the Council of Ministers of OHADA, as part of the Treaty⁹⁰.

The Executive Board conducted a comprehensive and comparative inventory of the texts that exist in all States and had mandated experts in charge of “researching the simplest, the most modern, and the most appropriate and therefore more efficient common legal formulation”.⁹¹

Since the scope of the business law is circumscribed, it belongs henceforth to the Permanent Secretary to propose an annual program of harmonization.

2 - The Permanent Secretary shall prepare the draft Uniform Acts: therefore it coordinates the work of experts and authorities involved in the elaboration of the acts in each State Party. It requires the opinion of the CCJA. After the adoption of the Acts by the Council of Ministers, it ensures their publication in the Official Gazette of OHADA.

3 - It coordinates the activities of the various organs of the OHADA and monitors the work of the organization.

4 - The Permanent Secretary shall propose to the President of the Council of Ministers the agenda of the council meeting; organize the election of members of the CCJA; and is responsible for the supervision of the ERSUMA, which he is Chairman of the Board of Directors.

5 - Finally, the Permanent Secretary is responsible for the appointment of its staff.

⁸⁸ The following matters were identified: Corporate Law, General Commercial Law, Transport Law, Law of the sale of goods, the Law of collective proceedings, the Law of security, the Law of recovery, the Law of arbitration. The labor law was added at the request of Heads of State and economic operators

⁸⁹ Decision No 002/2001/CM related to the program of harmonization of African business law

⁹⁰ They are: banking Law , Intellectual Property Law, Company Law and Mutual and Cooperatives Corporate Law, Law of civil Corporate, Competition Law, Contract Law and the law of evidence, see to that respect: Boris MARTOR and Sebastien Thouvenot, "The Unification of business law in Africa OHADA", op cit

⁹¹ M. KIRSCH, Penant n° 827 op. cit

IV-The Common Court of Justice and Arbitration (CCJA)⁹²:

Two other concerns animate both, the Heads of State, traders and legal practitioners, about the unification of the jurisprudence of business law on the one hand and, on the other hand, the interpretation of Uniform Acts.

At the seminar of Abidjan on 19 and 20 April 1993, the workshops No. III focused on the question of whether it is more appropriate to create two separate jurisdictions: one for the judicial function and another for the arbitration. The participants also expressed concerns about the high cost for those to be tried,⁹³ and suggested the facilitation of the access to the court by organizing fair sessions (session foraine in French) or by transferring the judges in the national supreme court.

Finally, with regard to these concerns, the community legislator has found the answers:

- It is normal to create a single jurisdiction with respect to the financial problems faced by member states and considering the scarcity of qualified personnel;
- The court would intervene instead of the Supreme Court or State Court, on the one hand and, on the other hand, the procedure may be oral or written. Finally, Article 19 of the Rules of Procedure of the CCJA provides that the court may meet in the territory of a State Party, other than the state where the headquarters is.

To unify the jurisprudence the solution is now to submit any dispute concerning the application of the Uniform Acts, first to the national courts of first and second degrees and then to the censorship of the common higher court to all member states. In addition, to unify the interpretation of the Uniform Acts, this interpretation is now entrusted to the common court.

Finally, the desire to popularize the use of arbitration for settling trade disputes, coupled with the desire to promote a new concept of arbitration, which should no longer be seen as mistrust to the magistrate, lead the community legislator to involve the community courts in the process of adjudication.

In consideration of this situation, the Council of Ministers meeting in N'Djamena (Chad) on 18 April 1996 adopted the following text:

⁹² See Joseph ISSA – SAYEGH, Jacqueline LOHOUES – OBLE, *OHADA – Harmonisation du droit des affaires*, op cit, no 390 à 582, pp 163 – 222.

⁹³ For the fees see the article 43 of CCJA procedural rule.

- The Rules of Procedure of the Common Court of Justice and Arbitration (CCJA);
- The statutes of the CCJA;
- The Rules of Procedure for Arbitration.

The court was formally established in Abidjan, the location of its headquarters⁹⁴, and quickly became operational⁹⁵. Appreciating the relevance of the creation of the CCJA, Professor Gilles CISTAC wrote: “The attractiveness of the OHADA system results widely from the confidence to a supranational court, away from the incompetence, corruption, political pressure, and peddling. Thus, the creation of a supranational court helps to promote the judicial security”⁹⁶.

1 - Composition of the CCJA:

The CCJA is composed of nine (9) judges⁹⁷; “however, the Council of Ministers might, taking into account the needs of the service and the financial possibilities, set a higher number of judges (...)”⁹⁸.

Judges are elected by secret ballot by the Council of Ministers for a term of seven (7) years non-renewable. For the election of those judges the Permanent Secretary invites each state to submit its candidates, at least four (4) months before the election date.

However, each state may submit two (2) candidates at most. In addition, they may only be submitted by the personality listed in Article 31 of the treaty, namely⁹⁹:

- Judges with at least fifteen (15) years of professional experience who possess the qualifications required to exercise the high judicial office in their respective countries”¹⁰⁰;
- The lawyers that are members of the lawyer association of the one of the States Parties and with at least fifteen (15) years of professional experience;
- And law professors with at least fifteen (15) years of professional experience.

⁹⁴ Address: (01) B.P 8702 Abidjan (01) Ivory Coast; Tel. : (225) 20 33 60 51/52 ; fax : (225) 20 33 60 53 ; www.ohada.org

⁹⁵ Abidjan (Ivory Coast), on 22 July 1996: establishment of the CCJA; On 4 April 1997: installation of the official CCJA

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

⁹⁶ Gilles CISTAC, "The legal integration in all its aspects: OHADA and SADC", op cit.

⁹⁷ Article 31 para 1 of the revised treaty.

⁹⁸ Article 31 para 2 of the revised treaty.

⁹⁹ Regarding the eligibility requirement: see Etienne NSIE, « the CCJA », Penant n° 828, September-December 1998 p. 308 and following.

¹⁰⁰ Article 31 para 1 of the revised treaty.

One third of the judges of the CCJA must belong to the categories of lawyers and law professors.

Following the reception of the application, the Permanent Secretary lists all the candidates in alphabetical order, and communicates that list to all member states at least one (1) month before the election¹⁰¹. The Council of Ministers, before proceeding to the election, should take into account that the court can not include more than one national of the State party¹⁰².

Once elected, members of the CCJA enjoy diplomatic privileges and immunities, and are irremovable and cannot hold any political or administrative function. However, they can have gainful activity after having been authorized by the court.

In case of vacancy of a seat, for death or resignation of a judge, he shall be replaced according to the renewal procedure¹⁰³.

Finally, the members of the court shall be renewed by seventh (7th) each year.

The members of the Court shall elect among themselves a President and two (2) Vice - Presidents for a term of three (3) years and six (6) months¹⁰⁴.

The President of the court appoints the Chief Clerk of the court, after the opinion the court, among the candidates nominated by member states and who have exercised their function for at least fifteen (15) years. The Chief Clerk shall ensure the Secretariat of the court.

Finally, “following the opinion of the court, the President also appoints the Secretary General with function to assist the court in the administrations of the arbitration, according to the criteria defined by the Regulation of the Council of Ministers”¹⁰⁵.

The Chief Clerk and the Secretary General, as appropriate, may propose to the President the candidates for other positions of the court¹⁰⁶.

¹⁰¹ The election of the members of the court are made according to the articles 1st and following of the rule of procedure of the CCJA.

¹⁰² Article 31 para 3 of the revised treaty.

¹⁰³ This procedure is identical to that of the appointment.

¹⁰⁴ The election are made according to the articles 37 and 38 of the treaty and 6,7,8 of the rule of procedure.

¹⁰⁵ Article 39 para 2 of the revised treaty.

¹⁰⁶ Regarding the appointment and the function of chief clerk: see the article 10 to 18 of rule of procedure

2 - Powers of the CCJA:

The Article 14 para 1 of the revised treaty provides that the CCJA “ensure the interpretation and application of the treaty and the regulations taken for its implementation, the uniform acts and the decisions”.

A review of its functions indicates that CCJA is vested with judicial and advisory powers and also may intervene in the arbitration procedures.

a-The Judicial Functions¹⁰⁷:

They are both contentious and advisory.

a1-The Functions of the Contentious CCJA:

1 – The CCJA is the court of cassation for all the disputes related to the uniform law. National courts are familiar, at first instance and on appeal, with disputes relating to the application of the Uniform Acts.

By way of appeal, the court shall rule on the decisions pronounced by the appellate courts “with the exception of decisions applying criminal sanctions”¹⁰⁸. It is seized “either directly by one of the parties to the proceeding or on referral of the national court”¹⁰⁹. The seizing of the court suspends all judicial proceedings before a national court with the exception of the enforcement procedures.

The CCJA may also be seized by the government of a State Party or by the Council of Ministers of OHADA.

Regarding the modality of the seizing of the CCJA, one author wrote: “it is through the preliminary ruling mechanism that national courts should seize the court”¹¹⁰.

The obligation imposed upon the parties to make appeals to the CCJA, not before a national court, when it comes to issues involving the application of the Uniform Acts, gives rise to a partial abandonment of sovereignty by States parties to the benefit of OHADA; this obligation also involves a positive consequence, namely the unification of the jurisprudence. In this regard TG LAFOND wrote “a uniform law calls for a uniform

¹⁰⁷ It is a summary of the general principles of this procedure. This one is essentially described by Articles 13 and seq of the Treaty and Articles 23 and seq of the Rules of Procedure.

¹⁰⁸ Article 14 para 3 of the treaty.

¹⁰⁹ Article 15 of the treaty.

¹¹⁰ Tristan Gervais de LAFOND, “The Treaty on the Harmonization of Business Law in Africa”, G. P. 20 and 21/09/1995 p.2.

jurisprudence”¹¹¹. The CCJA also ensures the harmonization of the interpretation of the Uniform Acts as indicated below, in his advisory competence.

2 – Proceeding before the CCJA is contradictory and essentially written; the hearings are public and the presence of a lawyer is mandatory. As soon as a matter is referred to the court, “the President shall appoint a judge, acting as reporter, who shall be responsible for preliminary inquiries on the matter and make a report to the court.”¹¹²

For the settlement of the dispute, it can be performed either following a written procedure, or following an oral procedure¹¹³.

In determining the appeal, the court evokes the case and rules on the merits without reference to a national court; and therefore it is a degree of jurisdiction: is it then a third (3rd) degree of jurisdiction¹¹⁴? One is tempted to answer in the affirmative. This right of evocation saves time for the parties who will no longer need to return before a National Court of Appeal for retrial of the case.

3 – The CCJA judgments benefit from the *res judicata* and are binding from the date they are delivered. They are capable of enforcement in the territory of each State Party in accordance with the rules of civil procedure applicable in the state concerned. Thus, the judgments of the CCJA are assimilated to the decisions of national courts with all the consequences of this assimilation.

In each State party the enforcement seal is affixed to the judgments of the CCJA, after checking the authenticity of the title, by an authority designated by the state government concerned¹¹⁵.

4 - However, extraordinary remedies may be exercised against the judgments of the CCJA; it concerns the third-opposition, the request for interpretation of the ruling or the request for review of the ruling¹¹⁶.

a2-The Advisory Functions of the CCJA:

The Article 14 para 2 of the Treaty establishes the advisory role of the court. In this regard, the CCJA is responsible for:

¹¹¹ Id. In that sense see Gaston KENFACK DOUAJNI, op.cit.

¹¹² Article 26 of the rule of the procedure of the CCJA.

¹¹³ Regarding these two procedures: see articles 27 and following of the rule of the procedure.

¹¹⁴ In that sense see G. KENFACK DOUAJNI, op. cit ; See also Etienne NSIE, op. cit.

¹¹⁵ Philippe TIGER, op. cit. p. 40.

¹¹⁶ Regarding these procedures: see articles 47 and following of the rule of the procedure.

- Giving advice on the draft of the Uniform Acts before their presentation to the Council of Ministers;
- Interpreting and ensuring the implementation of the Uniform Acts in States Parties;
- Interpreting the treaty, the implementing regulations, and the Uniform Acts;
- Making advisory opinions at the request of states, the Council of Ministers or national courts.

Articles 53 and following of the Rules of Procedure, determine the procedures for carrying out this role. Under these provisions:

1 - The court may be consulted by any state party or the Council of Ministers on matters relating to the interpretation and application of the treaty, the implementing regulations, and the Uniform Acts.

The advisory request is made in the form of a written request addressed to the CCJA accompanied, where appropriate, with any documents that may help to clarify the problem to be solved, and it must be presented accurately. The Chief Clerk shall notify that request to the member states and require their comments within the time fixed by the President of the Court. The response of each state shall be communicated to the other states and to the plaintiff, and be put into discussion between the applicant and the authors of the comment during a period set by the President. After this period the President decides whether there will be a hearing.

2 - It can also be consulted by the national courts settling a dispute concerning the application of harmonized law.

The request shall be forwarded by the court, to the CCJA, and shall precise the issue on which the court's opinion is sought. Any document which may help to elucidate the matter must be attached to this request. The Chief Clerk shall notify the request to the parties in dispute and to the member states, and require their observations; then it will proceed as in the case of requests for advice from a state or the Council of Ministers.

3-When the court gives its opinion, it mentions the following:

- “the indication that it is given by the court;
- the date on which it was given;
- the names of the judges who participated as well as that of the Registrar;
- the summary statement of facts;

- the grounds;
- the reply to the question put to the court”¹¹⁷

This procedure allows a uniform interpretation of the harmonized law. It has the advantage of involving not only the plaintiffs but also states. Thus, the interpretation given, ultimately, is the product of consensus arising from advice given by all stakeholders; therefore, its acceptance by all will not pose major difficulties.

In exercising its contentious and advisory activities, the CCJA rendered at the end of June 2003, 40 judgments and 14 advisory opinions¹¹⁸. From 1998 to 19 August 2003, it received a hundred and sixty two (162) appeals and on all the requests it has made forty-four (44) decisions and seven (7) orders and has also made sixteen (16) opinions following the consultations made by the governments of the States Parties.

b-The Role of CCJA in Arbitration Proceedings¹¹⁹:

Although some African French-speaking countries¹²⁰ have arbitration centers this procedure is not popular on the continent. In the Preamble of the “Treaty of Port Louis”, one can read that the signatory states are “willing to promote arbitration as a means of resolving the contractual disputes”. In that regard, the Council of Ministers of OHADA, meeting in Ouagadougou (Burkina Faso) on 11 March 1999, adopted the Uniform Act on Arbitration Law (AU / DA) and the Rules of Arbitration (RA) of the CCJA.

The CCJA have no monopoly of arbitration, it should be distinguished whether it is an institutional arbitration or an ad hoc arbitration; it is up to the parties at the time of drafting the arbitration clause to choose one of the procedures¹²¹.

b1-The Institutional Arbitration:

This is the arbitration organized by the CCJA which plays for the occasion the role of the arbitration center. The CCJA “conduct”, controls the procedure to be conducted before the

¹¹⁷ Article 58 of the rule of procedure of the CCJA.

¹¹⁸ See the speech of the Minister of justice at the meeting of donors, Libreville, June 2003.

¹¹⁹ About the procedure before the CCJA : see NSIE, op. cit. Adde Jacqueline LOHOUES-OBLE” the apparition of an international business law in Africa” RIDC-3, 1999, p. 543 and following; Philippe FOUCHARD, “The arbitration system of OHADA: the beginning” Petites Affiches no 205 of 13 October 2004, pp 52-58; Nanette PILKINGTON et Sébastien THOUVENOT “ the innovation of OHADA in the field of arbitration” , *La Semaine Juridique* n° 44 of 28 October 2004, Supplement no 5, pp 28 – 35

¹²⁰ Namely : Togo, Ivory Coast, Senegal and Cameroon.

¹²¹ About the comparison between the two systems, see Nanette PILKINGTON and Sébastien THOUVENOT “ the innovation of OHADA in the field of arbitration” ,op cit.

arbitral tribunal, it administers the arbitration procedure in accordance with the treaty and the Rules of Arbitration (RA).

1 - When a party (individual or legal entity subject to the public or private law) to a contract is domiciled in a member state of the OHADA, or habitually resides, or when the contract in question should be executed, whole or in part, on the territory of a State Party, the contractors may decide, by a clause or an arbitration agreement to submit any dispute arising from the execution of the contract, to the arbitration procedure, even if a proceeding is pending before another court¹²².

2 – The CCJA mission will not resolve the dispute, but control the proceedings; it shall appoint or confirm the arbitrators. After the procedure it appreciates the draft award.

3 - Two aspects seem to us essential as regards to the administrative role vested in the court: the appointment or confirmation of the arbitrators¹²³, and the appreciation of the award.

- In order to resolve the dispute, the parties may appoint a sole arbitrator or three (3) arbitrators who will be confirmed by the CCJA. It also intervenes in the appointment of arbitrators where:

- The parties have agreed to appoint a sole arbitrator and failing agreement between them, on the person of the arbitrator within thirty (30) days from the date of notification of the request for arbitration to the other party, the arbitrator shall be appointed by the CCJA.

- The parties have agreed that the dispute shall be decided by three (3) arbitrators: each party shall appoint one, and the third, who shall chair the arbitral tribunal, appointed by the court, unless the parties have agreed that he will be designated by two (2) other arbitrators. In the latter case the court confirms the appointment. However, failing agreement between the two (2) arbitrators on the third person, and at the expiration of a time limit fixed either by the parties or by the court, the third (3rd) arbitrator is appointed by the CCJA.

¹²² About the procedure before the CCJA: see Uniform act on the arbitration Law (AU/DA) and the rule of arbitration of the CCJA. Adde Jacqueline LOHOUES-OBLE op. cit; Philippe FOUCHARD, “The arbitration and harmonization of the business Law ”, Arbitration review 1999 No 3,p.541 Etienne NSIE

¹²³ Article 2-2 and article 3 of the rule of procedure.

- The parties have not fixed the number of arbitrators by mutual agreement: the court shall appoint a single arbitrator, unless the importance of the case seems to justify the appointment of three (3) arbitrators. In the latter case a period of fifteen (15) days is granted to the parties for their appointment.

-The parties must submit to the court of joint proposals for the appointment of an arbitrator and if no agreement within the time allowed, the CCJA may appoint the entire arbitral tribunal.

- Finally, the CCJA rules on the disqualification of arbitrators¹²⁴.

4 – The arbitrator or arbitrators may sign an arbitration award only after having obtained the opinion of the CCJA before which the draft must be submitted. However, are subject to the court for review and before being signed, “the draft decisions on the competence, the partial decision that put an end to certain claims of the parties, and the final awards ...”¹²⁵ the other draft are forwarded to the court just for information purposes.

In addition to that it can propose “changes regarding the form”, the court also gives to the arbitrator “the information necessary for the settling of the arbitration costs”¹²⁶, and also determines the fees of the arbitrator¹²⁷.

5 - The awards benefit from the *res judicata* and are enforceable in the territory of each State Party, in pursuance of the exequatur decision of the CCJA¹²⁸. The exequatur may be refused only in four (4) cases:

- When the arbitrator ruled without an arbitration agreement or on an agreement which is void;
- When he ruled without complying with the mission entrusted to him;
- Where the principle of adversarial proceedings had not been respected;
- Finally, when the award is contrary to public policy.

In these four cases the opposition to exequatur is open. Thus, the exequatur is not given when the CCJA receives a complaint contesting the validity of the award.

¹²⁴ About this procedure see the article 4 of the rule of procedure of the CCJA.

¹²⁵ See the article 23-2 of the rule of arbitration.

¹²⁶ About the arbitration fees, see the article 24 of the rule of arbitration.

¹²⁷ Article 24-2 of the rule of arbitration.

¹²⁸ See Articles 24 and 25 of the Treaty; see also Articles 29, 30 and 31 of the Rules of Arbitration. Enforcement is granted by order of President of the CCJA or the judge delegated for this purpose and this order is likely subject to objection within 15 days from its delivery.

6 - It follows from the wording of Article 25 para. 1 of the treaty that arbitral awards are fully recognized by law in all States Parties, on the one hand and, on the other hand, benefiting from *res judicata*, they can neither be an objection or appeal and the Uniform Act excludes the appeal. However, awards are subject to:

- An action for annulment as provided by Article 26 of the AU / DA, brought before a competent judge of the state in which the award was made, the ruling of this court, which is often a Court of Appeal, is subject to a further appeal before the CCJA;
- An application for review before the arbitral tribunal;
- And a third party-opposition before the arbitral tribunal.

In the exercise of this function, CCJA recorded at 19 August 2003, six (6) cases and made two (2) rejections decision, while four (4) cases were pending at that date.

b2-The Ad Hoc Arbitration:

It is governed by the Uniform Act on Arbitration Law (AU / DA), however, when the parties are allowed to derogate from the provisions of this act, they are allowed to determine the proceedings¹²⁹.

V- Regional Training Centre for Legal Officers (ERSUMA):

To address the low level of specialization of judges, and the lack of continuing training systems and the lack of legal training, among other reasons, the contracting parties agreed to establish a school for training and improvement of the judge and the judiciary staff. To respond to these concerns, ERSUMA was established on 17 October 1993 with its head office in Porto-Novo (Benin)¹³⁰.

The Article 41 para 1 of the revised treaty provides: “It is established an institution for the training, improvement and research in business law called Regional High Judiciary School (ERSUMA)”.

The ERSUMA is attached to the Permanent Secretariat and the statute that governs it was adopted by the Council of Ministers in the meeting held in Bamako (Mali) on 2 and 3

¹²⁹ See Joseph ISSA- SAYEGH, Jacqueline LOHOUES – OBLE, OHADA – Harmonization of the business law , op cit, no 492, p 198 et 199

¹³⁰ Address : 02 B.P 353 Porto Novo (Bénin). Tél : (229) 20 24 58 04 ; fax : (229) 20 24 82 82 ; www.ohada.org / www.ersuma.bj.refer.org

October 1995; it determines its organization, its functioning, its resources and the services that it offers.

The bodies of the ERSUMA are: the Council of Ministers, the Board of Directors, the School Council and the Directorate (which includes the General Directorate, Directorate of Studies and Training, and the Directorate of Administrative and Financial Affairs)¹³¹.

Justifying the creation of the Community School, the General Director of ERSUMA said at the seminar about the harmonized law held in Niamey (Niger) on 9 and 10 June 1998: “One cannot succeed the harmonization of the Business Law if we do not train the peoples capable of knowing this law, promoting it, and understand it, and apply it effectively and uniformly throughout the community space OHADA”¹³². In addition to this training mission and improvement, the ERSUMA is also a documentation center on legal and judicial matters and it is in charge of the promotion and the development of the research in African law, to work towards the harmonization of law and the jurisprudence in relation to the community courts and national courts, and to ensure all the missions that would be entrusted to it by the Council of Ministers or its Board of Directors.

D-FUNDING OF OHADA:

The speed with which the process of creation of OHADA and the elaboration of the harmonized law were done, witness the will of States’ parties to carry out this endeavor. Given the hopes placed in it, both by governments and by the traders in order to occupy a comfortable position in international trade, this enterprise should not suffer the same fate as several other initiatives which eventually disappeared because of the lack of the functioning budget , including financial resources. In this regard, the Article 43 of the treaty lists the resources of OHADA, but this list is similar to that of other sub-regional or regional. These sources of financing have proved their low reliability.

It is in response to this delicate issue that the Council of Ministers approved a creative approach of financing the OHADA using the creation of a Capitalization Fund around twelve (12) billion CFAF. The OHADA project being designed for twelve (12) years, these funds are intended to cover the operating costs of the institutions of the OHADA for

¹³¹ Regarding those bodies, see Joseph ISSA –SAYEGH, Jacqueline LOHOUES – OBLE, OHADA-Harmonisation du droit des affaires, op cit, no 374 à 389, pp 159 – 163

¹³² The acts of the seminar.

ten years. The Capitalization Fund is provisioned as follows: each member state contributes three hundred sixty fifteen million (375 000 000) CFAF, for a total of six (6) billion. The other six (6) billion CFA francs have been financed by external partners.

The meeting of the Council of Ministers (CM) of OHADA, held in Dakar (Senegal), on 5 February 1997, decided to entrust the management of financial resources of the OHADA to the UNDP.

During the Niamey (Niger), seminar of 9 and 10 June 1998, the General Director of ERSUMA gave some details about the financing needs of the OHADA institutions, by saying: "... the total needs of the financing of the ERSUMA for the project period (12 years) is 3 billion CFA francs for the operation (against 7.7 billion for the CCJA and 2.1 billion for the Permanent Secretariat of OHADA). It is 11 billion CFAF for the program of activities (against 1 billion for CCJA and 1 billion for the Permanent Secretariat)¹³³. To meet the financing needs of the new organization, a Round Table of Donors was held in Geneva on 29 and 30 April 1997 under the auspices of UNDP. It has recorded several pledges for contributions:

- France: 4 billion CFA francs of which 2 billion paid on 17/01/1998;
- Japan: USD 500,000;
- Belgium: USD 1,000,000.
- European Union: CFAF 1 billion to finance specific activities of the institutions of the OHADA;
- UNDP: USD 1,000,000 for the technical assistance to institutions of the OHADA.

Totaling approximately 6.5 billion CFA francs¹³⁴.

The funds gathered were used to launch the activities of the new organization, but they were exhausted in 2004. Also, in order to not penalize such activities and to ensure to the organization of regular and reliable resources, the Extraordinary Council of Ministers of Finances and Justice of OHADA, gathered in Libreville (Gabon) on 17 and 18 October 2003 during the 10th anniversary of the OHADA Treaty, decided to establish a tax consisting of a direct levy from the customs cord of each Member State, such tax is named as "OHADA levy" which is fixed at 0.05% of the amount of imports products originating in third countries for consumption in member states. The Heads of State and Government

¹³³ See the acts of the seminar p.28

of OHADA, gathered in Quebec City on 17 October 2008, adopted a statement: “The finance ministers of the member states of OHADA are mandated to make all the useful arrangements for the effective implementation of the autonomous financial mechanism of the OHADA as provided by the regulation No. 002/2003/CM of 18 October 2003 related to the autonomous financing mechanism of OHADA and, with effect from the 1st January 2009”.

This new financing mechanism allows OHADA to have safer resources than those that depend on contributions from States Parties.

¹³⁴To the rate of US\$ 1 = 600 CFA Franc

CONCLUSION

Since 17 October 1993 a new African organization was born, it worked on the unification of business law in the member states. To this end, several Uniform Acts have been adopted and entered into force, others will, without doubt, be adopted in the coming months. This new set of rules is a law of the economic activities which is now part of the legal corpus of each member state. It belongs now to the legal practitioners (the Judges as well as lawyers or notaries) and the economic operators to make the legal integration of business law in the space of OHADA effective. It belongs also to the states to ensure the effective implementation of the new business law.

As G. wrote TATY¹³⁵ for the effectiveness of the treaty, a number of measures seem necessary, it concerns namely:

1 - The establishment of a commission of harmonization in each State Party. In this regard, the commission set up in Niger is an ad hoc one, whose main role is to assess the draft Uniform Acts that are submitted to it and therefore it seems poorly suited for the dissemination of the new law.

2 - The control of the regional legal environment through appropriate teaching. This is one of the most effective measures to ensure the dissemination of the harmonized law. To this end, both in the professional schools and at the universities, the programs of law should be revised and the course content should focus on the harmonized law. Officials of those schools should ensure the effective adaptation of the programs and course failing which they will provide education whose content is no longer appropriate. For the harmonization of the teaching programs, the ERSUMA could play an important role.

3 - The establishment in each state of associations of legal professionals. In this regard, associations and/or OHADA clubs have been established in most States Parties and third states. It is essential that these clubs should be operational in order to organize or oversee the dissemination of harmonized law. These clubs or associations must gather both legal

¹³⁵ Georges TATY, "Brief reflections on the entry into force of common rules of business law of the Member States of the Franc Zone", *Journal Penant* No. 830, May - August 1999, p. 227 and seq.

practitioners and businesses; however they must also be the centers of discussion about all matters relating to law.

4 - The establishment in each Ministry of Justice in the States parties, a service of international affairs, whose role shall be, inter alia, the monitoring of the elaboration and the implementation of the harmonized law.

5 - To facilitate the reception of community law and its consistency with the domestic law, the simple involvement of the ad - hoc national commission does not seem sufficient. Indeed, it is desirable that the National Assembly and the Chambers of Commerce should be closely involved in the drafting of the texts.

6 - Finally, from now on the judge will base their decisions related to business law on the harmonized law, and lawyers will make their arguments from this law in order to defend their clients.

This set of measures focuses essentially on the dissemination of harmonized law at internal and regional plans; they may be complemented by other actions that will offer the advantage to disseminate this law both in the OHADA space and internationally. These include:

1 - the role of scholars by publishing articles in the specialized press. Thus there will be a doctrine of the business of law of the OHADA which will facilitate the awareness of all investors and legal professionals about OHADA;

2 - the role played by the Association for the Unification of Law in Africa (UNIDA)¹³⁶ through the publication and dissemination of uniform law. It must recall the crucial role of this association to promote the new business laws in Africa and to mobilize private funds for this purpose¹³⁷.

Finally, although the Uniform Acts can solve, in part, the problem of fragmentation of business law in each member state of OHADA, it is equally true that this fragmentation is still a reality. Indeed, in each States parties, the Uniform Acts are not the only law applicable to the business, there are various other internal pieces of legislation¹³⁸ whose

¹³⁶ UNIDIR, created in January 1998, was placed under the chairmanship of Mr. Kéba M'BAYE. It is now chaired by Judge Seydou BA. Address: 7 Ave. de Ségur, 75007 Paris. Tel / Fax (33) 1.53 59 96 05, E-mail: unida @ wanadoo fr

¹³⁷ In this regard see Jeanne TIETCHEU, "popularizing texts of OHADA", JAE 30 March to 12 April 1998, p. 57.

¹³⁸ Other texts will certainly be adopted in each of these states.

provisions are not inconsistent with those of the Uniform Acts, and are also applicable to the texts on penalties in particular. Finally each of the States parties are signatories of the regional and/or international conventions concerning business law.

In consideration of the situation, each State Party, despite the fact that it will legislate to fill the gaps, should consider the elaboration of a compilation of laws applicable to business law. This collection will be a valuable tool for legal professionals and traders; it would contain all the texts applicable to the subject. Then the problem of the fragmentation of texts will be solved; and the codification will resolve the problem of knowledge of law applicable in case of a dispute.

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