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Legal Integration and Circulation of Courts Decisions in the OHADA Area

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Abstract

Seventeen African states created in 1993 in Port-Louis the Organization for Harmonization in Africa of Business Law (OHADA) and thus embarked on a daring process of legal integration to guarantee in their space the legal and judicial security to build a broad common market for the achievement of major economic progress. To this end, Uniform Acts (uniform rules in certain business law matters) applicable directly in all member states have been adopted. Similarly, a Common Court of Justice and Arbitration (CCJA), a supranational court of cassation with jurisdiction over the interpretation and application of the Uniform Acts, has been created, which is undoubtedly a great innovation and indeed a real step to law and judicial integration. However, this effort to unify the substantive law and guarantee the unity of application and interpretation of the Uniform Acts by the CCJA does not go hand in hand with the creation of favourable conditions for the circulation of decisions taken by the substantive national courts of member States. Thus, in order to obtain the execution of a decision taken by the court of an OHADA state in another OHADA State, it is generally necessary to obtain an exequatur. However, the conditions of the exequatur are not only disparate, but generally demanding, leaving clear the existence of mistrust in a process of legal integration, which is antinomic. But this evil is also a good, because the requirement of the exequatur will allow to control the decisions of the jurisdictions of the Member states whose justice is not total worth of trust. In total and in analysis, the OHADA integration process cannot fully succeed without judicial integration. It is therefore necessary to set new, required objectives that involve harmonizing the rules of procedure and the rules of private international law and committing to respect the fundamental human rights.

Key words:

OHADA, CCJA, legal integration, judgements, governance

1 General Introduction

OHADA is a project, whose relevance, compared with more or less similar initiatives in Africa, is, to some extent, recognised.[1] However, in business judicial litigation in the OHADA area, circulation of public documents, notably, judgements rendered by the courts of one State Party in another, constitutes an irksome and increasingly pressing concern.

More specifically, influence of conditions on recognition and enforcement of judgements rendered in application of OHADA law by courts of one State Party in another Member State on the process of legal integration has been a matter of concern to the

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[1] See among others, Ulrich Spellenberg, Comparative law as a base for regional harmonisation, in: Döveling/Majamba/Oppong/Wanitzek, *Harmonisation of Laws in the East African Community – The state of affairs with comparative insights from the European Union and other Regional Economic Communities*, TGCL Series 5, 2018, 91 and seq.

OHADA doctrine[2] and authorities.[3] One of OHADA's objectives is to secure the legal and judicial environment through legal integration as a catalyst for economic unification and establishment of the rule of economic law;[4] and, to achieve that, there is need to institute judicial security.[5]

Of course, this worrying issue is not new. It is recurrent and so far without appropriate response although it is of particular importance because it is a major threat to the planned legal and judicial integration. Indeed, despite the stated legal and judicial integration goal, decisions rendered by one OHADA State Party remain foreign in another State Party and thus, raising the issue of their circulation.

Thus, in order to obtain enforcement of a judgement, it is sometimes necessary, for one reason or another, to request for the enforcement thereof, which presupposes recognition. There is need to distinguish between enforceability and recognition. In principle, the two terms are different. Traditionally, there is a distinction between recognition of a foreign judgement and its enforceability. As pointed out by Professor Pierre Mayer, recognition in private international law "is a position and not a legal action with respect to a standard emanating from another legal order or enshrined by it" [*our translation*].[6] This may be done either through a legal deed of the *for* or *de plano* in the recipient State. As for enforceability, it implies the intrinsic ability of a State to use the restraining organs to carry out the enforcement. It logically presupposes prior recognition of the deed, namely, the foreign judgement. Enforceability is conferred by the exequatur, most often through a legal deed.

OHADA law does not have any general provisions on procedures to be followed in settlement of business disputes before the national courts of States Parties or on measures for cross-border enforcement of decisions rendered by these courts. Article 13 of the Treaty merely affirmed the jurisdiction in principle of these courts and remained silent regarding rules of procedure, which should be adopted before such courts. Even the Rules of Procedure, adopted on 18th April, 1996 and amended by Regulation Number 001/2014/CM of 30th January, 2014, govern only proceedings before the OHADA Common Court of Justice and Arbitration. To ensure enforceability, it is necessary to obtain the enforcement order in the required State.

Legal integration means transfer of legal powers from States to an organ with decision-making powers and supranational jurisdiction[7] for creation of a true community based on the rule of law, driven by the unifying will of the States Parties. In the OHADA area, despite the normative textual identity in business law, enforcement of judgements rendered in States Parties is hampered by existence of acceptance rules that govern foreign public instruments, in general. However, as Pierre Meyer rightly points out, difficulties in

[2] Pierre Meyer, Circulation of judgements in French-speaking West Africa, Burkina Faso Review, N° 39-40, special issue, pp. 107 and seq.; Gérard Ngoumtsa Anou, Exequatur in compared positive law, RDAI, BL N° 5, 2012, pp. 588 and seq.; Louis d'Avout, Exequatur in European positive law, RDAI, BL N° 5, 2012, pp. 568 and seq.; V. Carole Ngono, *Circulation of enforcement orders in the OHADA area*, Doctorate thesis, University of Ngaoundéré, Cameroon, 2014; Bonice Banamba, Conflicts of jurisdiction in the OHADA area, Revue Lamy, Droit civil, N° 143, 1.2016, pp. 1 and seq.

[3] *Study on the relevance and feasibility of extending harmonization to the settlement of conflicts of laws and the circulation of public documents*, Permanent Secretariat, Juridis, Yaounde, 2013.

[4] Kéba Mbaye, The history and objectives of OHADA, LPA, 2004, p. 2.

[5] Ibid., p. 3.

[6] Pierre Mayer, *Methods of recognition in private international law; Mélanges Lagarde, Private International Law: Spirit and Methods*, Paris, Dalloz, 2005, p. 549.

[7] Joseph Issa-Sayegh, *Legal integration in the franc zone States*, *Penant*, No. 823, 1997, pp. 5 and seq.

efficiency of foreign judgements emanating from an OHADA State in the State addressed undeniably undermine legal certainty[8] and correlatively legal integration.

On the face of it, legal integration has a normative aspect, but also logically a jurisdictional aspect. The undeniable nexus between these two aspects was, convincingly, demonstrated by Meyer.[9] Indeed, more than simple transfer of powers, legal integration is, above all, expression of a common will based on mutual trust[10] to create a legal community. The technical tools to achieve this are clearly stated by several authors.[11] Successful establishment of such a legal community also requires a "free market" of judgements,[12] more precisely, an integrated judicial area. But in the OHADA model, initiators of this project opted for standardization of material rules of the Member States in areas capable of fostering economic attractiveness (Article 1 of the Treaty). Use of standardization, a technique of legal integration, leads to removal of legal disparities in the States Parties in favour of a single instrument imposing both textual and meaning identity, replacing national laws with a single as well as unique normative expression. The textual normative identity is supplemented by establishment of a single jurisdictional body at the supreme level to safeguard unity of understanding, interpretation and application of the unified law.

However, this standardization of material rules has obscured that of formal rules. Despite the undeniable link between legal integration, legal and judicial security, on one hand, and rules of judicial proceedings, acceptance of foreign judgements and direct and indirect international jurisdiction, on the other, rules of procedure, conflicts of laws and jurisdiction are left almost entirely to the jurisdiction of national laws.[13]

Such an option leaves States with the power to specify under what conditions decisions rendered by the courts of other States Parties even under OHADA law may be recognized and enforced in a requested OHADA State. Accordingly, exequatur is required everywhere and with conditions specific to each State. Some authors[14] are of the opinion that it is necessary to maintain such control rules while for others,[15] the control is inconsistent, unjustified and must be abandoned.

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[8] Meyer (n6) 107.

[9] Ibid., 113 et seq.

[10] On this notion, see Daniel Flore, *Brainstorming on the idea of mutual trust, the European criminal space*, Université Libre de Bruxelles, 2003, 133 and seq; Gilles Kerchove and Anne Werenbergh, *Mutual recognition of criminal court decisions in the European Union*, Brussels, Publications of the University of Brussels, 2001; Gilles Kerchove and Anne Werenbergh, *Mutual trust in the European criminal space*, Brussels, 2005.

[11] See, for example, Tallon, *Harmonization of civil law rules as a civil law and common law country*, RDIDC, 1990, 514 et seq.

[12] Meyer (n9) 113.

[13] There are few and isolated cases that the OHADA legislator has regulated in the field of:

- land transport by road (Art. 27(3) of AUCTMR: "Where a judgment entered by a court of a State Party has become enforceable in that State, it shall also become enforceable in each of the other States Parties as soon as the formalities required in the State concerned have been complied with…";
- execution of international bankruptcies to a certain extent - enforcement requires exequatur- (Article 247 AUPC: "Any decision to initiate or close collective proceedings, or decision settling a dispute arising from the said proceedings or any other final decision pronounced in the territory of a State Party and on which the collective proceedings have a legal impact shall be *res judicata* on the territory of the other States Parties".

[14] d'Avout (n2) 571.

[15] Ngono (n2) 177 and seq.

Therefore, it is useful to analyze relevance of maintaining national rules of private international law, particularly those relating to recognition and enforcement of public instruments with regard to the legal integration goal.

To achieve this, rules of judicial procedure, domestic and international rules of private international law and the case law of some key OHADA States were analyzed.[16] Then followed an analysis of the judicial practice and an empirical evaluation of the degree of assimilation as well as acceptance of the OHADA law by a sample of legal, judicial and economic actors of the OHADA area.

The approach revealed that exequatur is a general requirement for circulation of judicial decisions in the OHADA area (I), although assessment of the judicial and political environment of the Member States argues in favour of maintenance of these rules, even though they hinder circulation of court decisions and impose setting up of new related objectives necessary for the legal integration project (II).

2 General Requirement of The Exequatur for Recognition and Enforcement of Judgements

Initiators of the OHADA project devoted themselves only to standardization of material rules in identified areas, whose legal security would be necessary to improve the economic environment. This option implies that the issue of circulation of judgements is left to the jurisdiction of States. The latter require exequatur with conditions that they freely determine in their domestic laws (A). Such situation, of course, hampers legal integration (B).

2.1 Requirement subject to the domestic laws of States

Subjecting circulation of enforceable orders, in general, and foreign judgements, in particular, is a deliberate choice (1), even though domestic laws are disparate with the risk of distortions that may ensue (2).

2.1.1 A deliberate choice

In order to enforce judgements, on 10th April, 1998, the OHADA legislator adopted a uniform act referred to as the "Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures" (UAEM), which entered into force on 10th July, 1998. Rules relating to execution of enforceable orders were thus unified. However, this statement is misleading, for unification does not concern cross-border enforcement, but only concerns enforceable orders of a State within its borders. Therefore, there are no general common rules to ease recognition and enforcement of judgements in the area of legal integration. One can legitimately wonder whether it was a deliberate choice or an oversight. Observers who were interested in this issue concluded in their analysis[17] that it is not an oversight, but a deliberate choice.

This conclusion is based on the following two remarks:

1. The OHADA legislator referred the circulation of enforceable orders to domestic laws of Member States. This option stands out clear in Article 33(5) of the UAEM, which expressly states that "the following shall constitute writs of execution ... decisions recognised as court decisions by the national law of each State Party." However, decisions

[16] Benin, Cameroon, Congo Brazzaville, Côte d'Ivoire, Senegal and Togo.

[17] For example, Gérard Ngoumtsa Anou (n2) 592 et seq.; Meyer (n9) 115 and seq.; Banamba (n2) 12 and seq.

referred to in Article 33 are all decisions including those rendered in court or abroad pursuant to the OHADA Uniform Act.

2. The fact that the OHADA legislator organized in certain cases the unhindered intra-OHADA circulation of some decisions, for example, free circulation of decisions of the Common Court of Justice and Arbitration (CCJA) has been officially recorded. In effect, the OHADA legislator waived the CCJA's rulings from abuses of application of internal laws for their effectiveness in the Member States. In its responsibility of guaranteeing the unity of interpretation and application of Uniform Acts, the CCJA enjoys a certain judicial supranationality. Article 20 of the Treaty provides that "The judgements of the Common Court of Justice and Arbitration are final and enforceable. They shall be enforceable in States Parties in the same manner as the decisions of national courts ..." No national judicial procedure is, therefore, necessary to give this decision the authority of *res judicata*. However, proclamation of this exemption in the second sentence of this article is not entirely correct. CCJA decisions are not subject to conditions of recognition and enforcement of foreign decisions in States Parties. Strictly speaking, the CCJA is not a foreign court, but a community court, in other words an *"offshore national court."* Its decisions have more or less the same status like those rendered by the national judge. Consequently, there is no requirement for exequatur, but rather, a verification of authenticity not by a judge, but by a court clerk, in general, the chief clerk of the Court of Appeal with territorial jurisdiction. However, they are still subject to formality specified in Rule 46.1 of the Rules of Procedure: "The enforcement of Court rulings shall be governed by the rules of civil procedure applicable in the territory of the State in which it takes place. The enforcement order shall be appended without further control other than the verification of the authenticity of the document, by the national authority whom the Government of each Contracting State shall designate for this purpose and who shall be made known to the Court."

According to the foregoing provisions, CCJA rulings are enforceable in a State Party after the competent authority designated by the Government of that State Party affixes the enforceable formula to the Court decision. The instrument specifies, of course, that the authority responsible for affixing the enforceable formula on the CCJA rulings has no other power than to verify authenticity of the document. This so-called verification of authenticity is not a judicial procedure, unlike national judicial decisions. This is already a big step forward, even though this formality before a court clerk can sometimes take a few weeks. Some authors have proposed that it should be stroke off.[18] This is apparently relevant, but it will be necessary to first find a reliable identification system to replace it. Electronics can be of great help here. In addition, the OHADA legislator provided for other cases whereby recognition and enforcement are done by OHADA, evading domestic laws, with the exception of enforcement,[19] concerning:

- recognition and enforcement without exequatur (Art. 247(1) and (2) of AUPC)[20] as regards recognition of the initiating and closing decisions of collective proceedings;

[18] See Jean-Marie Tchakoua, 'Between dogmas and the quest for efficiency: brainstorming on the enforcement of court decisions', in Les *Horizons du droit OHADA*, Mélanges Michel Filiga Sawadogo Blends, Cotonou, CREDIJ, 2018, 245.

[19] The requirement of exequatur is reserved for enforcement, Article 247(2) of AUPC "notwithstanding any provision of this article, enforcement measures require exequatur".

[20] Uniform Act organizing Collective Proceedings for the Clearing of Debts (AUPC), 15th September, 2015, replaced that of 10th April, 1998. Art. 247(1) of AUPC: "Any decision to initiate or close collective proceedings, or decision settling a dispute arising from the said proceedings or any other final

- the effects of collective and main proceedings initiated in a State Party in another State Party (Art. 251(2) of AUPC);[21] and
- inter-State transport (Art. 27(3)): "When a judgment entered by a court of a State Party has become enforceable in that State, it shall also become enforceable in each of the other States Parties, as soon as the formalities required in the State concerned have been complied with." Although reference to formalities to be complied with in the State concerned is a cause for caution, it should be pointed out that there is a clear desire to make effective judgement rendered in one Member State in the other Member States without major hindrance. Overall, all sub-paragraphs of the aforementioned Article 27 are pertinent. Even those dealing with international jurisdiction deserve attention because they influence on applicable law and international efficiency of the decision rendered, where recognition and enforcement rules of the receiving State include control of legislative jurisdiction.[22]

All in all, the OHADA legislator could have legislated on the intra-OHADA international effectiveness of decisions rendered by a court of a State Party in another State Party. That was not done. It is not an oversight, but a deliberate choice.

This option is very noticeable in some CCJA opinions and decisions. For example, regarding "the competent authority to rule on all disputes or petitions relating to execution..." (Art. 49 AUVE), the High Court has constantly held that "it is up to each State to determine according to its own rules of judicial organization."[23] This choice leaves room for domestic laws of States Parties.

2.1.2 A choice leaving room for the disparate internal laws of States Parties

Absence of community enforcement rules leaves room for internal laws of States, which are either from national sources specific to each State or from international sources. Indeed, each State Party has its own rules of legislative or jurisprudential origin.

Rules from national sources are not only specific to each State, but also they are characterized by their disparities. Thus, for decisions rendered in an OHADA State by a national court under the Uniform Acts, the exequatur procedure is necessary, unless otherwise provided for by any conventional provision for bilateral or multilateral judicial cooperation other than OHADA.

Generally, all OHADA Member States subject recognition and enforcement of foreign judgements, even those rendered under OHADA law by a judge of a State Party, to obtaining of exequatur.[24]

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decision pronounced in the territory of a State Party and on which the collective proceedings have a legal impact shall be *res judicata* on the territory of the other States Parties".

Art. 247(2): "the provisions of paragraph 1 of this Article shall also apply to any decision recognized by the competent court of a State Party pursuant to Chapter II of this Part"; in application of this article, see Abidjan Court of Appeal, 27 June 2002, Ohadata J-03-29.

[21] Art. 251(2): "The effects of another main collective proceeding as defined in Article 1-3 above applying to all debtor's property located in the territory of the States Parties".

[22] See below 3.1.

[23] Notice No. 001\99\JN; Judgement No. 11/2004 of 26 February 2004, Judgement No. 129/215 of 12 November 2015.

[24] For example :

- *Benin:* Sections 1159 et seq. of the Code of Civil, Commercial, Social, Administrative and Accounting Procedure (Law No. 2008-07 of 28 February 2011);

A brief look at some national provisions reveals that conditions are not the same even though the adverse consequences of these disparities can be mitigated by the fact that most OHADA States have signed the so-called OCAM Convention[25] of 19th September, 1961, which provides for common conditions for exequatur.

National laws can be classified into three categories : those which, while explicitly requiring exequatur, do not list the conditions;[26] those providing for five or six conditions;[27] and those providing for four.[28]

For States with five or six conditions, the conditions include the following:

a) the decision emanates from a court with jurisdiction pursuant to rules *for* conflict of jurisdiction;
b) application of the applicable law under rules *for* conflict resolution;
c) a decision, which has become *res judicata* and enforceable according to the law of the State in which it was rendered;
d) the parties were regularly summoned, represented and found to be in default and;
e) compliance of the decision with the *for* public order and with a court decision having the authority of *res judicata*.

The above conditions are especially those of Senegal. Although numbered up to five, they are actually six conditions, since the last one comprises two conditions.

As for the four conditions provided for in some States like Cameroon, they include the following:

a) connection of the dispute to the State, whose judge was seized;
b) the decision has become *res judicata* and enforceable according to the law of the State in which it was rendered;
c) the parties were regularly summoned, represented or found to be in default; and
d) compliance of the decision with public order.

Some provisions clearly distinguish recognition of enforcement. Others do not. In any case, neither recognition nor enforceability is conferred by right without control. In addition, there is apparently no distinction between decisions. Some, however, do not contain any potential for enforcement. This generalization, which is very noticeable in Section 1161 of the Benin's CPCCSAC, is excessive and even harmful. All in all, the diversified national legislations are demanding.

- *Cameron:* Sections 6 et seq. of Law No. 2007/1 of 19 April 2007 to institute a judge in charge of litigation relating to the execution of judgements and lay down conditions for the enforcement in Cameroon of foreign court decisions, public acts and arbitral awards;
- *Côte d'Ivoire:* Sections 345 et seq. of the Code of Civil, Commercial and Administrative Procedure (Law of 21 December 1972 as amended by Ordinance No. 2015-364 of 20 May 2015);
- *Senegal:* Sections 354, 787 et seq. of the Code of Civil Procedure;
- *Congo Brazzaville*: Section 299 of the Code of Civil, Commercial, Administrative and Financial Procedure and Section 832 of Law No. 073/84 of 17 October 1984 to institute the Family Code.

[25]Convention brought together twelve States, including ten currently members of OHADA; The States of the former OCAM (Joint Afro-Malagasy Organization) had signed a judicial cooperation convention, a Collection of treaties, conventions and other instruments in the field of justice applicable in the Republic of Benin, Rights and Laws, Cotonou, Nounagnon, 2012, pp. 37 et seq.

[26] Congo Brazzaville, Section 832 of the Family Code requires exequatur while referring to Section 299 of the Code of Procedure, which does not list out the conditions but simply recalls the requirement of "found enforceable by a Congolese court".

[27] Senegal (Section 787); Côte d'Ivoire (Section 347).

[28]Cameroon, Section 6 (n24).

Apart from these national rules of ordinary law, rules of a conventional origin are also applicable. In fact, several OHADA States are bound by international conventions dealing with recognition and enforcement of court decisions as well as arbitral awards. Some conventions bring together most of the OHADA States. They include, in particular, the OCAM general Judicial Cooperation Convention of 12th September, 1961, the Judicial Cooperation Convention of 21st April, 1987 between ANAD[29] States and the Judicial Cooperation Agreement of 28th January, 2004 between the six CEMAC Member States.[30] None of these conventions removes conditions of acceptance of judgements rendered by the courts of States Parties.[31] Conditions they provide are sometimes more stringent than those of national rules. With regard to the OCAM Convention, Article 31 recalls the general requirement of exequatur for enforceability, while Article 30 lists out conditions and Article 35 formalities. Such conditions differ from those contained in the national laws of States Parties. While Article 31 of the Convention lists out five conditions, the national laws of some States contain only four.[32] Articles 31 of the OCAM Convention and 31 of the ANAD Agreement provide for five identical conditions for enforceability that include the following:

1. the jurisdiction of the court that rendered the decision;
2. application of the law designated by the *for* rule of conflict;
3. the decision has acquired the authority of *res judicata*;
4. the parties were regularly summoned or found in default; and
5. compliance with international public order.

The Agreement on judicial cooperation between the CEMAC States, referring to the requirements of fair trial, nevertheless, raises five conditions (Art. 14), which are almost similar to those of the two above-mentioned conventions, while Article 17 specifies the formalities required.

The OCAM convention is often invoked by courts of States Parties.[33] Even when they do not, they apply rules that are identical to those of this Convention.[34] The issue of its applicability has sometimes been raised. This issue arose because OCAM was subsequently dissolved. Some authors have expressed the view that the dissolution of the Organization should lead to obsolescence of the Convention.[35] However, as Meyer points out that the Convention binds States as parties to the Convention and not as members

[29] Convention on cooperation in judicial matters between Member States of the Agreement on Non-Aggression and Assistance in Defence (ANAD), Signed at Nouakchott, on 21 April 1987. Entry into force: in accordance with Article 67 of the Non-Assistance and Defence Agreement (Burkina Faso, Côte d'Ivoire, Mali, Mauritania, Niger, Senegal and Togo).

[30] Economic and Monetary Community of Central African States (Cameroon, Central African Republic, Congo Brazzaville, Gabon, Equatorial Guinea, Chad).

[31] The OCAM and ANAD conventions (Article 30 and Article 31 respectively) provide for five conditions.

[32] Example: Cameroon, Section 6 (n24).

[33] For example, Abidjan Commercial Court, Order of 9 April 2014, unpublished; Supreme Court of Côte d'Ivoire, Civil Training, Judgement of 11 March 2010, published. CSJ1-2011-1; Supreme Court of Côte d'Ivoire, Civil Training, Judgement of 8 June 2006, published. CSJ1-207-3; Cotonou Court of First Instance, Order No. 750/2016 of 29 September 2016, unpublished.

[34] TGI HC Dakar, Order No. 779, 10 July 2017, *Sté Al. v. Sté Af et al*; Court of Appeal of Dakar, Appeal Judgement No. 232 of 29 July 2013, the Appellate Court recalls the requirement of exequatur for the decisions rendered by foreign courts.

[35] Laurence Idot, Note under the Supreme Court of Côte d'Ivoire, (Judicial Bench), Appeal Judgement of 4 April 1989; Bouaké Court of Appeal, Appeal Judgement of 25 November 1987, *Bulletin du comité français de l'arbitrage*, 29 April 1986, 1989, No. 3, 545 and seq.

of OCAM. In addition, no provision of the Convention provides for its nullity in the event of dissolution of the Organization. The Supreme Court of Côte d'Ivoire had asserted, rightly, that provisions of the OCAM Convention to which Mali and Côte d'Ivoire are parties rule out application of the provisions of the Ivorian Code of Civil Procedure.[36]

All in all, the national laws and conventions concluded by OHADA States set conditions for circulation of decisions rendered in the OHADA area even under OHADA law. Such requirement is an impediment to legal integration.

2.2 Impediment to legal integration

Reference to the national law of States for enforcement of decisions in the OHADA area is an impediment to legal integration. Such impediment is linked to hindrance conditions arising from national laws (2.2.1) and conventional provisions (2.2.2).

2.2.1 Impediments resulting from disparity of national laws regarding conflict of laws and jurisdiction

Rules relating to conflicts of jurisdiction concern not only recognition and enforcement of foreign judgements, but also rules relating to direct international jurisdiction.

Regarding indirect jurisdiction in both ordinary and treaty law, conditions for effectiveness of foreign judgements applied equally to those rendered by States Parties under OHADA law are varied and severe for acceptance of public documents from States involved in a legal and judicial integration process, which, in principle, presupposes the unhindered circulation of public documents of States Parties. In such a process, normally based on mutual trust, which presupposes trust legitimated *a priori* in deeds from a foreign authority,[37] judgements emanating from the partner States should be welcome on trust in the said process. Thus, the conditions required for effectiveness of judgements rendered in States Parties under the OHADA law, are, truth be told, signs of mistrust or "mistrustful trust."[38]

The conditions for recognition and enforcement of foreign judgements in OHADA States are obviously inspired by the French jurisprudence Munzer[39] although now outdated in France, cited five conditions: jurisdiction of the foreign court, which rendered the decision, regularity of the procedure followed before that court, application of the relevant law, compliance with international public order and absence of any evasion of the law. Despite some adjustments, the conditions imposed by the national laws of OHADA States are almost identical.

It can be argued that the legal unification operated by OHADA through the Uniform Acts implicitly facilitates circulation of decisions in the States Parties. This is not totally wrong. Application of a common material law can, indeed, mitigate mistrust, reduce deployment of international public order and, to a certain extent, verification of the legislative competence for the States, which have established it as a condition for exequatur. In principle, it renders the condition for implementation of the relevant law utterly worthless.

This, however, is not enough to achieve legal integration, for closely linked psychological and purely legal reasons. Psychologically, control imposed by the exequatur implies that the decision coming from a State even in a legal integration project cannot have

[36] Appeal Judgement No. 174/10 of 11 March 2010 (n 33)
[37] Flore (n10) 133 and 134.
[38] Expression used by Flore, ibid. 134.
[39] 1 Civ. January 7, 1964, Rev. crit. 1964, 344; GAJFDIP, 2006, Appeal Judgement No. 41.

its effects in the court without control. In clear terms, the decision is unreliable. This then raises the issue of consistency of the OHADA project, given that legal integration is based on "mutual trust." Therefore, it is difficult to reconcile exequatur, an institution based on mistrust, with the OHADA project, which is necessarily based on "mutual trust."[40] Despite the relatively negligible importance of exequatur orders relating to circulation of intra-OHADA decisions, existence of these rules constitutes, by that very fact, mistrust, which is a psychological and perspective obstacle to legal integration.

Legally speaking, the requirement of exequatur recalls that sovereignty is still present and that the decision from an OHADA Member State remains a foreign decision. Verification of compatibility or dignity of this decision is a reminder of survival of legal borders in a legal integration project, what a paradox!

However, maintaining this provision, although criticized, not without reason, by part of the African doctrine,[41] it still has positive effects.[42]

The provisions directly regulating acceptance of foreign judgements must be supplemented by those relating to so-called direct international jurisdiction. They have an effect on circulation of judgements.[43] In the logic of acceptance of the jurisdiction of national laws in all issues of conflicts of jurisdiction, rules of international jurisdiction are, indeed, determined by States. This leads to an unavoidable heterogeneity of national provisions in this domain. Many States, in in the wake of acceptance of colonial law or drawing inspiration therefrom, adopted ordinary and exorbitant jurisdiction criteria (jurisdiction based on nationality[44] and *for* reciprocity).[45]

Implementation of these criteria has an impact on determination of the applicable law and, in turn, on circulation of court decisions in States where control of the applied law is established. Such exorbitant criteria may be grounds for refusal of exequatur if the judge of the receiving State refuses the jurisdiction of the foreign judge.

Moreover, the disparity of national laws on recognition and enforcement of judgements may favour forum shopping: for instance, the debtor may move to a State where the criteria of jurisdiction, the unclear powers of the exequatur judge and conditions (criteria and formalities) may enable him to escape enforcement of the decision or delay it. Such a situation in an area of legal integration destroys trust in the integration process.

Lastly, rules of conflict of law have an insidious influence on circulation of court decisions in the OHADA area. For example, when comparing substantive conditions of exequatur, in many OHADA States, there is still relevant legislative jurisdiction with regard to solutions to *for* rules of conflict of laws. Such a condition was abolished by the

[40] Ngoumtsa Anou (Gérard), Exequatur in comparative positive law: a look at the integrated OHADA area in the light of the European experience, RDAI/IBLJ No. 5, 2012, 588; Meyer, Circulation of Judgements in French-speaking West Africa], Revue Burkinabè du Droit, No. 39-40, special issue, 116.

[41] Meyer (n9) 111; Ngono (n2) 177.

[42] See 3.1.2.

[43] Meyer (n9) 108.

[44] Acceptance or imitation of Articles 14 and 15 the French Civil Code which grants jurisdiction to French courts when a French citizen seizes French courts or appears before them as defendant.

[45] *For* Reciprocity is provided for by Section 963 of Benin's CPF. It is an exorbitant jurisdiction criterion that allows a Beninese court to find that it has jurisdiction according to a jurisdiction criterion that the Beninese rules of conflicts of jurisdiction have not provided, but borrowed from those of a State where a court has used this criterion to find that is has jurisdiction to try a Beninese; the Beninese judge can thus find that he has jurisdiction by borrowing the same criterion of jurisdiction to try a national of that State, appearing before a Beninese court; Burkina Faso has a similar international jurisdiction criterion (Section 989 of the Persons and Family Code).

national laws of many African States[46] even before the Cornelissen[47] Judgement in which the French Court of Cassation, whose decisions are often a source of inspiration for legislators and judges of African States formerly colonized by France, abandoned application of the relevant law as a criterion for accepting foreign decisions. However, this may invoke recourse exception, a tool that may be used as a comprehensive defence mechanism.

2.2.2 Impediments resulting from the severity of certain conventional rules

Multilateral international conventions with provisions for recognition and enforcement of judgements in States Parties, some of which are members of OHADA, contain provisions that are sometimes more stringent than those of certain national laws. For example, Article 30 of the General Agreement on Judicial Co-operation (OCAM) innocuously stipulates that "contentious and non-contentious decisions rendered by the courts of one of the High Contracting Parties have the full authority of *res judicata* on the territory of other States," but immediately supplements that "where they meet the following conditions..." cited above.

These conditions are the same imposed on enforceability of the decision (Article 31 of the General Convention). Beyond the more or less numerous conditions of exequatur, what is important is the substance of laid down conditions. Some States like Cameroon, Côte d'Ivoire or Burkina Faso did not adopt the condition relating to application of the relevant law. Among States Parties to this Convention, these conditions take precedence over those imposed by national laws. Each of the conditions listed in Article 30 constitutes an obstacle in itself. But precisely, controlling relevance of the applied law leads to an appreciation of the law applied by a foreign court in light of its own system of conflict of laws and where the law applied by the foreign judge is not the same like one to be designated by the national rule of conflict, exequatur will be overruled! This approach, which is at variance with the legal integration process, can lead to a vicious circle if reciprocity is applied.

Professor Meyer, having rightly pointed out that the Treaty, which is supposed to facilitate the recognition and enforcement of foreign judgements, is even less liberal than national laws, wonders whether or not under such conditions it is not preferable to shelve conventional law. Unfortunately, all these States have adopted the constitutional principle of the primacy of treaty provisions over internal rules having the same purpose so much so that shelving treaty law will be legally difficult to sustain.

Moreover, the famous "public order" also provided for in national laws, to which the whole foreign decision must conform is a concept used in private international law as a standard *for* self-defence. This flexible notion, which generally appears in the last position, is a guardrail that can be used for all attempts at repulsion, when the other conditions are met.[48] The building of a self-defence system is a sign of lack of mutual trust indispensable in an integration process.

Legal integration should, in principle, lead to a free flow of judgements between the States Parties to the integration endeavour. All conditions imposed on the flow constitute

[46] For example, Côte d'Ivoire: Section 345(3); Cameroon, Section 6; Burkina Faso, Sections 993 and seq.

[47] Cass. fr., 20 February 2007, D. 2007, p. 1115, Rev. crit., 2007, pp.420 and seq. which abandoned this condition inherited from French law and echoed by the aforementioned OCAM Convention.

[48] The absence of an express mention that the parties have a remedy was invoked as a breach of public order; see Cotonou Court of First Instance, Order No. 09-16-REF com of 11 July 2016*, D. v. Novotel*, unpublished.

an obstacle to circulation of decisions. In addition, any obstruction to the circulation is a hindrance to legal integration.

However, in the present context, the need for exercising control a foreign judgement already rendered by a court of an OHADA State under the OHADA Uniform Acts is justifiable.

3 A justifiable requirement

Imposition of conditions for indiscriminately accepting foreign judgements by all OHADA States is criticized by some authors.[49] But in the current political and judicial environment, controlling acceptance of foreign judgements, even in application of unified substantive law, emanating from States, be they parties to the OHADA legal process, is justifiable due to lack of a judicial integration process (3.1) and a broader integration vision (3.2).

3.1 A requirement justifiable by lack of judicial integration

Standardization of substantive rules of targeted areas of business is undoubtedly a major aspect of legal integration. However, legal integration must be pegged on judicial integration to create a community based on the rule of law and free movement of public documents. Absence of such a process leaves room for judicial uncertainties (3.1.1) thereby justifying maintenance of control (3.2.2).

3.1.1 Uncertainties of judicial practices

In a legal integration process, standardization of rules is an asset. The community based on the rule of law, application of the same legal rules in a given field and area undoubtedly creates a legal proximity that excludes, at least, any suspicion in principle towards the applicable law. However, mutual trust, which is required for receiving deeds from a partner State on blind trust, presupposes not only a declaration of adherence to principles of fair trial, but also and above all, the smooth functioning of internal institutions, particularly the judicial system and correlatively the sound quality of decisions rendered.

As such, although the harmonized law is assumed to be clear and accessible, the judicial practice is much less so and the activity of the CCJA is not enough to do away with this uncertainty. In general, the rules of judicial procedures of OHADA States and powers of the exequatur judge are not always clearly defined so that one of the parties can take advantage of this uncertainty to result in a review proceeding significantly delaying the enforcement. In *Agrogabon v. époux X. et. al.*, the Gabonese exequatur judge conferred on himself a substantive power of review to refuse the exequatur. Such position was censured by the French Court of Cassation on grounds that "by carrying out the substantial review of the foreign decision, the President of the Court disregarded his powers ...",[50] while an Ivorian judge refused exequatur to a Malian judgement for a formality that does not appear among the criteria for granting exequatur.[51]

Currently, OHADA has a membership of seventeen States with as many special cases of judicial and political practices. These judicial practices are not all free from serious criticism resulting in a legitimate mistrust thereby justifying the exercise of a right of oversight on recognition and enforcement of a decision emanating from a State of the legal integration area.

There are ongoing debates on quality of justice in French-speaking Black Africa.[52] A survey conducted as part of a study on the issue revealed that one of the obstacles to

[49] Ngoumtsa Anou (n2), Ngono (n2) 177; Tchakoua (n18); Michel Romarie Azalou, *Exequatur in the OHAD Area: from necessity to uselessness*, Doctorate thesis, University of Perpignan via Domiti, 2013, 176 and seq.

[50] Cass.civ. 1 Civ. 14 January 2009.

[51] Supreme Court, ch. Judgement, 11 March 2010, Publ. CSJ1-2011-1.

[52] See "*Justice in Africa: new challenges, new actors*", Afrique contemporaine, No. 250, 2014-2; see especially, *Justice in Africa, 25 years after meaning: after the file Justice in Africa*, No. 256, 1990).

legal integration is poor quality of the service of justice. In almost all OHADA Member States, justice suffers from a crisis of credibility and hence, legitimacy. All the judicial systems of OHADA Member States are criticized for the following:

- limited independence;
- lack of impartiality;
- poor vocational training;
- poor ethics;
- poor moral as well as professional conscience; and
- corruption.

Professor Jean du Bois de Gaudusson recalled some of the formulae often used to characterize justice in Africa:[53] "Justice without judges" because of the way they perform their duties, "courts without litigants" due, among others, to distrust of this justice.

Justice in Africa is, indeed, in search for "good judgement". "Good judgement" implies that the judicial system operates under the rule of law and that the quality of decisions is such that they are up to legitimate expectations of litigans. In a State based on the rule of law or a State aspiring to so become independence of the judiciary and its practical realization as well as impartiality of the judge are fundamental principles of good justice, at the same time laying the basis for credibility of justice and correlatively, legitimacy thereof. The independence of the judiciary is a fundamental constitutional principle recognized in all OHADA States. It is based on separation of powers and implies that neither the legislator nor the government can interfere in the judge's duties. For example, they cannot sensor a court decision, suggest solutions to the judge or take the place of the judge to settle a dispute brought before him. In addition to such independence, there is the independence *vis-à-vis* the parties' impartiality, which can be subjective or objective. Controlling subjective impartiality is highly difficult because it is highly intimate. Any control at this level can only be the result of psychological inquisition. Conversely, it is possible to control objective impartiality because it is based on ostensible and therefore, verifiable facts.

Ultimately, it is nothing other than respect for the principles of "fair trial"[54] to which everyone is entitled. It is a question of respecting precise rules considered as imposing the respect for fundamental guarantees of a balanced trial.[55] This implies that decisions must be based much more on satisfying legitimate expectations of litigants than on subjective considerations relating to all sorts of influences in most OHADA States.

The political, economic and cultural bases of a society, notably paradigms that underlie the exercise of political power, actually influence the way justice is rendered[56] because, as Timsit[57] so well recalls, the law is in the writing. It means what the interpreter, the mouth

[53] Afrique contemporaine, op cit, thematic introduction, p. 14.

[54] Ulrich Djivoh, *Guarantee of the right to a fair trial*, Doctorate thesis, University of Abomey-Calavi, 2018; Lavergne (Benjamin), Mezaguer (Mehdi), (Dir.), Perspectives on the right to a fair trial, Proceedings of the IFR symposium t.15, Toulouse University Press, 2018; Christophe Alonzo, The reasoning of court decisions: requirements of the right to a fair trial.

[55] Elements constituting a fair trial are varied and not always very precise. Nevertheless, the adversarial, the reasoning of court decisions, the possibility of appeal, reasonable time, the independent and impartial court are considered as part thereof.

[56] See on this issue, Jean-Bernard Veron, Editorial of the *Justice in Africa: new challenges, new actors*, Afrique contemporaine, No. 250, p. 7. To some extent, actors of justice evoke these reproaches, Richard Kpenou and Saturnin Afaton, *Justice at the service of development in Benin*, Cotonou, CIPB, 2013, 68 and seq.

[57] Gerard Timsit, *Names of the law*, Paris, PUF, Les voies de la loi, 1991, 131.

of the law, intended to bring out through it. The judge's duty is essential in "good judgement." Political and social benchmarks, the judge's core beliefs and his relationships with influencing groups, influence on his decisions. Yet, despite recognized and proclaimed principles of sound justice, justice in most OHADA States remains "an illegible, disturbing and uncertain zone for those who resort to it."[58] A review of some decisions highlight some of these criticisms. A keen observer will notice that, because of its practices, justice suffers from a multidimensional crisis, including a crisis of credibility and legitimacy, which may justify mistrust of decisions from others and to justify maintenance of control, even if reduced.

3.1.2 Virtues of minimum control

Quite remarkable efforts have been made to establish OHADA law in the States Parties. A recent study revealed that OHADA law enjoys readership, which exceeds that of most national laws.As Timsit[59] would have it that such success is, however, at the level of predetermination and co-determination. The meaning of a standard is not only predetermined by the author of the standard and codetermined by the recipient of the standard. It is also over determined by the field in which the standard is issued and received. Overdetermination comes with values, beliefs and dominant ideology. If the environment remains wild, legal integration will lack an environment of mutual trust. Without such an environment, it is necessary to maintain minimal control.

Indeed, in the context of judicial uncertainties, controlled acceptance of foreign judgements even from a partner State in a legal integration process can be beneficial. It is true that control of these decisions in the OHADA area is considered "useless," "anachronistic" and "unjustified" by some authors,[60] no doubt, influenced by repercussions of the Cornelissen Judgement[61] in Africa. At first sight, the criticisms seem to be legitimate. However, this is a clearly angelic stance. As a matter of fact, in the current context characterized by legal uncertainties, it is necessary to control foreign decisions, which can be a mean of consolidating legal integration and help to ensure that OHADA law has not been ruled out in favour of another law for lack of jurisdiction or for ulterior reasons. Such control may also help to ensure that the rule of OHADA law applied is one that must be applied in the particular case.

In the same vein, control of the court with jurisdiction has indisputable virtues. In a situation where the jurisdiction of the CCJA is challenged by some supreme courts of States Parties,[62] control can be means to consolidate verification of authenticity to which subjected CCJA decisions are exempt from the requirement of exequatur.

Therefore, control of the law and court with jurisdiction can be an excellent way of stemming a rebellion against the authority of OHADA law and the CCJA.

Furthermore, control of the decision's compliance with public order is a necessary condition to block decisions that flagrantly violate basic human rights principles such as the right to a judge, the right to a fair trial or the right to remedy.[63] Therefore, as long as the right to a fair trial is not guaranteed, the requirement of exequatur is necessary to allow control of guarantee of fundamental rights and the right to a fair trial. This implies

[58] Richard Kpenou and Saturnin Afaton (n56).
[59] Timsit (n57) 57.
[60] See Ngoumtsa Anou (n3) 592; Ngono (n2) 177.
[61]Cass. fr, 20 February 2007, D. 2007, p. 1115, Rev. crit., 2007, 420.
[62] Supreme Court of Congo, Judgement No. 35/GCS of 30 November 2016.
[63] Cotonou Court of First Instance, refusal of exequatur for violation of the right to appeal.

that achieving legal integration must go hand-in-hand with the right to a fair trial. Fairness of the trial must be a related objective of the OHADA project.

In addition, unification of rules is supposed to already be a big step forward, though not enough. It is necessary to aim for reconciliation of rules and judicial practices. Absence of harmonization or even standardization in these areas, which is consubstantial with consolidation of the rule of law may, despite being harmful, justify maintenance of rules for accepting foreign public judgements and documents. However, legal integration can never be fully achieved without disappearance of these rules, which are real obstacles to the "free market" of law. But to validly justify removal of these obstacles, OHADA must create an environment of mutual trust. To achieve this, it must set related goals.

3.2 A requirement justified by absence of related objectives

Achieving the legal and judicial integration of the OHADA project requires creation of an environment of mutual trust. To achieve this, the organization must set new related goals. Usefulness of setting related objectives to be achieved was precisely and clearly explained by Porta.[64] Without such trust, a "free market" of court decisions is undesirable. The idea is to seek to reconcile primary objectives with others, useful for achieving aims of the OHADA project, namely, harmonization of rules of procedure as well as private international law (3.2.1) and respect for fundamental rights (3.2.2).

3.2.1 Necessary harmonization of rules of procedure and private international law

According to Article 13 of the Treaty, "disputes relating to the application of the Uniform Acts shall be settled at first instance and on appeal therefrom by national courts of States Parties." Therefore, national courts of States Parties are granted a wide autonomy in business litigation. The autonomy is broad insofar as the national courts of States Parties settle such disputes by means of their internal rules of judicial procedures. They have jurisdiction at first instance and on appeal to apply OHADA law in accordance with national procedural rules and their own operating methods.

Such autonomy necessarily has an impact on quality of decisions. This undoubtedly explains the general requirement of exequatur even for decisions rendered under OHADA law by the national courts of States Parties. However, this requirement, albeit palliative to the uncertainty of the judicial practice of some States, hinders legal integration to the extent that decisions cannot circulate freely. This can be surprising and invoke normative textual identity, that is, standardization of substantive rules as a form of legal integration. The normative textual identity of business law substantive rules is undoubtedly a key aspect of legal integration, but it is not enough for true legal integration. Mutual trust needed for legal and judicial integration, indeed, imposes respect for fundamental principles of sound justice. Therefore, it is imperative to reconcile rules of procedure and private international law.

Regarding rules of procedure proper, most constitutions of OHADA Member States have provisions referring to fair trial as the essential norm and standard of fundamental guarantees of sound justice. Such fundamental guarantees must interconnect rules of procedure of all OHADA Member States.

[64] Jerome Porta, *La réalisation du droit communautaire, Essai sur le gouvernement juridique de la diversité*, Paris, Paris, LGDJ, 2007, 828.

Since the legal integration project can no longer do without a normative textual identity of the procedural rules in the OHADA area, a temporary approach is, without doubt, reconciliation of rules for the acceptance of foreign legal deeds and situations. This concerns firstly, rules relating to recognition and enforcement of foreign public documents. Secondly, as previously stated, the rules of conflict of laws and direct legal jurisdiction are concerned, for they are susceptible to manipulation that create distortions likely to influence on rules of acceptance of foreign judgements.

Therefore, it is necessary to standardize or harmonize rules of procedure and those of private international law. But how? Should it be done by adopting uniform acts or through a uniform procedural regulation at least on general principles with regard to procedural law?[65] Some authors propose, with regard to the rules of procedure, a reform to adopt either by a uniform act or a uniform procedural regulation, at least, the general principles of trial.[66]

Because of susceptibilities and micro-nationalisms, one may, as a fixed objective to the community authority, be inclined to think initially of a requirement of compatibility as a major principle or a similarity of meaning of instruments, objectives, which are easier to achieve. This method, which does not impose textual similarity, has the advantage of allowing autonomy in formulation of legal rules provided that their meaning is equivalent. However, this option entails the risk of misinterpretation, requiring constant recourse to the body responsible for unity in instrument interpretation, the CCJA. The likely ensuing procrastination may lead to lethargy and become sources of rejection. In the final analysis, the so-called harmonization through standardization currently practised by OHADA seems to be the best option.

With regard to rules of international law, distinction should be made between rules of acceptance of foreign decisions and those relating to conflict of laws and direct judicial jurisdiction. Rules relating to recognition and enforcement of foreign deeds in OHADA Member States cannot be removed because of uncertainties of judicial practices in this area.

As for rules of conflict of laws and international judicial jurisdiction, their disparity makes them susceptible to manipulation that may influence conditions of acceptance of foreign judgements. It is, therefore, imperative to harmonize or unify them. Unification of these rules is unnecessary. In the first place, one may think of a requirement of compatibility with a major principle set by OHADA or a similarity of meaning of the instruments, objectives that are easier to achieve. This method, which does not impose textual similarity, has the advantage of allowing autonomy in formulation of legal rules provided that their meaning is equivalent.

Lastly, unification or harmonization of rules would already be a big step forward, though insufficient. It is necessary to aim at reconciliation of practices relating to respect for fundamental rights.

3.2.2 Necessary commitment to respect fundamental rights

The OHADA project is designed in a liberal and individualistic philosophy. Such a project is only compatible with a liberal political and economic system. One may argue that China is experiencing economic and social growth with a dual-system State: a liberal economic system and an authoritarian political system. But the main difference is that the

[65] See Robert Nemedeu, *OHADA Law and Procedural Law*, in *Les Horizons du droit OHADA*, op. cit., p. 703.

[66] Precisely, Nemedeu (ibid).

OHADA system is a set of sovereignties in which the degree of democratization, respect for fundamental freedoms, credibility of the justice system and economic development is highly disparate. It is neither a group of totalitarian States nor a group of democratic States. Therefore, it is necessary to set new objectives, linked to the legal integration project, to bring all States back to principles of respect for fundamental freedoms and credibility of the justice system, which implies adoption of new paradigms of governance.

The requirements of a community based on the rule of law cannot do without respect for the fundamental rights of the person.[67] Respect for fundamental rights is one of the pillars of a State governed by the rule of law to which all OHADA States claim to aspire. A State governed of by the rule of law is often cited as one of the preconditions for economic development.[68] In addition, the concept of fair trial and judicial practices consistent with fair trial requirements are consubstantial with a State governed by the rule of law.[69]

Given that the goal pursued by the OHADA project through securing the legal environment is economic development based on the rule of law[70] and the fight against poverty, it seems necessary to consider that human rights are not only part of the fundamental social values, but also a powerful driver of change. OHADA must reconcile respect for fundamental rights and economic development for poverty reduction. Respect for human rights principles at every stage of development programming is necessary to provide the framework for design and implementation of development activities. Respect for such principles is essential in the exercise of their normative jurisdiction not only for Community authorities in the exercise of their normative duties, but also to national authorities.

Lastly, mutual trust required for mutual recognition and free circulation of court decisions from OHADA States in the legal integration area that they have created, relies a common base comprising three items: the rule of law, democracy and fundamental human rights.[71] This is not a matter of institutional window-dressing, that is, the theoretical concretization of these principles and setting-up of mechanisms to guarantee them, but their real effectiveness.

Therefore, it is perfectly understandable failure to include and consider such principles in the OHADA objectives may legitimately lead all States Parties to issue conditions for circulation of the judicial decisions. It is even understandable that, one day, some of them develop the theory of invalid deeds *for* less[72] to counter arbitrary judicial practices of certain Member States.

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[67] On the issue, see Porta (n64) 829.

[68] Daron Amoceglu and James Robinson, *Why Nations fail: The Origins of Power, Posterity and Poverty*, Geneva, 2015, passim, especially 23 et seq.

[69] Djivoh (n54) 19.

[70] Mbaye (n4).

[71] Flore (n10), 133 to 136; Emmanuelle Bribosia, Mutual trust and fundamental rights "Back to the future", Cahiers de droit européen, 469 to 522.

[72] Andreas Bucher, The social dimension of private international law, common core course, ADI Pouch, 2011, 531 et seq.; it entails validating in the requested State the legal situations born abroad without validity. This theory makes it possible to accept legal situations born abroad and whose grounds for refusal of validity are considered unacceptable by the requested State.

4 Conclusion

Through their project, OHADA States decided by transfer of jurisdiction to set up an organization aimed at securing the legal and judicial environment through legal integration with a view to establishing an economy based on the rule of law.[73] More than just transfer of power, legal integration is, above all, the expression of a common will based on mutual trust.

However, achievement of the OHADA objectives can be thwarted by quality of distribution of the normative jurisdictions between the Organization and States Parties, on one hand, and by the practical judicial uncertainties and lack of integration of respect for basic human rights in the OHADA project, on the other hand.

Legal and judicial security, which presupposes containment of situations of conflicting or non-conflicting legal uncertainty, is above all the outcome of foreseeable jurisdictional decisions. Such decisions must correspond to legitimate expectations of litigants and decision-makers. Therefore, it is not enough to have clear and accessible legal rules; the judicial practice also needs to be reassuring. Unfortunately, it is uncertain that such is the case in the OHADA area. Indeed, even if the harmonized law is believed to be clear and accessible, the judicial practices are much less so.

Therefore, it is perfectly understandable that States Parties issue conditions for recognition and enforcement of decisions rendered by the courts of States Parties in application of the unified law. Such pattern is an impediment to legal integration, even though the impediment can be justified.

To overcome this, it is necessary to create an environment of mutual trust for a "free market" of decisions. To achieve this, the crux of OHADA project must be assigned related goals such as standardization of rules of procedure and respect for fundamental rights, with the expected impact of reconciling judicial practices in order to achieve the desired legal and judicial integration.

5 Recommendations

a) Harmonize rules of conflict of jurisdiction;
b) Harmonize rules of judicial procedure;
c) Set objectives for harmonization of judicial practices in the sense of "good judgement;" and
d) Set convergence objectives for respect for fundamental rights of the human person.

[73] Mbaye (n4) 2.