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Regional arbitration institution for ECOWAS: lessons from OHADA Common Court of Justice and Arbitration

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**Int. A.L.R. 99* Introduction

The States of the West African sub-region currently do not host many international arbitration references and various reasons are proffered for this situation. Arbitration practitioners within these states will prefer to see more arbitrations hosted in the sub-region. This article examines whether the establishment of a new regional arbitration institution similar to the OHADA Common Court of Justice and Arbitration (CCJA) within ECOWAS will be a solution. The CCJA, in addition to its juridical role within OHADA, also administers arbitration references under its own set of arbitration rules. It is this latter role of the CCJA that is primarily examined in this article in answering the question of whether the ECOWAS Common Court of Justice (CCJ) should, in addition to its role as a supranational regional court, also transform into a regional arbitration institution to render within ECOWAS Member States comparative services as the CCJA does in OHADA Member States. To answer this question, this article examines OHADA and her harmonisation strategy in section one; section two briefly highlights certain provisions of the arbitration rules of the CCJA as a regional arbitration institution within OHADA; section three examines the remit of ECOWAS and the role of the CCJ; section four examines the arguments for and against setting up a new regional arbitration institution within the ECOWAS sub-region, and the role of the Asian-African Consultative Organisation (AALCO) regional centres; section five argues for the strengthening of national courts in the sub-region and proposes the expansion of the jurisdiction of the CCJ to include applications for the recognition and enforcement, and challenge of foreign or international (transnational) awards connected to ECOWAS Member States, but not for the CCJ to transform into a regional arbitration institution.

1. OHADA and her harmonisation strategy

OHADA was created by Treaty, signed in 1993 and entered into force in 1995. The revised Treaty was ratified in 2008 and entered into force in 2010, and is a grouping of 17 African countries¹ with a particular focus on the harmonisation (through the instrument of unification of laws) of their business laws for the purpose of attracting greater foreign direct investment (FDI) as they seek to create more conducive and predictable legal environment for foreign investors within their states.² The OHADA countries are geographically located in Western and Central Africa which explains why nine OHADA Member States are also members of ECOWAS.³ The Member States of OHADA have some relevant and deep commonalities such as French as the official language of most of the Member States⁴; membership of the franc zone as it relates to their currencies⁵; and French law as their received laws along with the civil law tradition.⁶ One major impact of the strong connection to France is that the nature of the substantive laws under the OHADA regime is not strange or unfamiliar to the citizens, judiciary or legal practitioners within OHADA Member States. Ntongho has argued that OHADA laws are based on French law which does not reflect "African culture and practice".⁷ Such an assertion, correct in itself, does not take account of the role of received laws generally in the continent. She contends that this is one of the reasons why other African countries are not joining OHADA. The reasons she says are because France is a major donor **Int. A.L.R. 100* to these (OHADA) African countries and has strong colonial ties with them.⁸ In addition to this however, the continued effect of and strong connection between all colonised African countries with their former colonialist country must not be overlooked. This is encapsulated in the concept of received laws (reflecting those bodies

of laws not indigenous to the relevant African country) evident in legal transplantations and the legal systems adopted in various African countries. It can therefore be asserted that the substance of OHADA laws is not "foreign" in her Member States because they are predominantly Francophone countries conversant with the civil law legal system on which OHADA laws are based and in which their lawyers are trained.

The impact of received laws therefore cannot be left out of the discussion on harmonisation of laws in Africa. This is particularly relevant for laws regulating business transactions.⁹ It is interesting that Ntongho gives, as one of the reasons why Anglophone African countries will not join OHADA, the fact that their laws are based on the common law legal tradition which in itself is received and not indigenous. African lawyers are familiar working with received laws (whether French or English based) and these can form the basis of any discussion for a harmonised regime of laws.¹⁰ This does not remove the perception in Anglophone countries that if they joined OHADA, they will be disadvantaged because OHADA uniform laws are primarily based on French law and the civil law system.¹¹ The late Professor Yakubu summarised the obstacles to the expansion of OHADA as follows:

"They include lack of political will resulting in the judicial and commercial infrastructures' instability and continued lack of sophistication and strength. Other impediments include the divergence of legal, cultural and social traditions, differing economic philosophies on specific topics such as priorities in bankruptcy, and very generally, the continuing influence of the nations' colonial past".¹²

It is of course important to keep the goals and limitations of OHADA in view. As a creation of Treaty, OHADA is binding only on its Member States. It may be that its description and title (Harmonisation of Business Laws in Africa) causes confusion as to its sphere of influence. It is not an African Union institution, neither is it a regional economic community nor a customs union nor regional trade organisation. It is an organisation of a number of states that cut across two main geographical regions of Africa, Western and Central Africa, with strong common interests and colonial histories that share a similar legal system which happens to be the civil law system. So the idea behind OHADA is not one of states desiring to pool their sovereignties together,¹³ and agree common policies for the economic development of their Member States (as in ECOWAS). This being the context in which OHADA exists, it is therefore impractical to seek to translate its mechanisms to the whole continent. Bamodu and Ndulo have separately argued that the harmonisation of business laws in Africa should be undertaken on a continental level under the auspices of the African Economic Community (AEC). However, in this author's view, harmonisation of business laws on a continental level is a huge project which may not be realisable within a reasonable time (if ever) primarily because of the very diverse nature and competing legal systems of the countries within the continent.¹⁴ Moreover, such harmonisation process can in the interim be undertaken on a regional basis, a view supported by art.4(d) of the Treaty establishing the AEC which provides as one of the objectives of the AEC, the coordination and harmonisation of "policies among existing and future economic communities in order to foster the gradual establishment of the Community".¹⁵ Therefore the key analysis should be whether, either on a continent-wide level or in the various geographical regions, the mechanism of harmonisation of business or commercial laws adopted by OHADA can be replicated towards the attainment of uniformity and certainty (and in some cases modernisation) of their business laws.

Back to OHADA and the harmonisation method it adopts. Article 1 of the OHADA Treaty states:

"The objective of the present Treaty is the harmonisation of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies ...".¹⁶

And art.5 provides that these common rules "are to be known as Uniform Acts". The effect of the uniform acts is stipulated in art.10: ****Int. A.L.R. 101***

"Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws."

Beauchard and Kodo have argued that the implementation of this art.10 remains uncertain even with the CCJA publishing an interpretation of the article in an Advisory Opinion to the effect that art.10 is limited to those provisions in domestic laws that are identical to or conflict with a provision of a uniform act.¹⁷ The authors argue that the uncertainty arises with domestic courts making decisions upholding domestic laws that conflict with a uniform act, and that these tensions arise from a lack of the use of express abrogation language in the Treaty.¹⁸ They conclude that the conflicting positions adopted within the Member states "would have to start with an exhaustive identification, state by state, of all language abrogated by the uniform acts".¹⁹ This is on the basis of the rules of abrogation

adopted in these jurisdictions. As an example the CCJA in *Delpuch v SOTACI* ruled that national legislation can be applied to understand the provisions of the Uniform Act on Arbitration (UAA).²⁰ This decision of the CCJA supports the assertion that both regimes (domestic laws and Uniform Acts) continue to exist side by side. So where a domestic law on the same subject matter contains identical or contradictory words (or words to that effect), the uniform act will supersede and take precedence over the domestic law, though the domestic law may help clarify the Uniform Act.

As mentioned above, the focus or interest of OHADA is limited to business laws which are defined under art.2 as

"regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect of credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, are also included the following laws: Employment law, Accounting law, Transportation and Sales laws, and any such other matter that the Council of Ministers would decide, unanimously, to so include as falling within of Business Law, in conformity with the objective of the present Treaty and of the provisions of Article 8."²¹

To this end, OHADA has adopted the following nine Uniform Acts: (1) Law of Cooperative Societies of December 15, 2010; (2) General Commercial Law revised December 15, 2010; (3) Law of Commercial Companies and Economic Interest Groups, latest revision of January 30, 2014²²; (4) Secured Transactions and Guarantees Law revised December 15, 2010; (5) Simplified Recovery Procedures and Measures of Execution of January 1, 1998; (6) Collective Proceedings for Clearing of Debts, January 1, 1999; (7) Arbitration Law, June 11, 1999; (8) Organisation & Harmonisation of Accounting Firms, January 1, 2001 and January 1, 2002; and (9) Contract of Carriage of Goods by Road of March 22, 2002. OHADA is also currently consulting on a Uniform Contract law,²³ and has its sights on laws regulating labour law, consumer sales law, competition law, intellectual property law, banking law, evidence law and a law to regulate unincorporated forms of business.²⁴ So it is evident that there is no limit to this list of "business laws", a description which in itself is problematic.

The necessity to define and limit what matters fall within business laws is aptly raised by Beauchard and Kodo in the context of overlap of subject matters and conflicts in the sphere of influence and regulation by the various regional organisations to which OHADA Member States also belong.²⁵ Such overlaps, the authors conclude, create legal uncertainty

"which can be resolved only if each of these organizations were to ensure that the rules it adopts do not address the same topics as other such organizations, or at the very least, that their rules do not internally conflict".²⁶

This state of affairs reveals a lack of collaboration between the regional organisations within the sub-region to which these states belong. It may therefore be necessary for the states within the sub-region to agree a development master plan to apply. Such a master plan will definitely ensure not just greater collaboration but also elimination or reduction of overlaps between the various regional organisations. An agreed master plan on development of the sub-region will necessitate each regional organisation having a clearly defined remit and scope of activity which fits into the functions of other organisations within the master plan. This will reduce the numbers of regional organisations within the sub-region, a concern also raised by the African Development Bank in its *Regional Integration Strategy Paper for West Africa, 2011–2015* *Int. A.L.R. 102 (AfDB Report) and recognised as one of the major problems in the sub-region, too many regional organisations,²⁷ and remove or limit the overlaps that have been alluded to.²⁸ From this analysis therefore, and assessing the scope of activities of current organisations within the sub-region, OHADA will be best suited to regulate laws relating to business transactions. This is what OHADA currently does and has established institutions that work towards the achievement of this goal. However the subject matters that fall within the definition of "business" laws need to be better and more clearly defined.

2. CCJA: Role and function as arbitration institution

The CCJA is one of the five principal organs of OHADA.²⁹ Each organ of OHADA is assigned a specific role aimed at the fulfilment of the goals of OHADA. So for example the Council of Ministers (CM) which comprises the Ministers of Justice and Finance of the Member States adopts the Uniform Acts, approves the annual programme of harmonisation of business laws, and generally adopts regulations for the implementation of the Treaty.³⁰ The CCJA on its part performs "a dual role as a regional supranational court and as an arbitration institution".³¹ As a regional supranational court, the jurisdiction of the CCJA includes interpretation of the OHADA Treaty and regulations, resolving

disputes on the interpretation of the Treaty, giving opinions on uniform laws and making final decisions on disputes arising under the Uniform Acts.³² It is therefore clear that the CCJA exists to support the OHADA machinery and ensure uniform interpretation of the uniform acts to create predictability and stability in this regard. However, that is just one aspect of its functions. The second aspect of its dualist nature which is of primary interest in this paper is its attribute as a regional arbitration institution.³³ "Regional" in this respect refers to the OHADA region which is made up of the OHADA Member States. Article 1.1 of the CCJA Arbitration Rules provides:

"The Common Court of Justice and Arbitration hereafter referred to as 'the Court' shall perform the functions of administering arbitrations within the domain devolved upon it by article 21 of the Treaty under the conditions hereafter defined."³⁴

Thus, it is the OHADA Treaty by virtue of its art.21 that grants the CCJA its status as a regional arbitration institution. The CCJA acts in an administrative capacity just like any arbitration institution when administering arbitral references under its Rules.³⁵ A quick digest of the arbitration regime of the CCJA reveals a modern mechanism for administering arbitration. The disputing parties commence the reference through filing a request and answer with the Registrar of the CCJA.³⁶ Article 10 of the Rules clarifies that such parties thereby subject themselves to

"the provisions of Part IV of the OHADA Treaty, these arbitration rules, the internal rules of the Court (CCJA), their appendixes and the costs of arbitration rates ... in force at the time of the introduction of the arbitral proceedings ...".³⁷

Where one party refuses to participate in the reference, the arbitration shall continue even in such party's absence. The parties can agree the seat of arbitration while hearings can hold in any location as decided by the arbitral tribunal.³⁸

On arbitrators, the parties can determine number and appointees. The default provision is one or three arbitrators. Where parties appoint the arbitrator, the CCJA will need to confirm such appointee and where they fail to nominate, the CCJA appoints the arbitrator, usually from its list of arbitrators.³⁹ It is interesting to observe that in appointing arbitrators, the CCJA "may first take into consideration the opinion of experts whose **Int. A.L.R. 103* competence are known in the area of international commercial arbitration".⁴⁰ Thus, the judges of the CCJA themselves do not sit as arbitrators in such references.⁴¹

Appointed arbitrators are under a continuing obligation to disclose and remain independent of the parties.⁴² Such arbitrators are required to complete their mandate, though they may be replaced by the CCJA as a result of resignation, successful challenge or death, inability to perform their functions or a legal or factual impediment.⁴³ It should be noted that arbitrators functioning under the CCJA Rules have greater opportunity of being heard (as compared to other institutional rules) before any decision that affects them is taken. This includes decisions on challenge or replacement on any grounds except death. It is the appointed arbitrators that make decisions over the dispute between the parties and evidence their decision in an award⁴⁴; rule on their jurisdiction and validity of the arbitration agreement⁴⁵; determine any application for interim measures of protection or provisional claim⁴⁶; and hear the parties in an adversarial hearing having full control of the proceedings.⁴⁷ Finally, just like the ICC Court of International Arbitration, the CCJA scrutinises all final awards rendered under its Rules.⁴⁸

It is also important to note that the CCJA fixes the cost of the arbitration including the amount the parties need to pay in advance and any subsequent deposits.⁴⁹ The parties shall pay the required deposits towards the cost of arbitration in equal shares.⁵⁰ Payment of the deposit is very important since the file will only be transmitted to the arbitrators after the deposit requested has been paid in full, and the cost of arbitration fully paid before the CCJA releases the award to the parties.⁵¹ Once the final award is released to the parties, it then falls within their power to enforce, challenge or seek annulment of the award.⁵² CCJA arbitration enjoys a wide confidentiality clause which includes the arbitral proceedings, deliberations of the CCJA, the documents and award. This confidentiality clause is binding on all those connected to the reference.⁵³ After the final award is issued to the parties, the CCJA reverts to being a regional supranational court on the basis of which it takes jurisdiction to hear enforcement or annulment actions in respect of the award.⁵⁴ The administrative role performed by the CCJA in arbitration references under its Arbitration Rules is clear from this brief summary. This also shows that the tasks the CCJA undertakes are not dissimilar to those undertaken by arbitration institutions generally. In recognition of the administrative nature of these tasks, decisions on them taken by the CCJA are recognised as administrative and not judicial in character.

The provisions of art.27 of the CCJA Arbitration Rules however differ from those of other arbitration institutions, and make CCJA arbitration special. Article 27 provides:

"Awards made in conformity with the provisions of these arbitration rules are binding in respect of the claim on the territory of each member state, as if they were ruling, made by Courts in the state. They may be the object of compulsory enforcement on the territory of any one of the member states."

The provisions of art.27 are judicial and not just administrative in character. It regulates matters on enforcement of the resultant award which is usually provided for in national laws or international conventions on arbitration.⁵⁵ Article 27 ensures that CCJA awards are directly enforceable in the seventeen OHADA Member States, wherever the judgment debtor has assets against which enforcement can be executed.⁵⁶ All the party wishing to enforce such award requires is the grant of exequatur by the CCJA and all the enforcing state needs to confirm is that the exequatur emanates from the CCJA. As a supranational court, its orders cannot be challenged in the courts of OHADA Member States since the CCJA is the court of final jurisdiction on OHADA related matters. In the same manner, art.30.6 of the CCJA Rules provides for very limited grounds on which CCJA Arbitral **Int. A.L.R. 104* awards may be challenged or annulled.⁵⁷ It is important to note that this challenge can be made proactively, that is before, or following the grant of exequatur (recognition) of the final award.⁵⁸ The important power that reflects the dualist nature of the CCJA is that matters of enforcement and challenge of an award rendered under the CCJA Arbitration Rules is reposed in the CCJA in its judicial capacity. So various paragraphs of art.29 CCJA Arbitration Rules provide:

"If a party intends to challenge the recognition of the award and its res judicata effect pursuant to article 27 above, he shall seise the Court (referring to the CCJA) of the matter by petition which he shall serve on the opposing party." (art.29.1)

"The Court (CCJA) shall inquire on the petition and rule under the conditions prescribed by its rules of procedure." (art.29.4)

"If the Court (CCJA) rejects the recognition and res judicata of the award referred to it, it shall annul the award ..." (art.29.5)

The effect of these provisions of the CCJA Arbitration Rules is that judicial actions on awards rendered under the auspices of the CCJA Arbitration Rules is taken before the CCJA itself unlike awards made under the OHADA Uniform Arbitration Act (UAA). For awards made under the UAA, actions commence from domestic courts in OHADA Member States with final appeal to the CCJA. It is this right of parties to directly invoke the jurisdiction of the CCJA which makes recourse to arbitration under the CCJA Arbitration Rules different and attractive. So a party that obtains a CCJA based arbitral award can immediately (without going through the national courts of an OHADA Member State) obtain enforcement of the same award before the CCJA and pursue execution in the Member State where the defaulting party has assets.⁵⁹ This effectively creates a "one-stop" court over such arbitration awards since there is no appeal from CCJA judgments. There is no similar regime within ECOWAS. This aspect of the CCJA arbitration regime makes it worth exploring whether ECOWAS can and should adopt the same regime, and if it should, how this may be implemented.

3. ECOWAS and its Community Court of Justice (CCJ)

ECOWAS is a Treaty based geographical grouping of fifteen countries (nine of which are also members of OHADA)⁶⁰ and the recognised regional economic community (REC) in the sub-region. Most ECOWAS Member States have French as their official language (referred to as Francophone countries) while the others (some of which are the economically more powerful states within the sub-region) have English as their official language (referred to as Anglophone countries),⁶¹ and in the same divide, the civil and common law legal traditions.⁶² In addition to these factors, the Anglophone countries are not parties to the franc monetary zone (one of the major connectors between OHADA Member States). These basic descriptors show the few commonalities (basically geographic location of the states) binding on ECOWAS Member States unlike those commonalities binding on OHADA Member States.⁶³

The aims of ECOWAS as stated under art.3 of the 1993 Treaty are to

"promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of

the African Continent." ⁶⁴

Thus, it is evident that the aims of both organisations are different. OHADA has a narrower scope which is to harmonise business laws within its Member States while ECOWAS has a broader vision of general economic development of its Member States and gradual integration leading to an economic union. The integration efforts of ECOWAS targets the policies of its Member States while the harmonisation efforts of OHADA focus on the substantive provisions of the business laws of its Member States. Therefore with divergent goals and purposes across different levels, there is no reason both organisations cannot complement each other. It should be noted that some of the defined sectors of involvement, such as transport, communication, trade, money and finance **Int. A.L.R. 105* services overlap in both organisations.⁶⁵ It is argued that even if there is such overlap, the goals of both organisations are different, and they operate by means of different tools: ECOWAS adopts policies while OHADA drafts substantive laws; so with careful planning, both organisations can easily complement each other.⁶⁶ Such complementarity should eliminate the concerns of duplication and hierarchy of norms or rules of the various regional organisations within the sub-region. So for example, in keeping with its declared policy of economic integration and the need for a stable environment to achieve this, ECOWAS has been most active in the area of peace keeping and free movement of its citizens, including freedom of establishment by its citizens in its Member States.⁶⁷ There has been little movement in its expressed goals of "integration of the private sector, and harmonisation of national investment codes" for example.⁶⁸ Therefore, if ECOWAS retains and works within its declared goal by creating an enabling environment for businesses to thrive (for example through providing security and ease of establishment and movement within the sub-region), then OHADA can design uniform business laws to regulate the conduct of business within the States of the sub-region, either through unification or harmonisation of such laws. This is not the nature of the relationship currently existing between the two organisations. One reason being the fact that though all the States of the sub-region are ECOWAS Member States, not all ECOWAS Member States are members of OHADA, and OHADA also includes some states from Central Africa.⁶⁹

Within the various organs of ECOWAS, two are of interest with regard to the question examined in this article.⁷⁰ The first is the Community Court of Justice (CCJ) and the second is the Arbitration Tribunal of ECOWAS (ATE).⁷¹ The CCJ was established under art.15 of the ECOWAS Treaty and its jurisdiction and procedure are contained in the Protocol and Supplementary Protocol on the CCJ.⁷² The jurisdiction of the CCJ covers the adjudication of matters such as those on the interpretation and application of the ECOWAS Treaty and its constituent documents, failure of members to honour their obligations under the ECOWAS Treaty and documents, the Community and its officials and violation of human rights occurring in Member States, among others.⁷³

On the ATE, this is established under art.16 of the Treaty but is not yet in existence or functioning and the Protocol relating to the ATE has not been promulgated. The effect of this is that there is no ECOWAS Arbitral Tribunal in place. It will be the case eventually when such a Tribunal is put in place that its remit will be to determine disputes arising from the application of the ECOWAS Treaty. Therefore such a Tribunal will still not be empowered to administer the resolution of disputes of a private nature arising from business transactions as any arbitration institution will do. The ATE will also not have powers or jurisdiction equivalent to the CCJA arbitral reference under OHADA. So it is clear that since the primary aim and focus of ECOWAS is not to harmonise business laws within its sub-region, under its present Treaty (including its constituent documents) ECOWAS does not have the necessary institutions similar to OHADA to introduce and implement a harmonised regime for business laws within its Member States. That said, if the Member States of ECOWAS decide to harmonise their business laws, then there are various possible mechanisms to adopt to achieve such defined purpose within the current organisations in the sub-region without the need to create another regional organisation to achieve such a purpose.⁷⁴

According to the African Development Bank (AfDB) in its *Regional Integration Strategy Paper for West Africa 2011–2015 (AfDB Report)* ECOWAS is planning to adopt uniform acts just like OHADA.⁷⁵ It may be useful to quote the relevant part of this section of the Report:

"Along with reform efforts by individual countries, efforts are on-going to harmonize business laws and procedures across ECOWAS to facilitate cross-border business. ... OHADA made a radical contribution to regional integration by transferring the development and enactment of harmonized business laws from national authorities to a supranational body. It also allowed the Common Court to have final jurisdiction over business law cases, although this remains a challenge as **Int. A.L.R. 106* incidentally there are frictions between the national courts and the Common Court. Building on the OHADA initiative, ECOWAS is working towards the harmonization of business laws including the

adoption of a Regional Investment Policy Framework and a Regional Competition Policy. Clearly ECOWAS should step up efforts with respect to business harmonization in view to promote the private sector".

This AfDB Report recognises the advantages of having a harmonised business regime as adopted by OHADA and acknowledges some of the challenges OHADA is dealing with as a result. However, the AFDB Report does not show how OHADA's particular method of dealing with business laws is more efficient or effective than those of the individual (non-OHADA) ECOWAS Member States, though it recommends harmonisation of business laws to ECOWAS. Beauchard and Kodo examined the effectiveness of the OHADA harmonisation regime on the attainment of legal certainty within the OHADA region and conclude that legal certainty has not been achieved within OHADA and state that:

"Although sufficiently comprehensive formal laws have been adopted, their overall application and enforcement continue to lag and there are legitimate concerns about whether they will ever be uniformly applied, since the domestic statutes that contradict OHADA have not even been identified, still less removed. ..." ⁷⁶

It is generally accepted that OHADA's lead in the harmonisation of its business laws is a positive step in the right direction. However, the successes and failures of the OHADA regime need to be studied so that other sub-regions (such as ECOWAS) that may consider following in the same direction may avoid the pitfalls through learning from the experience of OHADA. In addition, it will still be necessary to examine whether ECOWAS Member States have the political will to pursue and implement an OHADA-style harmonisation of business laws within the sub-region.⁷⁷ The importance of political will in discussions on regional organisation cannot be overemphasised. For example, Forere has argued that political interference hampers the process of economic integration in Africa following an examination of the ECOWAS and SADC integration processes.⁷⁸

The support by AfDB for the harmonisation of business laws within ECOWAS also raises one critical question, which is mentioned but not answered in this paper: this is whether the harmonisation of business laws falls within the remit of the ECOWAS Treaty or fits within the wider vision and goals of ECOWAS as enumerated above. It appears that though art.13(o) of the ECOWAS Treaty empowers its Member States to add "any other activity" to the objectives of the organisation, the same article provides a limitation on this power to the effect that such additional activity should be towards "attaining Community objectives" which are the gradual integration towards an economic union. In answering this question, there will be need to also determine whether a harmonised regime of business laws within ECOWAS Member States will lead to the attainment of its vision of an economic union or aid development of the sub-region. On the presumption that the States of the West African sub-region wish to harmonise their business laws, two options of how such a desire can be implemented are explored below.

Option 1: Join OHADA

This option argues for the remaining seven non-OHADA ECOWAS Member States to opt into the OHADA Treaty instead of creating or duplicating the remit of OHADA within ECOWAS or forming a new regional grouping for the same purpose.⁷⁹ This option is attractive since as stated by the AfDB Report, there are effectively too many regional organisations within the sub-region (according to the AfDB, there are 30 of these) with overlapping mandates.⁸⁰ Also as mentioned above, such opt-in will clearly define the roles of the various regional organisations within the sub-region and eliminate or reduce the problem of possible subject matter overlaps. However, there are also arguments against these seven states joining the OHADA Treaty. Such arguments are based on the non-existence of some of the commonalities already mentioned above such as language, legal traditions, and ceding more sovereignty to the regional organisation (because of the role of the CM and CCJA), and imposition of the Uniform Acts already adopted by OHADA without due consideration of the local or domestic laws or legal traditions of these opt-in states. These are all valid and legitimate reasons which should however not stop other States joining OHADA, but can also be negotiated by the States, thus requiring careful **Int. A.L.R. 107* study before taking any such opt-in steps.⁸¹ Such steps should also provide an opportunity for a re-negotiation of the OHADA Treaty between its current members and those wishing to opt into the Treaty.⁸² Examples of some matters that will need to be re-negotiated are: the working languages of the organisation and effective translation services⁸³; the relationship between the supreme courts of Member States and the CCJA; and the status of uniform acts vis-a-vis domestic laws which will include the question whether the uniform acts should only regulate those aspects of business laws with a foreign element, thereby removing domestic law from

its purview.⁸⁴

Option 2: Extend scope of ECOWAS to cover harmonisation of business laws

The second option relates back to the question on whether such a task will fall within the remit of the ECOWAS Treaty. If it falls outside of the wording of the current Treaty, then ECOWAS may consider expanding its remit or scope so as to extend this to the regulation of the private sector, and so adopt uniform business laws. As a Treaty based organisation, ECOWAS can pursue this enlargement through a revision of the Treaty to specifically include such powers. It is of course arguable that such a revision of the Treaty may not be necessary if business laws also fall within its investment bureau or portfolio (under the Commission for Industry and Private Sector Promotion). This option raises some concerns. The first is on the position of the nine ECOWAS member States who are already parties to OHADA. Will these states be required to submit to both regimes or leave OHADA or opt out of the new ECOWAS regime? None of these will be ideal for these States and the harmonisation within ECOWAS will be less effective if it does not include all the Member States. The second concern is that ECOWAS does not currently have the necessary institutions in place to implement a harmonised business law regime following the OHADA style. Such institutions will need to be designed and constructed with attendant costs and expertise among other implications (such as political will).

One institution which ECOWAS does have and which will play a key role in any such harmonisation effort is the CCJ. So in adopting uniform business laws, the competencies of the ECOWAS CCJ will need to be expanded to grant it similar powers and jurisdiction as those of the OHADA CCJA. However, within OHADA, the tension between the CCJA and national supreme courts has been mentioned above. To ameliorate this tension, the jurisdiction of the CCJ may be designed so that the supreme courts of ECOWAS member States have jurisdiction over such uniform laws. To further ensure consistency of interpretation of the uniform acts, ECOWAS should retain the referral system to the CCJA within OHADA, though from the Supreme Courts of ECOWAS Member States unlike the position within OHADA of referrals from the Courts of Appeals.⁸⁵ The next section examines whether there is a need for a regional arbitration institution similar to the CCJA within the ECOWAS sub-region.

4. Regional arbitration institutions within the ECOWAS sub-region

An effective arbitration regime requires the existence of modern arbitration laws, trained and/or experienced arbitration practitioners, functioning arbitration institutions and supportive national courts. In this section a brief mention is made of the robustness of the laws and conventions on arbitration adopted by states on the continent before a detailed discussion on arbitration institutions within the ECOWAS sub-region and the question whether ECOWAS needs to establish its own regional arbitration institution (similar to the CCJA).

Most ECOWAS states have modern arbitration laws which uphold the standard principles of party autonomy, arbitrator's independence, lack of interference from national courts, finality of arbitral awards and limited grounds of recourse against the final award.⁸⁶ At the level of the continent, 61 per cent of African States are parties to the New York Convention including the economic power houses,⁸⁷ so that convention awards are recognisable and enforceable within such jurisdictions⁸⁸, while 47 African States are parties to the ICSID Convention.⁸⁹ So the statutory framework to support arbitration references is available in most African States.

On arbitration institutions, there are arbitration institutions in most ECOWAS States with modern arbitration rules most of which are modelled after the **Int. A.L.R. 108* UNCITRAL Arbitration Rules.⁹⁰ No discussion on regional arbitration institutions in Africa will be complete without acknowledging the influence of the Asian-African Regional Consultative Organisation (AALCO) in not only setting up the regional arbitration centres but adopting the UNCITRAL Arbitration Rules for use by such centres.⁹¹ As articulated in the AALCO 17th Session held in Baghdad in 1977, such regional centres were necessary "so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized". Currently there are five operational AALCO regional centres for arbitration in Kuala Lumpur (1978), Cairo (1979), Lagos (1989),⁹² Tehran (1997) and Nairobi (2007)⁹³ with one in each of North, West and East Africa.⁹⁴

The AALCO regional centres are empowered to assist parties with the enforcement of arbitral awards in states within their covered region.⁹⁵ It is not very clear how many arbitral awards or times any of the AALCO regional centres in Africa have assisted parties in this regard.⁹⁶ This power granted to the

regional centres and acknowledged by the host country does not extend the remit of the centres to other states within the centres' regions.⁹⁷ Having so said, even if the regional centres cannot assist parties in enforcing their awards in other states in their region, it will be very useful if the regional centres do assist parties in enforcing their arbitral awards within the state they are domiciled, and publish data on such assistance. This will make arbitration under the rules of the regional centres more attractive to disputants.

The physical location of the regional centres may also impact on the degree of usage by the citizenry of each region in Africa. The Cairo and Nairobi Centres are located in the capital cities of Egypt and Kenya respectively while the Lagos Centre is located in the commercial centre (and not the capital, Abuja) of Nigeria. These regional centres do not have secondary offices in other States within their region. It is acknowledged that though parties can hold their hearings in any location under the arbitration rules of these centres,⁹⁸ the lack of physical presence in other states within their covered regions may negatively impact on the knowledge of their existence and the use of their services in such states, though the Lagos Centre noted in its 2006 Annual Report that it visited the Benin, Burkina Faso and Ghana "to publicize the role and usefulness of the Centre in the sub-region" which is commendable.⁹⁹

It therefore must be noted that the AALCO regional centres remain relevant within the African continent and continue to not only host arbitration references under their rules but disseminate awareness of arbitration (and alternative dispute resolution mechanisms) within their locations. All said the Lagos regional centre remains just one out of many arbitration institutions within the ECOWAS sub-region. It is acknowledged that all the arbitration institutions within the sub-region are domiciled in the various states and none is supranational, as the CCJA is within OHADA. ECOWAS may therefore decide to transform the CCJ into such a regional arbitration institution for the sub-region with its own set of arbitration rules, effectively the same system as adopted with arbitration under the CCJA Arbitration Rules. However, it is noted that such a system will only create another arbitration institution within the sub-region, albeit with certain clearly defined additional powers, which will apply only when the reference is under the institution's rules. It can therefore be concluded that there are adequate numbers of arbitration institutions within the West African States to meet the needs of the sub-region, so that the establishment of a new regional institution, whether under ECOWAS or another organisation, will only congest an already crowded space. What is needed is the strengthening of the current arbitration institutions through collaborations and strategic space sharing, affiliations with other arbitration institutions within and outside the continent (an example is the collaboration between the London Court of International Arbitration and the Mauritius International Arbitration Centre)¹⁰⁰ to share knowledge, expertise and promotion of best practices in the administration of arbitration references. Such collaborations will also build confidence in the administration of arbitrations within the continent.

However, even with the existence of modern arbitration laws and several arbitration institutions within the sub-region along with a budding group of well-trained and experienced arbitration practitioners, all of which favourably compare with any other developing region of the world, there is still a dearth of arbitration references taking place within the sub-region (as also in the wider continent). It is important to explore possible solutions to this since all of these resources are pointless if they do not lead to an increase in the numbers of arbitrations taking place within the sub-region and continent. **Int. A.L.R. 109*

International arbitration practitioners refer to the perceived weaknesses with national courts and their lack of support for arbitrations held within the continent as one of the reasons seats in Africa are not usually preferred.¹⁰¹ The scope of this paper does not permit a discussion of whether these perceived weaknesses are justified or not. However, the impact of such perception is keenly felt within the sub-region and this paper examines the issue of judicial assistance supportive of arbitration references connected to the sub-region. It is accepted that the arbitral mechanism in any jurisdiction needs an effective judiciary which is independent and supportive of arbitration to complete its effectiveness.¹⁰² Arbitration does not replace the judiciary.¹⁰³ Each has its sphere of influence and regardless of how effective or efficient arbitration institutions and arbitration practitioners within the sub-region are, the third leg of the arbitration stool needs to be present for a firm balance to be maintained.¹⁰⁴ The third leg of the stool is the judiciary. The next section examines various ways national courts within the sub-region may be strengthened and in addition proposes the use of a Treaty-based regional supranational court to determine only matters of enforcement, and challenge or annulment of transnational awards within the ECOWAS sub-region.

5. Strengthening national courts and the CCJ

National courts are relevant before commencement of the arbitral reference,¹⁰⁵ during the arbitration proceedings¹⁰⁶ and after the conclusion of the arbitration reference.¹⁰⁷ There are examples of instances where national courts in the sub-region have taken jurisdiction even in the face of a written and valid arbitration agreement, so that parties have had to go through the full appeal mechanism of a state at the very early stages of the arbitration reference.¹⁰⁸ This defeats the major reason why the parties chose arbitration in the first place, which is to avoid the courts.¹⁰⁹ It is therefore important that courts are clear on what their role in the arbitral process is and determine how to function in that role so as not to frustrate the will of the parties (opting out of the court process) while also protecting the interest of the state in ensuring the observance of basic procedural fairness in the arbitral proceedings. It is these interests that need balancing by the courts within the sub-region.

There are two critical phases in which courts become involved in arbitration references which are of relevance to this discussion and which will now be examined. The first is during the early stages of the arbitration reference (before commencement of the arbitration or constitution of the arbitral tribunal) when parties can apply to a court to challenge the arbitration agreement or for the appointment of an arbitrator or to challenge the jurisdiction of the arbitral tribunal. The laws in most ECOWAS states give national courts jurisdiction to determine these matters and usually such jurisdiction rests with first instance courts.¹¹⁰ It is at this level of courts where decisions suggestive of a lack of support of the arbitral process are usually handed down.

It is therefore proposed that at this stage of the reference, the jurisdiction of national courts should be limited to determining the existence of the arbitration agreement in accordance with the relevant national (or applicable) law. Other matters on the validity of the arbitration agreement and jurisdiction of the arbitral tribunal should be left to the arbitral tribunal to determine. Such determination by the tribunal will be in the first instance with the national court taking a "second look" at such issues in a challenge application to annul or set aside the final award.

For all matters on the appointment, challenge and replacement of arbitrators, it is proposed that these should be determined by appointing authorities and not national courts.¹¹¹ Such appointing authority will make decisions on arbitrator appointment (where a party fails to make the appointment) and determine matters of arbitrator challenge, all as administrative decisions, with no right of appeal or challenge of such decisions before national courts during the arbitration proceedings.¹¹² The facts relied upon for arbitrator challenge may still be relied upon (if the parties reserve their right) to challenge the final award before the courts under an appropriate ground such as partiality of the arbitrator. This proposal will assure that once parties have agreed to arbitration, the court will only get involved if the parties or the arbitral tribunal requires assistance with matters such as interim measures or collection of evidence, and or to enforce or annul or remit the final award. This proposal if accepted also effectively deals with the current problem of parties making several court applications which may start with the commencement of the reference and at various points throughout the arbitral reference, with their attendant time and cost implications. It is envisaged that these few changes will greatly reduce the numbers of such applications before national courts in the sub-region, with the attendant effects on time and cost on the arbitral reference.

The second phase is following the publication of the final award which is then not voluntarily performed so that one party may wish to seek recognition and enforcement of the award, or to challenge the award. It is recognised that it is the courts that have jurisdiction over these matters. However, determining such applications do not necessarily have to be unduly protracted.¹¹³ As is evident, the commodity for which parties arbitrate is the final award so that frustrating the enforcement of an arbitral award is a frustration of the whole arbitral process, a waste of the parties (and arbitrators') time, and the money the parties have spent prosecuting the arbitration. This is the most important phase of concern, not least because the judgment debtor may not have assets in any other jurisdiction (particularly where a foreign party is involved) for which the judgment creditor may pursue enforcement under the New York Convention (or such jurisdiction may not be party to the New York Convention). Parties will not wish, at this stage, to go through the various court levels in a foreign country.

The key concern here is how courts within the sub-region can better ensure an efficient mechanism for the actions required of them during this second phase. One recommendation is for a change in the laws of these states (which may include the constitutions in some states) so that applications for all matters falling within the second phase will commence at the Court of Appeal level with very limited appeals (with leave of the court) to the Supreme Courts.¹¹⁴ This recommendation is based on the fact

that most of the interventionist actions of the courts are made by first instance judges, as mentioned above. In addition, the recommendation seeks to reduce the levels of appeals parties will need to go through before a final determination is obtained. This recommendation will apply to both purely domestic, foreign and international awards and whether such applications are made on the basis of the national law or an international convention such as the New York Convention.¹¹⁵

The second recommendation under this phase will require distinguishing between purely domestic awards and transnational (foreign and international) awards. The proposal is for the CCJ, as the supranational regional court situated within the sub-region, to also have jurisdiction to determine applications emanating from awards that have a foreign element or that are transnational in nature. This effectively will require that some powers are ceded to (or shared with) the regional court from national courts on such matters.

The implementation of this proposal within the ECOWAS sub-region requires that the CCJ should be endowed with powers similar to those of the CCJA but limited to the recognition and enforcement, or challenge of transnational arbitral awards connected to ECOWAS Member States. ECOWAS citizens currently have access to sue Member States before the CCJ though on limited grounds covering human rights violations.¹¹⁶ This proposal envisages a widening of the jurisdiction *rationae* and *personae* of the CCJ to include these matters as it relates to transnational arbitral awards and for citizens of ECOWAS to be sued as respondents before the CCJ.¹¹⁷ Such a widening of jurisdiction for the CCJ will differ from that of the CCJA because of the lack of a uniform arbitration law within ECOWAS, however such matters can be included in the ECOWAS Treaty just as is contained in Part IV of the OHADA Treaty. In determining such applications, the CCJ will apply the (national) law or convention on which the parties rely.

On implementation, the CCJ will adopt the same procedures and methods for which its judgments are currently enforced within ECOWAS Member States.¹¹⁸ This is through a Treaty based undertaking by the Member States to treat the decisions of the CCJ as of equivalent status to those of the highest court (so the supreme courts) of the Member States and to enforce the decisions of the court. This also implies that where a Member State fails to ensure the execution of such arbitral award enforced by the CCJ, such Member State may be in breach of the provisions of the ECOWAS Treaty itself for which the Member State can be sued before the CCJ. These proposals should not be read as exclusive. Parties should **Int. A.L.R. 111* have access to these various regimes from which they can choose which best suits their particular circumstance; whether to pursue their actions before national courts or the CCJ where the final award is transnational.¹¹⁹ Parties may still wish to have access to an appeal mechanism at this stage. For such parties, pursuing their application through the national courts will be preferable. Other parties may wish to avoid national courts completely and so rely on CCJ as a supranational court for this purpose with no prospect of appeal from her decision (so effectively get one shot).

These proposals will definitely reduce the opportunities for parties to interrupt the arbitral process through various applications before national courts, relieve the courts from dealing with such matters (and its impact on their caseloads) during the arbitral proceedings, and preserve the parties' and state's interest in the court determining matters relating to the final award after the arbitration proceedings. This in effect means that the intention of the parties to resolve their disputes by arbitration is protected by the state (through her courts) and the parties retain access to the coercive powers of the court following the arbitral proceedings. There are also limitations to the proposals, the most important of which is the political will on the part of the States to cede more sovereignty to a regional institution such as the CCJ, as already mentioned. The question of political will arises because of the delays in the full implementation of the current provisions of the ECOWAS Treaty. It may be that the different challenges such as security, that some of the Member States are dealing with impact on the implementation timetable.¹²⁰ It is apt to quote Justice Torgbor's recent observation on the judiciary and arbitration¹²¹: He said:

"The debate is entirely different where the call is for sustained improvements and the use of best endeavours to compel judiciaries everywhere to be consistently fair and just in the global delivery of justice. It is then not restricted to judges but extends to lawyers and other role players in the justice delivery system, under a common obligation, to adhere to and be guided by a consistent application of the laws, rules and the universal standards of practice in the dispensation of justice. Otherwise the incompetent, biased and corrupt judge is neither supportable nor defensible in any jurisdiction or continent in arbitration or litigation matters."

Conclusion

ECOWAS and OHADA fulfil different functions and play different roles in the economic development agenda of their Member States. The CCJA of OHADA evidences the functionality of an institution with a dualist nature as both an arbitration institution and supranational court within the sub-region. It has been argued that ECOWAS does not currently need such a dualist institution because the sub-region is home to many arbitrators and arbitration institutions. It has, however, been proposed that the competencies of the CCJ of ECOWAS should be expanded to include the determination of applications for the recognition and enforcement, and challenge of transnational arbitral awards. It is also argued that national courts within the sub-region can complement these efforts by consciously adopting pro-arbitration policies that are supportive and not interventionist. It is also proposed that the Courts of Appeals in the sub-region should have original jurisdiction over the recognition and enforcement, and challenge of final awards and the decision can be appealed (with leave) to the Supreme Courts. This will effectively remove such matters from the jurisdiction of first instance courts who will retain jurisdiction over all applications (such as interim measures and compelling witnesses) to assist the arbitral tribunal during the arbitration proceedings. It is also proposed that greater use should be made of appointing authorities to the exclusion of national courts on certain secondary matters such as appointment and challenge of arbitrators.

It is acknowledged that even where all these measures are taken, it is still for lawyers and contract drafters in these jurisdictions to include arbitration clauses in their contracts and to actively nominate or choose a seat within the sub-region so that the goals of increasing the numbers of international arbitration references with seats in the continent and greater involvement of the continent in the arbitral process may finally be set in motion.

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- *. Email: eo3@soas.ac.uk. The author wishes to thank Justice Edward Torgbor and Mr Jean Alain Penda for their very valuable comments on the initial draft of this paper. The content of the paper remains the author's.
- 1. The 17 African countries are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Cote D'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo, Senegal, Chad, and Togo. The nine countries in asterisks are also members of ECOWAS. This list of OHADA Member States is available at: <http://ohada.org/etats-parties.html> [Accessed September 3, 2014].
- 2. OHADA Treaty art.1.
- 3. The West African Economic and Monetary Union (UEMOA under its French acronym) is another regional organisation within West Africa to which the following Francophone ECOWAS and OHADA Member States also belong: Benin, Burkina Faso, Cote D'Ivoire, Guinea Bissau, Senegal and Togo.
- 4. Spanish is the official language in Equatorial Guinea, Portuguese is the official language in Guinea Bissau, and Cameroon has both French and English as official languages. Though the 2008 revised Treaty (art.42) adopted English, Spanish and Portuguese as OHADA additional working languages, in practice French remains the sole OHADA working language and the controlling language of all its documents and not much official translation of OHADA documents to the additional languages has been done.
- 5. This is reflected in Preamble No.3 of the 1993 Treaty which states in part: "Convinced of the fact that their membership in the franc zone is an economic and monetary stability factor and constitutes a major asset for the progressive realisation of their economic integration ...".
- 6. Cameroon operates both the common law and civil law traditions for its legal system. On how the OHADA regime operates in Cameroon and the impact of the different legal systems on its practice see *M. Tumnde, "OHADA as Experienced in Cameroon: addressing areas of particular concern to Common law Jurists" in C.M. Dickerson (ed.), Unified Business Laws for Africa (London: GMB Publishing, 2009), pp.69–82.*
- 7. R.A. Ntongho, "Political Economy of the Harmonisation of Business Law in Africa" (2012) 5(2) Journal of Politics and Law 58, 59.
- 8. It is noted that France may no longer be the major donor to OHADA as the World Bank has also become a major donor with the UK Department for International Development also contributing to fund various programmes in some OHADA

States such as the DRC.

9. In most African countries, indigenous (and religious) laws regulate personal matters such as family and inheritance which may not necessarily implicate business transactions and those matters with a foreign element, though the rise in large mechanised farming may implicate customary land law.
10. It must also be acknowledged that even after most African countries became independent, the laws enacted by their legislatures were still heavily influenced by those in operation in their former colonialist states.
11. Ntongho, "Political Economy of the Harmonisation of Business Law in Africa" (2012) 5(2) Journal of Politics and Law 58, 61. See also, A. Akin-Olugbade, who in a paper titled, "The Harmonization of Investment Laws in Africa and Prospects for Future Harmonization of such Laws" presented as the ADB contribution to the panel on "Investment Law, Dispute Resolution and the Development Promise: Back to the Future" at the 2007 Annual Meeting of the American Society of International Law, ASIL Proceedings, Vol.101, p.452, stated, "one of the major challenges that OHADA faces is the extension of its membership to African countries of the common law tradition".
12. J.A. Yakubu, "Community Laws in International Business Transactions" in C.M. Dickerson (ed.), *Unified Business Laws for Africa* (2009), p.6.
13. Though, loss of some sovereignty to the supranational agencies in such an organisation is inevitable.
14. See G. Bamodu, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" (1994) 38(2) Journal of African Law 125, 169, where he argues for African countries to harmonise their private international law rules which affect trade on a continental basis. See also M. Ndulo, "Harmonisation of Trade Laws in the African Economic Community" (1993) 42 Int'l Comparative Law Quarterly 101.
15. The Treaty was concluded in Abuja on June 3, 1991 with text available at: http://www.au.int/en/sites/default/files/TREATY_ESTABLISHING_THE_AFRICAN_ECONOMIC_COMMUNITY.pdf [Accessed September 3, 2014]. It is important to note that the ECOWAS Treaty declares ECOWAS as the only regional economic community within the West Africa sub-region for purposes of participation in the AEC, and OHADA is not a regional economic community.
16. The wording of art.1 remains the same in both the 1993 original and 2008 revised Treaties.
17. See R. Beauchard and M.G.V. Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), *The World Bank Justice and Development Working Paper Series*, pp.25–26. A pdf copy of the paper is available at: <http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/17-2011CanOHADAIncrease.pdf?resourceurlname=17-2011CanOHADA> [Accessed September 3, 2014]. See also The CCJA Advisory Opinion of April 30, 2001 to which the authors refer.
18. Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), *The World Bank Justice and Development Working Paper Series*, pp.26–28, referring specifically to decisions from the Court of Appeal Niamey (Niger) and Court of First instance Ouagadougou (Burkina Faso) as examples.
19. Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), *The World Bank Justice and Development Working Paper Series*, pp.24–25.
20. *Delpech v Sotaci CCJA decision No.010/2003 June 9, 2003*, where the CCJA referred to art.44 of the Ivorian Arbitration Law in interpreting the reference to "competent judge" in art.25 UAA. The CCJA decided this article referred to the Court of Appeal of Cote d'Ivoire, as having jurisdiction over the action to nullify an award.
21. The wording of art.2 remains the same as in the 1993 original Treaty.
22. This revised version came into force on May 5, 2014.
23. See C.M. Dickerson, "OHADA's Proposed Uniform Act on Contract Law" (2011) 13 European Journal Law Review 461.
24. Listed by M.B. Idris, "Harmonization of Business Laws in Africa: an insight into the Laws, Issues, Problems and Prospects" in C.M. Dickerson (ed.), *Unified Business Laws for Africa* (2009), p.31.
25. Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), *The World Bank Justice and Development Working Paper Series*, p.25.
26. Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011),*The World Bank Justice and Development Working Paper Series*, p.25.
27. AfDB Report, para.3.1.1.2 refers to the multiplicity of regional organisations within the sub-region. The Report is available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/RISP%20for%20West%20Africa%20-%20REV%202.pdf> [Accessed September 3, 2014].
28. As raised by Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), *The World Bank Justice and Development Working Paper Series*, p.25.
29. OHADA Treaty art.3 lists the other principal organs of OHADA as: The Conference of Heads of State and Governments

(created under the 2008 Revised Treaty), the Council of Ministers, and the Permanent Secretariat. There is also notably the Regional Training Centre for Legal officers (ERSUMA) where training and continuing education on business laws is conducted and is provided under art.41 of the Treaty.

30. See E. Onyema, "Arbitration under the OHADA Regime" (2008) *Int'l Arbitration Law Review* 205, 206.
31. See Onyema, "Arbitration under the OHADA Regime" (2008) *Int'l Arbitration Law Review* 205, 208. See also B. Martor, et al., *Business Law in Africa: OHADA and the Harmonization Process*, 2nd edn (London: GMB Publishing, 2007), pp.271–283.
32. OHADA Treaty art.14.
33. The current CCJA Arbitration Rules were adopted on April 18, 1996 and published in the OHADA Official Journal on November 1, 1997 and became effective in 1998.
34. OHADA Treaty art 21 provides the connectors that will trigger CCJA jurisdiction as: where a party to the contract has its domicile or usual place of residence in any OHADA Contracting State; or if the relevant contract is to be fully or partially enforced in one or more Member States. So to arbitrate a dispute under the CCJA Arbitration Rules, one or more of these connectors must be present.
35. The role of the CCJA is very similar to that of the Court of Arbitration of the International Chamber of Commerce (ICC), with its Chief Court Registrar also performing the functions of a Secretary General of the CCJA "Arbitral Institution".
36. See CCJA Arbitration Rules arts 5, 6, and 7.
37. Part IV OHADA Treaty is the chapter on Arbitration while there is a separate Uniform Act for Arbitration.
38. CCJA Arbitration Rules art.13.
39. See CCJA Arbitration Rules art.3.1. However, in three member tribunals, the CCJA appoints the presiding arbitrator unless the parties provide otherwise. This same arbitrator appointment procedure is adopted in multi-party disputes, though in default the CCJA may appoint all arbitrators. The CCJA list of arbitrators is updated annually.
40. CCJA Arbitration Rules art.3.3.
41. OHADA Treaty art.21(2), and CCJA Arbitration Rules art.2.2. See also Onyema, "Arbitration under the OHADA Regime" (2008) *Int'l Arbitration Law Review* 205, 208.
42. CCJA Arbitration Rules art.4.1 and note that the ground of lack of independence mirrors that of art.7 of the 1998 ICC Arbitration Rules. Also note that under the 2012 ICC Arbitration Rules art.11 now includes lack of impartiality. It is also interesting that the test is in the "minds of the parties" (English translation) which closely mirrors the ICC Arbitration Rules basis of the "eyes of the parties" under its art.7.2 (retained as art.11.2 in the current 2012 ICC Rules).
43. CCJA Arbitration Rules arts 4.3 and 4.4. The decision of the CCJA on this matter is not appealable as it is an administrative decision and the CCJA does not have to give reasons for its decision.
44. The award must be issued within 90 days from the close of hearings and the CCJA can extend this time on application of the arbitral tribunal according to art.15.5 and the tribunal can make a consent award under art.20 CCJA Arbitration Rules. Article 22.3 CCJA Arbitration Rules give the presiding arbitrator special powers to decide the dispute alone where there is no majority.
45. See CCJA Arbitration Rules art.10.3 and on the basis of public policy, the arbitrator can *suo moto* determine his/her jurisdiction under art.21 CCJA Arbitration Rules.
46. See CCJA Arbitration Rules art.10.5. Note that for urgent measures or those that the tribunal cannot grant, a party can seek such orders from any competent national court, and the CCJA should be duly informed.
47. CCJA Arbitration Rules art.19 and note that the arbitral tribunal may hear the parties separately but in the presence of their legal advisers, and may also hold a documents only hearing.
48. OHADA Treaty art.24 empowers the CCJA to scrutinise the final award and "suggest any formal amendments to such a decision" which, art.23.2 CCJA Arbitration Rules defines as "modifications of form". All draft awards on jurisdiction, partial awards and final awards are subject to scrutiny of the CCJA according to art.23 CCJA Arbitration Rules.
49. See arts 8 and 11 while art.24 CCJA Arbitration Rules defines what items are included in the cost of arbitration.
50. CCJA Arbitration Rules art.11.2 and note that one party can pay the deposit where the other party fails to pay; and part of the amount can be paid by bank guarantee.
51. This also applies to supplementary requests for payment of additional deposits. Lack of payment suspends the arbitral proceedings. It is the Secretary-General of the CCJA that notifies the parties of the final award after full payment of all outstanding costs of arbitration according to art.25 CCJA Arbitration Rules.
52. The parties can also seek correction, interpretation or additional award from the tribunal or CCJA in accordance with

art.26 CCJA Arbitration Rules.

- [53.](#) CCJA Arbitration Rules art.14.
- [54.](#) CCJA Arbitration Rules arts 29 and 30.
- [55.](#) For example, art.35 UNCITRAL Model Law on International Commercial Arbitration (2006 revision) (Model Law) and art.III UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).
- [56.](#) This is through the grant of an order of exequatur by the CCJA which makes the award enforceable in all OHADA Member States.
- [57.](#) The grounds for challenging an application for exequatur according to art.30.6 CCJA Arbitration Rules are: (i) where there was no arbitration agreement or the agreement was void or had expired or lapsed; (ii) where the arbitrator ruled without conforming to his/her mandate; (iii) Where the adversarial procedure was not adopted; and (iv) where the award is contrary to international public policy.
- [58.](#) According to CCJA Arbitration Rules art.30.2 the exequatur is granted *ex parte* without a hearing. See *Martor, et al., Business Law in Africa: OHADA and the Harmonization Process (2007)*, pp.280–283.
- [59.](#) See *La Societe Benin Control SA v Republic of Benin CCJA 004/2013 AR13, decision of May 13, 2014*.
- [60.](#) ECOWAS was created under the May 28, 1975 ECOWAS Treaty which was revised on July 24, 1993 with the following Member States: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, (Mauritania withdrew its membership from the Community in 2000 to join the Arab-Mahgreb Union), Niger, Nigeria, Senegal, Sierra Leone, and Togo. This list is available at: <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> [Accessed September 3, 2014]. The nine Member States in asterisks are also OHADA Member States, which is a slight majority of ECOWAS states. All references in this section are to the 1993 Revised ECOWAS Treaty.
- [61.](#) For example Nigeria and Ghana attracted the largest inflows of FDI in the sub-region according to *UNCTAD World Investment Report, 2014 (UN Publication)*, pp.37–41. See also *B. Moeller, "Africa sub-regional Organisations: Seamless Web or Patchwork?" (2009) 56 Crisis States Working Paper Series, p.3* where the author describes Nigeria as the "obvious hegemon" within ECOWAS.
- [62.](#) All African countries have pluralist legal systems generally made up of domestic statutes (including national constitutions), customary laws (which are indigenous), religious laws (for example Islamic laws) and regional and international conventions, in addition to received laws.
- [63.](#) Eight ECOWAS Member States (Benin, Burkina Faso, Cote D'Ivoire, Guinea, Mali, Niger, Senegal and Togo) have French as their official language, five (Gambia, Ghana, Liberia, Nigeria, and Sierra Leone) are English speaking while Cape Verde and Guinea-Bissau are Portuguese speaking.
- [64.](#) This provision fleshes out recital 11 of the Preamble to the Treaty which states the final goal of ECOWAS as, "the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa".
- [65.](#) So for example these sectors are listed under art.3.2(a) of the ECOWAS Treaty with comparators in some of the OHADA Uniform Acts mentioned above. See *Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011),The World Bank Justice and Development Working Paper Series, p.25* on the problems raised by overlaps and lack of hierarchy of rules in the various regional organisations within the sub-region. Also note that some States belong to the three primary organisations of ECOWAS, OHADA, UEMOA already mentioned.
- [66.](#) ECOWAS can agree the policy and OHADA drafts the law implementing such policy.
- [67.](#) In compliance with ECOWAS Treaty arts 4(d) on non-aggression between Member States; 4(e) on maintenance of regional peace, stability and security...; and 4(f) on peaceful settlement of disputes among Member States.
- [68.](#) See ECOWAS Treaty art.3.2(g) and (i) respectively.
- [69.](#) Cameroon, Chad, Central Africa Republic, Republic of Congo, Gabon, and Equatorial Guinea are also Members of CEMAC (The Central Africa Economic and Monetary Community) and the ECCAS (Economic Community of Central African States) which also includes Democratic Republic of Congo, Sao Tome & Principe, Angola and Burundi.
- [70.](#) The principal institutions of ECOWAS as listed under art.6 of the Treaty include: the Authority of Heads of State and Government; Council of Ministers (two from each Member State); Community Parliament; Community Court of Justice, and the Executive Secretariat.
- [71.](#) Under art.15 of the Revised Treaty, the CCJ is renamed as the Court of Justice of the Community while under art.16, the ATE is renamed as Arbitration Tribunal of the Community.
- [72.](#) The Protocol of the CCJ A/P.1/7/91 was amended by the Supplementary Protocol A/SP.1/01/05.
- [73.](#) As listed under art.9 of the Protocol. This list of competencies of the CCJ also evidences the fact that the goal or

purpose of ECOWAS is not the regulation of business laws.

74. ECOWAS Treaty art.3(o) empowers the Member States to enlarge the aims and objectives of ECOWAS to "any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives".
75. *AfDB Report, para.3.1.6.2.*
76. *Beauchard and Kodo, "Can OHADA Increase Legal Certainty in Africa?"(2011), The World Bank Justice and Development Working Paper Series, p.31.* There is no published analysis on the question whether inward FDI has increased in OHADA Member States since the adoption of the uniform acts, and the correlation between the adoption of the uniform acts and such increases. This is not the focus of this article and so not discussed.
77. It is true that most of the inefficiencies identified by Beauchard and Kodo in the functioning of OHADA evidence a lack of political will on the part of the governments of her Member States.
78. See M. Forere, "Is Discussion of the "United States of Africa" Premature? Analysis of ECOWAS and SADC Integration Efforts" (2012) 56(1) *Journal of African Law* 29.
79. OHADA Treaty art.53 makes the Treaty "open to all members of the O.A.U (now AU) not signatory to the Treaty." So non OHADA, ECOWAS States can join OHADA and they will be bound by the Treaty and all the approved Uniform Acts, and be subject to the jurisdiction of the CCJA. See also Ntongho, "Political Economy of the Harmonisation of Business Law in Africa" (2012) 5(2) *Journal of Politics and Law* 58, 58–61.
80. *AfDB Report, para.3.1.1.2;* a conclusion with which Beauchard and Kodo agree at p.25.
81. A third option mooted by Mr Jean Penda in conversation with this author is for the seven non-OHADA Member States of ECOWAS to adopt the harmonisation process of OHADA and some or all of the Uniform Acts but not join OHADA as an organisation. This is the current position of Madagascar while it decides whether or not to join OHADA. The same goes for Burundi and Mozambique. This option is attractive but its workability needs to be carefully examined, which is why it is not discussed in this article.
82. Such call for renegotiation before joining OHADA is not new as the DRC did when it joined so that the application of some of the Uniform Acts in the DRC was suspended.
83. It is true that the 2008 revised OHADA Treaty has expanded the official languages of OHADA but this has not been practically implemented so there are still no official translations of OHADA documents or changes in the working language of the CCJA or OHADA institutions.
84. This preserves domestic laws which may need to protect the citizens of each state especially as there is still a large uneducated illiterate population within these states. In addition such foreign focused laws may better serve the goals of attracting foreign investments and better create the necessary legal certainty for inward foreign investments to thrive.
85. See OHADA Treaty arts 13 and 14. See also the same referral provision within the European Communities to the European Court of Justice under art.234 of the Treaty Establishing the European Community (Treaty of Rome) 1957.
86. See generally on the arbitration laws and environment of various African States, *Lise Bosman (ed.), Arbitration in Africa: a Practitioner's Guide (Kluwer Law International, 2013).*
87. Such as Nigeria, South Africa, Mozambique, Egypt, Morocco, and Ghana, the top six receipts of inward FDI in 2013 according to *UNCTAD's World Investment Report 2014 (WIR14), pp.37–39.*
88. As at July 10, 2014, 33 of the 54 (61%) African States; 10 of the 15 (67%) ECOWAS Member States; and 10 of the 17 (59%) OHADA Member States are parties to the New York Convention, from data available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed September 3, 2014].
89. As at July 10, 2014, 45 of the 150 (30%) ICSID Contracting States are from Africa; all 15 ECOWAS Member States, and all 17 OHADA Member States are parties to the Washington Convention from data available at: <https://icsid.worldbank.org/ICSID/FrontServlet> [Accessed September 3, 2014].
90. See E. Onyema, "Enforcement of Arbitral Awards in Sub-Sahara Africa" (2010) 26(1) *Arbitration International* 138 for a list of examples of arbitration institutions in sub-Sahara Africa. Also see *Bosman, Arbitration in Africa: a Practitioner's Guide (2013).*
91. For more details on the AALCO regional centres see *A. Asouzu, International Commercial Arbitration and African States (Cambridge: Cambridge University Press, 2001), pp.53–112.*
92. The impact of the Lagos Regional Centre on the Nigerian arbitration space is debatable considering the existence of several other arbitration institutions within the country actively engaged in promoting arbitration.
93. Nairobi is still very young having its enabling law only promulgated in 2012.
94. See the Report on the AALCO's Regional Arbitration Centres, AALCO/51/ABUJA/2012/ORG3 of 2012.
95. See *Asouzu, International Commercial Arbitration and African States (2001), pp.77–80.* Article 1(d) and (e) of the Lagos

- Regional Centre Headquarters Agreement simply refers to assistance with enforcement of arbitral awards, without defining whether in Nigeria or the West Africa sub-region. See text of the Agreement, available at: http://www.rcicalagos.org/downloads/HeadQuarters_Agreement.pdf [Accessed September 3, 2014].
96. There is no publicly available data on this in the annual reports provided to the AALCO by the Lagos Regional Centre.
 97. Such powers are contained in the Host States Agreements which Asouzu argued has the status of a treaty under customary international law at pp.77–78.
 98. For example, Lagos Regional Centre Arbitration Rules art.19.
 99. See para.91 of its 2006 Report to AALCO available at: http://www.rcicalagos.org/downloads/report_of_forthfifth_session.pdf [Accessed September 3, 2014].
 100. For details see <http://www.lcia-miac.org/> [Accessed September 3, 2014]. The Lagos Regional Centre notes on its website collaborations with LCIA, AAA/ICDR and City Dispute Panel, London.
 101. For an example of a recent post on these perceived weaknesses see, Dutson, Webster and Smyth, all of Eversheds LLP, "International Arbitration Africa Style" where their list includes: judges lack of support of arbitration, corruption, political instability and unrest, and length of proceedings, available at: <http://www.globallegalpost.com/global-view/international-arbitration-africa-style-82836387/> [Accessed September 3, 2014].
 102. An example is India and the current pro-arbitration movement by its courts as exemplified in recent decisions such as *Reliance Industries Ltd v Union of India Civil Appeal No.5765 of 2014*, in which the Supreme Court gave a robust decision to counter the effect of the *Bharat Aluminium Co v Kaiser Aluminium (2012) 9 SCC 552* decision on the application of Pt 1 of the Indian Arbitration and Conciliation Act on arbitrations with seat outside India.
 103. See for example Jan Paulsson, "Why Good Arbitration Cannot Compensate for Bad Courts" (2013) 30(4) Journal of Int'l Arbitration 345, where he argued that both an efficient court and efficient arbitral system are needed.
 104. The three legs of the arbitration stool constructed in this article are: the laws on arbitration (including the conventions), arbitration practitioners (including arbitration institutions), and the judiciary. It is possible for the legal practitioners (a group not covered in this article because of its length, but which nonetheless play an important role in this discussion) to be included with arbitration practitioners.
 105. Usually when a party wishes to challenge or assert the arbitration agreement or seek assistance with appointment of arbitrators.
 106. Usually to challenge arbitrators, seek assistance with gathering of evidence and grant of interim measures of protection.
 107. To obtain the recognition and enforcement of the award, or to challenge the final award.
 108. One recent example from Nigeria is the *NNPC v Statoil* dispute where the Federal High Court granted an injunction to restrain the arbitration proceeding on a without notice application in which NNPC had not fully disclosed material information and over which there was no urgency, and the Court of Appeal set the order aside in *Statoil (Nigeria) Ltd v NNPC (the arbitrators) Appeal No.CA/L758/12*.
 109. The fact that disputants will go through the whole appeal system to the Court of Appeal or Supreme Court just to uphold their arbitration agreement increases both time and cost of resolving the dispute.
 110. See as examples: the High Court under s.59 Ghana ADR Act 2010; the High Court under s.57 Nigeria ACA 1988; the High Court under s.49 Gambia ADR Act 2005.
 111. The UNCITRAL regime envisages the existence of an appointing authority, as does ss.14(3) and 16(3) Ghana ADR Act 2010. On the impact of the expanded role of the appointing authority under the Ghana ADR Act 2010 see E. Onyema, "The new Ghana ADR Act 2010: a Critical Overview" (2012) 28(1) Arbitration International 101, 111–113.
 112. This recommendation is not novel since this is the position under institutional rules. The law in Ghana provides for judicial review of such decisions made by the appointing authority under s.19(5)(b) ADR Act 2010.
 113. Another example from Nigeria is the pending enforcement of the award from the *IPCO v NNPC* arbitration rendered in 2004, which has been partially enforced by the English courts with various applications still making their way through the Nigerian courts. For the latest English decision see *IPCO (Nigeria) Ltd v NNPC [2014] All E.R. (D) 188*.
 114. This is the position in Cote d'Ivoire for example while art.37 Arbitration Law of Cape Verde refers to its Supreme Court of Justice.
 115. Awards under the ICSID Convention do not fall within this discussion since enforcement of such awards is determined by the highest courts of states and there is an internal annulment procedure within ICSID according to arts ICSID Convention.
 116. ECOWAS Treaty art.15.4 provides that the jurisdictions of the CCJ, "are binding on the Member States, the Institutions of the Community and on individuals and corporate bodies".

- [117.](#) This limitation to transnational awards ensures national courts retain jurisdiction on these matters over purely domestic awards. The additional competencies of the CCJ will require the amendment of its 2005 Supplemental Protocol.
- [118.](#) Revised CCJ Protocol art.24.2 provides: "Execution of any decision of the Court shall be ... submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State", and art.24.3 provides that such writ will be enforced upon verification that it is from the CCJ, and art.24.5 provides that such writ can only be suspended by the CCJ itself.
- [119.](#) This recommendation implies that parties who proceed under the CCJ will have a "one-court" stop in similar fashion to the CCJA while those who proceed under national courts will have access to the tiers of appeal available in the particular jurisdiction with the relevant Supreme Court as the court of last resort.
- [120.](#) So for example, Nigeria as one of the economic power houses of ECOWAS is currently struggling with the Boko Haram Islamist group threatening the security of the country. Matters of security will clearly rank in priority to harmonisation of business laws in such a state, and as noted by the *World Investment Report 2014* (p.39), transnational corporations are divesting from Nigeria partly because of security issues.
- [121.](#) Justice Edward Torgbor in a keynote address titled, "Opening up International Arbitration in Africa", delivered at the ICC/FIDIC Conference on International Construction Contracts and the Resolution of Disputes, Johannesburg, June 9–10, 2014, in which he argued for the opening up of the international arbitration regime to African arbitration practitioners, arbitrators and cities as seats of arbitration.

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