

# THE OHADA COMMON COURT OF JUSTICE AND ARBITRATION: EXOGENOUS FORCES CONTRIBUTING TO ITS INFLUENCE

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## I

### INTRODUCTION

The Common Court of Justice and Arbitration (CCJA) is the supranational, apex court of the Organization for the Harmonization in Africa of Business Laws (OHADA), an organization that currently covers seventeen countries in West and Central Africa.<sup>1</sup> OHADA is the French-language acronym for this organization's title and specifically refers to harmonization;<sup>2</sup> nevertheless, the organization's purpose is to make those laws uniform, not just harmonized. Its larger purpose is to encourage economic development.

Embedded within OHADA, the CCJA is different in important ways from the other international courts (ICs) discussed in this issue. No other IC is in the same way an integral part of its member states' national judicial systems: within its jurisdiction to review laws, which covers only OHADA laws, the CCJA functions as the highest national court of its member states. This includes receipt of appeals from private litigants and decisions of cases on the merits. In contrast, although the European Court of Justice can receive cases from private parties, it decides a point of law—akin to a certified question—after which the case returns to the national court for further adjudication.

Additionally, the CCJA's jurisdiction over OHADA laws, which is thus limited to specific business laws, sets this court apart from other ICs. Although the World Trade Organization's dispute-resolution system is in practice the

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1. Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

2. In French, "Organisation pour l'Harmonisation en Afrique du Droit des Affaires." *Traité relatif à l'Harmonisation en Afrique du Droit des Affaires* art. 3(1), Oct. 17, 1993, 4 *Journal Officiel de l'OHADA* 1 (Nov. 1, 1997) [hereinafter OHADA Treaty], <http://www.ohada.com/traite.html>.

next-most commercial of the ICs discussed in this volume<sup>3</sup> and affects commercial transactions, it does not involve the private parties' internal agreements directly. It does not permit private suits and thus does not implicate national legal systems.<sup>4</sup> In contrast, the CCJA's interpretations of OHADA laws theoretically affect the structure within which private commercial transactions occur and thus all economic actors from all levels of OHADA member states' economies.

In practice, however, the CCJA does not reach all these actors in the OHADA member states. A substantial majority of the workers in those states engage in commerce without the benefit of formal laws and therefore without the CCJA's commerce-enhancing predictability. Accordingly, it is important to recognize the extent of the CCJA's influence not only on the elites, but also on the more vulnerable within the OHADA countries' economies.

To that end, I start in part II with a positive-law sketch of OHADA and of its CCJA, and then briefly define the informal sector. In part III, I lay out the types of influence the CCJA exercises within the formal (elite) sector, assessing the extent of its narrow, intermediate, and extensive authority.<sup>5</sup> Next, I consider the sources of these authorities, using Cameroon, one of OHADA's seventeen member states, as the primary illustration. I ask how the CCJA's authority in the formal sector has been affected by the "institutional-specific contexts," including the extent to which the CCJA's jurisdiction, limited as it is to business, is nonpolitical. I then explore the influence of various "constituencies," and of the "overarching socio-political contexts" on the evolution of the CCJA's authority. This portion of the analysis also addresses, for each of these three types of authority, whether the influences on the CCJA are top-down or bottom-up, and whether the CCJA's influence reaches throughout the formal sector. Finally, I conduct the same analysis for the informal sector by evaluating the current ineffectiveness of the CCJA within this sector, again using Cameroon as the example.<sup>6</sup>

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3. See, e.g., James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 259 (2013) (noting that the East African Court of Justice does not in practice focus on commercial cases).

4. For example, a government is the wrongdoer in the case of a subsidy, and although an alleged dumper is a private party, it is not a party to a transaction with the putatively injured person.

5. See *infra* Parts III.B.1–III.B.3, respectively; see also *supra* Introduction, at 2.

6. See *infra* Part III.C.

## II

### POSITIVE-LAW AND ECONOMIC CONTEXTS OF THE CCJA, A REGIONAL COURT

#### A. OHADA and Its Institutions: Positive Law

##### 1. OHADA in Its Larger Context

The first step to understanding the CCJA in context is to recognize that it is part of the larger organization—OHADA. OHADA seeks to unify business laws among its seventeen West- and Central-African member states, which are inhabited by almost a quarter-billion people.

The organization was launched in 1993, in the heat of a major economic crisis in the West- and Central-African region, when fourteen countries, mostly former French colonies, signed the OHADA Treaty. At its formation, OHADA was influenced on the macro level by the Washington Consensus for liberalization, and on the micro level by the civilian legal system, especially the French legal system. The treaty has been amended only once, in 2008, effective 2010.

The OHADA regime was imposed top-down by governments seeking to curry favor with potential foreign investors from the global North. The founders' assumption was that foreign private entities would be more willing to invest in African countries that had laws with which these entities were familiar.

##### 2. The OHADA Institutions Other Than the CCJA

The most powerful aspect of the OHADA statutes, its Uniform Acts, is that, once adopted by OHADA's legislature, the Council of Ministers, they automatically become part of each member state's internal, municipal law ninety days later.<sup>7</sup> The national parliaments play no role in the approval of the Uniform Acts and cannot modify the texts post-adoption. Thus, the Council of Ministers uniformizes textual business law across OHADA's entire territory.

Because the Council of Ministers is composed of apparently powerful but politically vulnerable Ministers of Justice or Finance from each member state, the 2008 amendment to the OHADA Treaty added a new institution—the Conference of Heads of State and of Government. According to OHADA's former head of legal affairs, before the creation of this Conference the Council of Ministers was frequently paralyzed by ministers unwilling to expose themselves to political second-guessing in their home states. This was the political reality, although any member state could block any draft Uniform Act by simple veto.<sup>8</sup> It is too early to tell whether the Conference will be able to shift to itself the political pressure on the Council of Ministers, but the

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7. OHADA Treaty, *supra* note 2, art. 10.

8. *Id.* arts. 8, 12 (requiring unanimity of represented governments for the Council of Ministers to adopt or modify a Uniform Act).

formation of the Conference is evidence of OHADA's political salience.

Orchestrating these institutions is OHADA's executive branch, the Permanent Secretariat, which is located in Cameroon and headed by the Permanent Secretary, who is appointed by the Council of Ministers.

The OHADA Treaty also provides for a training center for members of the bench and bar. Known by the acronym "ERSUMA,"<sup>9</sup> and located in Benin, it seeks to "train the trainers" and is paying increasing attention to helping non-Francophones understand the Uniform Acts.

Another major category of OHADA institution is its panoply of Uniform Acts. The OHADA Treaty's first two articles state that the Uniform Acts must be business laws,<sup>10</sup> and its Article 10 specifies that "Uniform Acts are directly applicable and binding in the member states, notwithstanding any conflicting provision of previously or subsequently enacted domestic law."<sup>11</sup>

As of January 2015, there are nine Uniform Acts, covering the establishment, operation and demise of a business. By way of summary description, these statutes' titles are, in order of adoption and in unofficial translation: General Commercial Code (GCL); Commercial Companies and Economic Interest Groups (Company Law); Secured Transactions; Simplified Recovery Procedures and Measures of Execution (UA on Simplified Procedures); Bankruptcy and Collective Discharge Procedures; Arbitration; Accounting; Carriage of Goods by Road; and Cooperatives. The first Uniform Act came into effect in 1998 and the most recent in 2011. Two previously adopted Uniform Acts were revised, effective 2011 (GCL and Secured Transactions), and a third (Company Law) has been revised effective May 5, 2014.

The Uniform Acts are designed to attract foreign direct investment.<sup>12</sup> There has been a growing appreciation that these statutes also govern purely domestic transactions, as well as transactions that are foreign only to the extent that the

9. *Id.* art. 41. École Régionale Supérieure de la Magistrature is sometimes translated "Regional High Judiciary School."

10. *Id.* art. 1. An unofficial translation of these articles states:

Art. 1. The objective of the present Treaty is the harmonization of business laws in the member states . . . .

*Id.* See also *id.* art. 2. An unofficial translation of this article states,

For purposes of this Treaty, the field of business law includes all law and regulations concerning company law, the juridical status of economic actors, proceedings with respect to credit and recovery of debt, secured transactions and means of enforcement, bankruptcy, receiverships, arbitration, employment and labor law, accounting law, transportation and sales law, and any other subject that the Council of Ministers decides, unanimously, to include in accordance with the purpose of this present Treaty and the provisions of Article 8, below.

*Id.* Unofficial translation by author and Jean Alain Penda Matipé from the original French-language text, but starting from the translation into English, also unofficial, found at <http://www.ohada.com>.

11. *Id.* art. 10 ("Les actes uniformes sont directement applicables et obligatoires dans les Etats Parties, nonobstant toute disposition contraire de droit interne, antérieure ou postérieure.")

12. Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 20 n.3 (2005) [hereinafter Dickerson, *Harmonizing*] (discussing the intention of the original drafters).

economic actors are from different OHADA states-party. Thus, the Uniform Acts' drafters have increasingly proposed provisions that take into account the perceived specificities of the territory in which they will be applied, whether or not the investment is from a foreign source. Examples cover the entire focus of the UA on Simplified Procedures; the Company Law's more simple entities, including the brand-new simplified stock company;<sup>13</sup> and the new "enterpriser" category in the revised GCL.<sup>14</sup> Nevertheless, as further discussed in part III, below, these laws have limited effectiveness.

Next, we turn to a doctrinal description of the CCJA, the final major OHADA institution that is a formal organization, as distinguished from law as an institution.

### 3. The Common Court of Justice and Arbitration

The CCJA has three principal roles. The first entails review of draft Uniform Acts: the CCJA verifies the drafts' consistency with the OHADA Treaty before the Council of Ministers adopts them.<sup>15</sup> Its second role is to supervise arbitrations effected by the arbitration center sheltered under the CCJA's wing.<sup>16</sup> Though the first role is important and the second could become significant,<sup>17</sup> the CCJA is best known for its third role—ensuring that the OHADA statutes' uniform texts are interpreted in a uniform manner.

In this, its judicial role, the CCJA's responsibilities are bifurcated. On the one hand, the CCJA has a consultative role interpreting existing Uniform Acts. A member state, the Council of Ministers, or a national court hearing an OHADA case can submit a question to the CCJA.<sup>18</sup> A famous example is the CCJA's 2001 advisory opinion on the Côte d'Ivoire's request, which concluded that OHADA Uniform Acts abrogate identical, as well as conflicting, national laws and regulations.<sup>19</sup>

On the other hand, the CCJA hears appeals from penultimate national courts. From trial courts up to the second-highest level of national appellate courts, decisions relating to OHADA Uniform Acts are the responsibility of

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13. Société par Actions Simplifiée. Acte Uniforme Relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique, art. 853-1 *et seq.*, Jan. 30, 2014, N° Spécial Journal Officiel de l'OHADA 1 (Feb. 4, 2014) [hereinafter Company Law].

14. Daniel Tricot, *Statut du commerçant et de l'entrepreneur*, 201 DROIT & PATRIMOINE 67 (2011).

15. OHADA Treaty, *supra* note 2, art. 7. The system is reminiscent of French constitutional review before 2010, when a 2008 constitutional amendment began permitting some post-hoc constitutional review. With respect to realities on the ground, the National Committees are also important. These nontreaty institutions, typically captives of the member states' governments and relatively elite, are intended to provide preadoption input to their governments and thence to the Council of Ministers, from all aspects of the legal profession.

16. OHADA Treaty, *supra* note 2, arts. 21–26.

17. GASTON KENFACK DOUAJNI, LA PROCÉDURE ARBITRALE APPLICABLE DEVANT LA CCJA, 3 REVUE DE DROIT UNIFORME AFRICAINE 28 (2010), <http://www.ohada.com/doctrine/ohadata/D-11-64.html> (noting the CCJA-supervised arbitration center's lack of influence compared with local, private centers).

18. OHADA Treaty, *supra* note 2, art. 13.

19. CCJA Advisory Opinion N° 001/2001/EP of 30 Apr. 2001 (applying OHADA Treaty Art. 10), <http://www.ohada.org/ohada-jurisprudence/fr/content/default/3294,avis-n0012001ep.html>.

each member state's usual judicial system. The national courts are required to hand down decisions based on their own applications of the Uniform Acts.<sup>20</sup> An appeal from the second-highest national level is to the CCJA, and the OHADA court, unlike a classic "cour de cassation," decides on the merits, and does not have to send the litigation back down to the national courts for further consideration.<sup>21</sup> The CCJA's decisions have the same impact as those of a national jurisdiction; that is, they cannot be contravened by a lower, national court's later decision in the same matter.<sup>22</sup>

As to the court's internal operations, Articles 31–40 of the OHADA Treaty are the primary sources of guidance, supplemented by Procedures adopted by the Council of Ministers.<sup>23</sup> These treaty provisions and related procedures mandate high qualifications for CCJA judges, stated terms in office from which they cannot be removed, and diplomatic immunity, all of which favor judicial independence. These documents also call for term limits, which reduce individual entrenchment. The minimum number of judges is nine.

Aside from the doctrinal basis of OHADA and the CCJA, to what extent does the CCJA practically affect the reliability of business transactions within OHADA's member states? To accurately assess the CCJA's true authority, both the formal and informal sectors will be considered in part III. A brief description of the informal sector is set out immediately below.

## B. The Informal Sector: An Economic Context of OHADA and the CCJA

The informal sector produces 30% of worldwide GDP, and conservatively estimated, between 40% and 60% of the Sub-Saharan economy.<sup>24</sup> It comprises a substantial portion of the economies of the OHADA member states. For example, a 2006 study estimated that approximately 50% of Cameroon's GDP is generated in the informal sector.<sup>25</sup>

The worldwide figure does suggest that the informal sector is important in the global North as well. Immediately before the financial crisis of 2008, the informal sector was approximately 14% of the size of that region's official

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20. This is somewhat overstated. See John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1867–69, 1874 (1988) (noting, a decade before adoption of the OHADA Treaty, that although classic French interpretation considers the legislature to be the sole lawmaker and judicial precedent to have no value, the modern reality is far more nuanced).

21. OHADA Treaty, *supra* note 2, arts. 13, 14.

22. *Id.* art. 20.

23. The Council of Ministers amended these procedures on January 30, 2014.

24. See Friedrich Schneider, *The Shadow Economy and Work in the Shadow: What Do We (Not) Know?*, (Inst. for the Study of Labor, Discussion Paper No. 6423, 2012), <http://ftp.iza.org/dp6423.pdf> (describing the informal sector as not reflected in GDP); Friedrich Schneider & Dominik H. Enste, *Shadow Economies: Size, Causes, and Consequences*, 38 J. ECON. LIT. 77, 78–79 (2000) (describing "shadow economy" as unregistered).

25. Richard Walther, *La formation professionnelle en secteur informel: Rapport sur l'enquête terrain au Cameroun* (Agence Française de Développement, Document de Travail N° 17, 2006, <http://www.afd.fr/webdav/site/afd/shared/PUBLICATIONS/RECHERCHE/Scientifiques/ Documents-de-travail/017-document-travail.pdf>).

GDP.<sup>26</sup> That is a non-negligible percentage that almost certainly increased during the crisis, but the informal sector still has a much greater impact on national economies in the global South than in the global North.

In the global North, the formal sector is generally robust enough to cast a shadow over informal-sector workers: they at least tend to know what the formal law provides, whether or not they respect it. By contrast, in sub-Saharan Africa, the vast majority of workers subsist or better due to the informal sector. In 2010, the World Bank estimated that 70% of nonagricultural workers in Cameroon's urban settings<sup>27</sup> operated in the informal sector.<sup>28</sup> As part III.C emphasizes, in much of the informal sector of these regions, the formal sector and its formal business laws have no perceptible impact. This reduces these formal laws' capacity to facilitate prodevelopment activities, such as capital formation, in a significant portion of non-Western economies.<sup>29</sup>

The informal sector is large in size and traditionally covers all activity that is sufficiently unregistered to pass under the government's radar. Examples include illegal and fraudulent transactions, but also otherwise legal business conducted clandestinely to evade taxes<sup>30</sup> or to avoid burdensome registration procedures,<sup>31</sup> as well as otherwise legal businesses unregistered simply due to ignorance of the requirements.

The difficulty of locating the boundary between the formal and informal sectors complicates identifying the latter.<sup>32</sup> For instance, permanence may not be determinative: though the informal sector includes workers who carry their inventory on their heads, it also includes workers with more permanent-

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26. Schneider, *supra* note 24, at 23 (estimate for 2007).

27. *Id.* In 2010, in Cameroon, 58.4% of the population was estimated to live in urban areas. Cameroon Country Profile, U.N. STATISTICS DIV., <http://data.un.org/CountryProfile.aspx?crName=CAMEROON> (last visited Nov. 25, 2014).

28. *Cameroon Economic Update, Unlocking the Labor Force: An Economic Update on Cameroon*, CAMEROON COUNTRY OFFICE (Jan. 2012), [http://siteresources.worldbank.org/INTCAMEROON/Resources/CMR\\_Economic\\_update.January.2012.pdf](http://siteresources.worldbank.org/INTCAMEROON/Resources/CMR_Economic_update.January.2012.pdf) (last visited Nov. 25, 2014); *see generally* Claire Moore Dickerson, *Bringing Formal Business Laws to Cameroon's Informal Sector: Lessons and Cautions from the Tax Example*, 13 WASH. U. GLOBAL STUD. L. REV. 264, 271–73 (2014) [hereinafter Dickerson, *Tax*].

29. *See* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 5–6 (2000) (noting that real estate ownership unrecognized by the non-Western formal legal systems limits the owners' ability to capitalize their asset); *see generally* Claire Moore Dickerson, *Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law*, 59 AM. J. COMP. L. 179 (2011) (discussing the importance of formal law's facilitation of capital formation) [hereinafter Dickerson, *Entrepreneurs*].

30. Dickerson, *Tax*, *supra* note 28, at 291–93 (informal-sector workers do pay at least some taxes). *But see* STÉPHANIE KWEMO, *L'OHADA ET LE SECTEUR INFORMEL: L'EXEMPLE DU CAMEROUN* ¶ 1108, at 345–46, ¶ 1111, at 347 (most informal-sector workers do not pay taxes).

31. WORLD BANK & INT'L FIN. CORP., *Making a Difference for Entrepreneurs*, *DOING BUSINESS* 2011, at 3, <http://www.doingbusiness.org/reports/global-reports/doing-business-2011/> (noting that the higher the regulatory requirements to formation, the less likely are businesses to be registered); *see also* KWEMO, *supra* note 30, ¶ 358, at 145 (noting informal-sector workers' reluctance to register).

32. That is inherent in the definition of the informal sector. *See generally* Dickerson, *Entrepreneurs*, *supra* note 29, at 185–86 (discussing different definitions of the informal sector).

appearing businesses, such as stands or racks in organized markets. Size is not determinative either. Although the majority of informal-sector businesses are small sole proprietorships,<sup>33</sup> there are also some substantial businesses perceived to be in that sector in Cameroon, including one reputed to send five shipping containers of goods weekly from the country's largest market. The type of activity is not determinative either. Informal-sector businesses cover every style of good, from produce to so-called second-hand goods,<sup>34</sup> to clothing and shoes, to consumer durables. They also cover services and manufacture.

A modern assumption is that the informal sector contains all economic activity not reflected in a country's GDP.<sup>35</sup> Informal-sector economic activity thus includes virtually all microenterprises, but also a significant portion of more substantial activity below the level of economic elites. Although some of the transactions may include commercial documentation traditional to businesses in the global North, many of them will not. They will, instead, depend on familial, tribal, and historic relationships as the principal and extralegal constraints.<sup>36</sup>

The foregoing is the face of a very important portion of commerce effected within OHADA's member states, and thus within the CCJA's positive-law jurisdiction.

### III

#### CCJA AUTHORITY ON THE GROUND: FORMAL AND INFORMAL SECTORS

Although further study could productively encompass the CCJA's role both as the vetter of draft Uniform Acts and as a center of arbitration, especially in the context of the formal sector, this article is limited to the most public of the court's roles—its appellate decisions and advisory opinions concerning existing Uniform Acts.<sup>37</sup>

After discussion of the court's influence as its "authority," this part will turn seriatim to the CCJA's authority in each the formal and informal sectors.

#### A. CCJA Authority: Contextual Specificities

##### 1. The CCJA's Audiences and Its Types of Authority

To frame the discussion, the analysis tracks the structure presented in the introduction to this issue. The CCJA's authority may be narrow authority, limited to the litigation parties' respect for the ultimate decision in their own case, even when unfavorable. It may be intermediate authority, representing effective influence not only over those litigants but also over actual or potential

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33. KWEMO, *supra* note 30, ¶ 749, at 251–52 (noting that the vast majority of Cameroon's informal-sector enterprises are sole proprietorships without formal employees).

34. These can be new in the sense that they have not been previously used.

35. See Schneider, *supra* note 24, at 5.

36. See, e.g., John R. Heilbrun, *Commerce, Politics, and Business Associations in Benin and Togo*, 29 COMP. POL. 473, 481, 485, 487 (1997) (discussing cross-border informal transactions).

37. See *supra* Part II.A.3.



litigants engaged in similar but different disputes. Or, its authority may be extensive authority that exists when the court's decisions influence the entire legal profession, including the bar and bench, law students and paraprofessionals, and law scholars.<sup>38</sup>

We can perceive authority, an abstract concept, through the behavior of the CCJA's audiences. In the case of narrow authority, did the losing litigant respect the decision? This is qualitatively different from classic IC analysis because the litigants before the CCJA typically are private parties and not state-signatories of the constitutive treaty. The principal role of the state regarding the CCJA is to ensure that the national judicial regime reliably enforces CCJA judgments. Rather than fear an adverse decision, as does a state before an IC as a litigating party, a state in the OHADA context need fear only the cost of its enforcement mechanisms.

Evidence of intermediate authority is found when potential litigants respect a decision of the CCJA, or a CCJA-consistent decision of national courts deciding matters under OHADA law. Evidence of extensive authority is found when the entire legal profession, including both the bench and bar, manifests respect for a decision from the CCJA, or for a CCJA-consistent decision from a national court. For both intermediate and extensive authority, the OHADA member states' principal burden is not the risk of becoming a losing party. Instead, it is the cost of maintaining an effective national judicial system to resolve disputes under OHADA, whether or not appealed to the CCJA, and of enforcing OHADA-based final judgments, whether rendered by the CCJA or a national court.

Two related concerns deserve elucidation and are now discussed in turn: the integration of the CCJA's authority with the OHADA laws' authority, and the importance of analyzing the court's authority from both a top-down and a bottom-up perspective.

## 2. The CCJA's Authority Is Inseparable From the OHADA Laws' Authority

Most other ICs discussed in this volume do not interpret statutes adopted by a formal legislature. By contrast, OHADA's robust legislature, the Council of Ministers, has adopted nine Uniform Acts. Further, most ICs have historically decided disputes between their creator-states. Instead, the CCJA involves these states only when asked a certified question, or when the state, typically through a parastatal, is acting in a commercial role.<sup>39</sup>

The CCJA's unusual configuration and context invite us to consider the OHADA statutes to have their own authority, separate from that of the CCJA. Thus, if the statutes are respected by litigants, by potential litigants, or by the legal profession, they possess, respectively, narrow, intermediate, or extensive

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38. See Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 10–11.

39. See *supra* Part II.A.3.

authority. The influence of French legal concepts on OHADA's formation explains and supports a recognition that the legislature and its actions possess authority separate from that of the judicial regime.<sup>40</sup>

But despite any impact of history, in practice, the OHADA statutes' authority is subsumed in that of the CCJA. Both the bench and bar consider statutory interpretations previously handed down by the CCJA to the extent that they are available, as well as predictions about future CCJA interpretations, based on the court's prior decisions.<sup>41</sup> The CCJA's authority thus is embedded in the OHADA Uniform Acts so long as the appropriate audiences respect the court's actual and likely interpretations.

Consequently, OHADA's statutory texts are not freestanding; instead, the audiences for those texts influence and reflect the authority of the CCJA.

### 3. The Importance of Top-Down and Bottom-Up Perspectives

Because the audiences both reflect and influence CCJA authority, be it direct or embedded in statutes, correctly identifying the audiences is important to understanding the nature and extent of CCJA authority. In an environment where the informal sector is of significant size and impact, the audiences' location within either the formal or informal sector and along the spectrum of formality helps to identify the norms relevant to each of those audiences.<sup>42</sup> To the extent that an actual or audience-anticipated CCJA interpretation conforms to local norms, the relevant audience will need less institutional push to recognize the interpretation as authoritative. Thus, it is important not only to know whether an audience is in the formal sector or the informal one, but also whether it is at the top or bottom of that sector. These are not judgmental terms: they describe a place on a spectrum where the top tends to be elite and the bottom vulnerable. The more elite the audience, the more likely it is to have embraced norms that conform to those of the global North and, therefore, to those of OHADA.

Imagine, for example, that a major multinational establishes a subsidiary in the OHADA territory with a manager in charge, and that the manager takes the subsidiary's assets to start a new, separate business ostensibly owned by the manager. The multinational is at the most formal, "top" end of the formal sector and brings with it the norms from the global North. It will expect the courts, including the CCJA, to interpret the OHADA Company Law's

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40. Merryman, *supra* note 20, at 1867, 1873–74 (commenting that the notion of the legislature's supremacy under French law is "folklore" but nevertheless influential).

41. The legal profession's formal approach under OHADA is similar to that of U.S. lawyers and judges reviewing U.S. Supreme Court precedent for guidance in interpreting statutory or regulatory text. For example, in *United States v. O'Hagan*, 521 U.S. 642 (1997), both the lower federal courts and the government lawyers relied on the assumption, based on the Court's prior pronouncements, that the statute and relevant rule supported a cause of action in misappropriation. The texts' authority derived from that of the Court. See generally Securities Exchange Act of 1934, 15 U.S.C. § 78j (2012); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (2014) (promulgated thereunder).

42. See, e.g., CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167–234 (1983) (considering the importance of local norms to comparative law).

provisions on abuse of rights consistently with analogous provisions in France. In common-law terms, the manager will be liable for conversion and breach of fiduciary duty. If that is not the outcome, the multinational will likely question the CCJA's narrow authority, and similarly situated potential litigants will deny the court any intermediate authority. In other words, the extent and depth of the court's authority depends in part on the audience's preexisting expectations.

Consider now an example from Cameroon's formal sector, but towards the "bottom" of that sector, in the sense that it is furthest from the commercial realities of the global North, and most based on local norms. A successful businessman, seeking to retire, asked his nephew to run the business, over which the uncle would retain ownership. The nephew and his wife accepted the offer but soon concluded that an entirely different area of activity would be more successful. They therefore took assets from the uncle's business to launch the new activity in their own names. When the nephew and his wife were wildly successful, the uncle not only failed to sue but was reportedly delighted.<sup>43</sup>

Technically, the uncle-nephew story is identical to the multinational-manager story. Assets were taken from the owner and used contrary to the owner's expressed wishes. Because the uncle was happy with the outcome, the CCJA could not become involved, but if this court had been asked to rule, the uncle would not have understood a decision that held the nephew liable. From the uncle's perspective, the relevant entity was not his business or that of the nephew; it was the extended family. The nephew's actions enriched the relevant entity, and thus, from the perspective of local norms, the nephew neither stole assets nor abused rights. The uncle and others who adhere to these norms would tend not to respect a judgment that faulted the nephew. In contrast, the crucial entity in the global North is not the extended family, as myriad disputes among co-owners of family-business entities attest.

These stories demonstrate that there are different audiences within the formal sector and that the reinforcement and reflection of the CCJA's authority depend on preexisting norms. This relevance of top-down versus bottom-up perspectives on CCJA authority applies because OHADA law has been transplanted from one context and set of normative assumptions, to another. The importance of the difference in perspectives is at least as salient in the informal sector as it is in the formal one. Because of the permeability between the formal and informal sectors, the uncle-nephew businesses may well operate in both sectors, and will likely apply the same local norms at the bottom of the formal sector and at the top of the informal sector.

The bottom of the informal sector is at the other end of the spectrum from the top of the formal sector and its norms from the global North. To extend the CCJA's authority among business people throughout the informal sector, the court will have to consider the pre-existing norms in each stratum. We turn first to the formal sector.

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43. Claire Moore Dickerson, *The Cameroonian Experience Under OHADA: Business Organizations in a Developing Economy*, 112 BUS. & SOC'Y REV. 191, 202-03 (2007).

## B. Current Reality in the Formal Sector: Elites and Narrow, Intermediate or Extensive Authority

The reason to start with the formal sector is that it is the arena most similar to that affected by classic ICs. Though the persons ultimately influenced may well be the most vulnerable, direct impact is at the elite level. The work of the ICs is substantially state-to-state, and even the NGOs implementing or monitoring IC decisions tend to be organized by local or foreign elites.

Similarly, in the OHADA context, formal-sector activity involves elites. It means the use of lawyers not only with formal training and law degrees, but also trained specifically in the OHADA Uniform Acts and practice. It means also having parties to litigation who can afford these lawyers and the court fees, and who have sufficient formal experience to have had at least some OHADA-litigable formalism in their contested business transactions.

In order to discuss properly the reality on the ground, we need to pick a particular local environment because the CCJA directly affects member states' internal commercial and judicial contexts. For purposes of this article, the illustrative example is Cameroon, with a focus on one of the two Anglophone regions of that country, the South-West Region. The advantage of privileging an Anglophone region, while recognizing that eight of the country's ten regions are Francophone, is that the difficulties in identifying the CCJA's authority are magnified by language issues. OHADA's structure is French-influenced, and the CCJA's effective working language is French.<sup>44</sup> If the CCJA's decisions have authority in an Anglophone region, they almost certainly have authority in the much larger Francophone territory of OHADA, which includes 80% of the Cameroonian regions, as well as fourteen of the other sixteen OHADA member states.<sup>45</sup> An additional reason to use Cameroon as the illustration is that, with the exception of Côte d'Ivoire, where the CCJA is located, Cameroon has been the greatest source of appeals to the CCJA.<sup>46</sup> For these reasons, my research has focused on Cameroon, particularly but not exclusively its Anglophone regions.<sup>47</sup>

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44. OHADA Treaty, *supra* note 2, art. 42 (2008) (including English as working language). *But see* Letter from Acka Assiéhué, CCJA Chief Clerk, & Marcel Serekoisse-Samba, CCJA President (Chief Justice), *Evolution des Affaires Contentieuses (2008 et 2013)*, Letter of Mar. 24, 2014 (on file with author) [hereinafter CCJA Letter] (noting that, as of March 24, 2014, all appeals to the CCJA have been in French, although the CCJA sent back a certified question received from the Court of Appeal of Cameroon's Anglophone South-West Region, with a request for a French translation, and the CCJA's President in parallel requested that OHADA's ERSUMA, *see supra* Part II.A.2, provide such a translation).

45. Guinea-Bissau's official language is Portuguese; Equatorial Guinea's official languages are Spanish and French. Dickerson, *Harmonizing*, *supra* note 12, at 19 n.2.

46. Jimmy Kodo, *Etats des dossiers en matière contentieuse par pays: de l'installation de la CCJA au 30 juin 2012* (distributed to conference participants at the University of Cape Town, on October 23, 2012) (from the CCJA's installation in 1997 to June 30, 2012, the three most active sources of appeals to the CCJA were Ivoirian courts (588), Cameroonian courts (159), and Senegalese courts (84)).

47. Collection, expansion and publication of Masters theses including similar information for other parts of the OHADA territory would be useful. Kwemo's doctoral thesis is a rare example of a published study relating to realities on the ground, in this case, in Cameroon. *See* KWEMO, *supra* note

Cameroon is formally bijural, based on colonial influence.<sup>48</sup> Because Cameroon's Constitution specifies that treaties "override" the country's internal laws,<sup>49</sup> the OHADA Treaty's preemption of domestic law covering the same topics is effective.<sup>50</sup> With respect to commercial law, then, the OHADA Uniform Acts are the formal law of Cameroon to the extent of their coverage.

Beyond that coverage, the common law applies in the Anglophone regions, and Cameroon's law of obligations contained in its Civil Code applies in the Francophone regions, all as subsequently modified by domestic law.<sup>51</sup> The CCJA's jurisdiction relates only to issues arising under the OHADA Uniform Acts or other pronouncements by OHADA institutions.<sup>52</sup>

## 1. Narrow Authority in the Formal Sector

### a. Existence of narrow authority in the formal sector.

Since the CCJA's inception in 1997 through the end of June 2012, 1,172 cases have been addressed to the court, and 563, or 48%, of these resulted in decisions rendered.<sup>53</sup> It is likely that the CCJA benefits from narrow authority in the formal sector, if only because there is little indication to the contrary.

This narrow authority is not the classic version where the parties to the litigation before the IC are the states, party to the treaty creating the IC. There, the litigant that loses is the state that either does or does not acquiesce to the court's decision, and thus to its authority. Although member states can litigate before the CCJA, either because a state requests a consultative opinion or, indirectly, because the party to the litigation is a parastatal, the litigants more typically are private parties. In this last circumstance, the state's involvement is only to enforce the CCJA's judgment. In this role, the state-party has less incentive to meet a CCJA decision with nonacquiescence than if it had lost a case, except to the extent that establishing and maintaining effective enforcement procedures require political will and expenditure.

Under the OHADA Treaty, the member states are to respect the CCJA's

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48. See generally Claire Moore Dickerson, *Promises of Future Performance and Informal-Sector Transfers of Personal Property: The Example of Anglophone Cameroon*, 2011 ACTA JURIDICA 285, 288 n.7 (2011) [hereinafter Dickerson, *Future Performance*] (discussing Cameroonian bilingualism and bijuralism).

49. CONSTITUTION OF THE REPUBLIC OF CAMEROON June 2, 1972, art. 45.

50. OHADA Treaty, *supra* note 2, art. 10; see also *supra* Part II.A.3.

51. See generally Dickerson, *Future Performance*, *supra* note 48, at 289 (discussing Cameroonian French- or British-inspired contract law other than the GCL, applicable before and after independence); Jean Alain Penda Matipé, *Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa*, in UNIFIED BUSINESS LAWS FOR AFRICA: COMMON LAW PERSPECTIVES ON OHADA 7, 16 (Claire Moore Dickerson ed., 2d ed. 2012) [hereinafter UNIFIED BUSINESS LAWS] (discussing Cameroonian legal history).

52. OHADA Treaty, *supra* note 2, art. 14(1).

53. Kodo, *supra* note 46. Of the 563 decisions, 485 were "arrêts" (classic judgments), and 78 were "ordonnances" (typically, decisions that the CCJA would render on an urgent and often temporary basis).

decisions in litigation automatically and immediately; however, the CCJA Procedures call for each national government to appoint a representative to verify the judgment's authenticity, and to notify the CCJA of that representative's identity.<sup>54</sup> The current director of ERSUMA, Félix Onana Etoundi, asserted in 2008 that execution of CCJA decisions remained problematic because many of the national authorities had failed to identify that representative within the national administration.<sup>55</sup> That refusal by states to pass along information could increase even private parties' failure to respect a CCJA decision, thus reducing the court's narrow authority. Private litigants can further reduce the narrow authority by using other technicalities to duck enforcement of CCJA judgments. They can claim fraud in the underlying decision,<sup>56</sup> argue that land is unregistered if that is the object of enforcement,<sup>57</sup> or simply hide assets. These techniques can be very effective where the overall judicial structures are weak.

In the enforcement of CCJA judgments, incontrovertible information is lacking; the CCJA does not collect evidence regarding its judgments' execution, and judgments are ultimately executed by member states' sheriff-bailiffs, not the CCJA itself. On the other hand, the court's Chief Clerk and its Chief Justice do report that the court has not received any appeals complaining of nonexecution,<sup>58</sup> and, further, it is logically unlikely that parties would continue to expend the time and treasure to appeal to the CCJA if its judgments were systematically ignored by the losing party. The fact that there are private-party appeals to the CCJA suggests that private parties expect to recover if they win—and to have the CCJA's judgment executed against them if they lose.<sup>59</sup>

The CCJA nevertheless does appear worried about the extent of its narrow authority, perhaps especially when a member state is a party, directly or indirectly. Even though these cases appear to be relatively infrequent, they tend to include major parties and significant sums. In this context, the CCJA has taken a broad view of immunity for parastatals by protecting enterprises that are at least majority-owned by a state, even if they are engaged in commerce and thus lack protection under modern conceptions of sovereign immunity. Perhaps the court feared that the state-party would not have enforced a judgment against its parastatal; CCJA judges may be sensitive to political pressure from member states, at least in relatively visible cases.<sup>60</sup>

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54. OHADA Treaty, *supra* note 2, art. 20; CCJA Procedure art. 46(1), <http://www.ohada.com/reglements/670/686/chapitre-8-de-l-execution-force.html>; *see generally supra* Part II.A.3.

55. Félix Onana Etoundi, *L'évaluation de la jurisprudence de la CCJA en matière d'interprétation et d'application du droit OHADA (07 avril 1997–30 avril 2008)*, 865 *Recueil Penant* 1, 20–21, <http://www.ohada.com/doctrine/ohadata/D-11-18.html>.

56. OHADA Treaty, *supra* note 2, art. 20.

57. UA on Simplified Procedures art. 253 (requiring that land be registered before forcible sale), <http://www.ohada.com/actes-uniformes/496/567/section-2-l-immatriculation-prealable.html>.

58. *See* CCJA Letter, *supra* note 44.

59. The CCJA could request that any winning party before this court report back within a year on the effectiveness of the national judicial system's efforts at enforcement.

60. Aziablévi Yovo *c/ Société Togo Télécom*, CCJA, arrêt n° 043/2005, (July 7), *in* LES GRANDES

On balance, though, the CCJA does appear to have narrow authority, and the existence of its intermediate authority, the topic of part III.B.2, below, tends to be further evidence of narrow authority. Admittedly, intermediate authority—and even extensive authority—can exist where narrow authority does not: in the classic IC context, member states could refuse to comply, thereby depriving the IC of narrow authority, while the legal profession within the member states might nevertheless express support for the IC's decision. The CCJA is more likely than other ICs to have narrow authority as a basis for intermediate authority, however, because the CCJA's decisions are first implemented at the lowest levels of national judicial systems, and because most of the commentary is either by legal professionals operating at that level or by academics who focus on implementation at that level. Thus, despite the lack of affirmative confirmation that CCJA decisions are enforced, and despite the suggestion that the CCJA is reluctant to test member states' commitment to the court's authority, evidence of intermediate authority suggests the existence of significant narrow authority.

b. The audiences of narrow authority in the formal sector.

The CCJA's audiences concerning narrow authority are the actual litigants. Institution-specific contexts, such as the CCJA's access rules and jurisdiction as experienced by the litigants, are sources of this authority.

The original drafters' entire purpose for OHADA was to facilitate commerce. The structures of OHADA generally and of the CCJA are designed to shelter those entities from political pressure. The mere fact that the subject matter is commercial is not sufficient to eliminate this pressure; the issue of parastatal sovereign immunity is partial proof, and more broadly, commerce is deeply political as a source both of government revenue through taxes, and of power in competition with government.

The OHADA Treaty seeks to reduce the impact of politics through features designed to enhance the CCJA judges' independence. The judges cannot be removed unilaterally, and they have diplomatic immunity.<sup>61</sup> The court also continues the French norm of unsigned opinions, further protecting the judges from retaliation even by their own countries' governments.<sup>62</sup>

OHADA also modified its structure to facilitate appeal to the CCJA: the practical impediments of cost and complexity of appeal were reduced by removing the requirement that the appellant be domiciled in the Côte d'Ivoire, the court's seat.<sup>63</sup>

Still in the context of institution-specific structures that contribute to the

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DÉCISIONS DE LA COUR COMMUNE DE JUSTICE ET D'ARBITRAGE DE L'OHADA 611–614 (Paul Gérard Pougoué & Sylvain Sorel Kuate Tamégué eds., 2010) [hereinafter *LES GRANDES DÉCISIONS*] (interpreting UA on Simplified Procedures art. 30 in a controversy of 118,970,213 CFA francs, equivalent to almost U.S. \$250,000).

61. See *supra* Part II.A.3.

62. CCJA Procedure, *supra* note 54, art. 22.

63. See CCJA Procedure, *supra* note 54, art. 28(3).

CCJA's narrow authority is the lack of alternative to that court. The party that loses an OHADA-related case at the penultimate level of the national judiciary can appeal only to the CCJA.<sup>64</sup> In the early days of OHADA, national supreme courts were known to hear such cases, but this arrogation of power in violation of the treaty is reportedly now less frequent. Instead, the supreme courts forward the cases to the CCJA, as mandated by the treaty. Although some litigants continue to bring cases to the national supreme courts, which evidences some weakness in the CCJA's narrow authority, that evidence is countered by direct appeals to the CCJA as well as appeals that are continued after their transfer to the OHADA court.

Narrow authority thus does appear to be bolstered by institutional structures. The source of this authority, in institutional-specific contexts, is top-down. Within the relatively elite context of the formal sector, the states themselves are the source of this authority, through the adoption of the OHADA Treaty. Litigants' respect for the CCJA decisions reinforces and reflects that authority. At the top of the sector, the strongest evidence of and support for the CCJA's narrow authority comes from litigants who appeal to the CCJA. Towards the bottom of the sector, non-Ivorian parties are less likely to appeal to a court that, being at a greater distance than their national supreme court, will probably entail additional expenses; these litigants are less likely to reflect or support the CCJA's narrow authority.

Non-design sources of authority, including constituencies and overarching sociopolitical contexts, apply more closely to intermediate and extensive authority than to narrow authority.

## 2. Intermediate Authority in the Formal Sector

### a. Existence of intermediate authority in the formal sector.

When considering the CCJA's intermediate authority, all decisions of lower national courts subject to CCJA opinions are relevant, whether or not ultimately appealed to the CCJA.<sup>65</sup> These lower-court decisions confirm the CCJA's intermediate authority by revealing that CCJA decisions are respected even by nonparties, at least to the extent that the national lower-court judges and practitioners can find copies of the CCJA's case law.<sup>66</sup> There are many illustrations of lower courts carefully dissecting CCJA judgments, and a couple of examples, one particularly iconic, are instructive.

On June 4, 2003, the CCJA rendered an opinion (Rent Opinion) upon the request of Senegal, interpreting GCL, Article 101(5), concerning whether a specially appointed judge responsible for urgent matters, the "juge des référés," is authorized to decide expulsions for nonpayment of rent. By interpreting the technical term "jugement" broadly, the CCJA concluded that the "juge des

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64. OHADA Treaty, *supra* note 2, arts. 13–16; *see supra* Part II.A.3.

65. *See* OHADA Treaty, *supra* note 2, arts. 13–16; *supra* Part II.A.3.

66. *See* Merryman, *supra* note 20 (discussing civilian versus common-law norms).



référés” had the necessary authority.<sup>67</sup>

Subsequently, lower courts in various OHADA member states, including Cameroon, followed the CCJA’s interpretation,<sup>68</sup> but within two years after the Rent Opinion, two trial courts in Cameroon came to the contrary conclusion.<sup>69</sup> These decisions could be viewed as intentional rejections of the CCJA’s authority, but more likely, they reflect the extraordinary difficulty that even appellate-level judges, not to mention trial-level judges, have in obtaining copies of CCJA decisions.<sup>70</sup> Perhaps the lower courts, unable to obtain the CCJA’s decisions, were trying to respect the CCJA’s authority by adopting the very formal interpretation that they expected of the CCJA. In any event, the CCJA probably has some intermediate authority, at least towards the top of the formal sector: with respect to the Rent Opinion, the mixed results with respect to intermediate authority in the formal sector are from trial courts, and any constraint on that authority may thus be limited to the bottom of that sector.

The other decision that seems to reflect the CCJA’s intermediate authority even more unambiguously is the well-known case of the *Epoux Karnib (Karnib Spouses)*.<sup>71</sup> In the original 2001 case, the CCJA ruled that the UA on Simplified Procedures did not allow a stay of execution of a temporary order. It became relevant to a later case that execution in the 2001 litigation had commenced before the debtor requested the stay. This 2001 CCJA decision revolved around a technical and rigid interpretation of Article 32 of the UA on Simplified Procedures concerning stays of execution, and Article 10 of the OHADA Treaty emphasizing the OHADA statutes’ preemption of domestic law. The case involved the top of the formal sector, as the appellant was one of Côte d’Ivoire’s largest banks, and the amount at issue exceeded the equivalent of

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67. LES GRANDES DÉCISIONS, *supra* note 60, at 105 (discussing CCJA avis n° 001/20037EP (June 4); Rafiu Oyewemi *c/* Tony Anthony, CCJA, arrêt n° 011/2004 (Feb. 26), and its interpretation of the term “jugement”). GCL art. 101 was replaced, effective 2011, by GCL art. 133, which no longer uses the word “jugement.” See *infra* Part III.B.3.a (discussing the existence of extensive authority).

68. Followed by a consistent CCJA decision on appeal, CCJA, arrêt n° 011/2004 (Feb. 26). See generally LES GRANDES DÉCISIONS, *supra* note 60, at 114–15.

69. *Affaire Fonko Jean c/ Notou Eric*, Tribunal de première instance de Bafoussam [Bafoussam Court of First Instance] Apr. 30, 2004, Ordonnance de référé n° 65, Ohadata J-05-06, <http://www.ohada.com/jurisprudence/ohadata/J-05-06.html>. See also LES GRANDES DÉCISIONS, *supra* note 60, at 115. The other court of first instance was in Douala and came to roughly the same conclusion, but based on a different Uniform Act. *Affaire Société ANFI c/ Wea Marguerite*, Tribunal de première instance de Douala Ndokoti [Douala Ndokoti Court of First Instance] Jan. 27, 2005, Ordonnance de référé n° 147/074-05, Ohadata J-05-145, <http://www.ohada.com/jurisprudence/ohadata/J-05-145.html>. LES GRANDES DÉCISIONS, *supra* note 60, at 115.

70. Asked about availability of CCJA decisions, an Anglophone examining magistrate at the high court in Cameroon’s South-West Region pointed to bookshelves of the court’s presiding justice and said, “empty cupboards.” Interview with magistrate, in Buea, South-West Region, Cameroon, on June 4, 2013. As noted by another justice of that high court on that same date, in Cameroon’s Anglophone regions language issues make meaningful access to CCJA decisions particularly difficult, as CCJA judgments are always in French.

71. *Epoux Karnib c/ Société Générale de Banques en Côte d’Ivoire*, CCJA, arrêt n° 2/2001 (Oct. 11), Recueil de jurisprudence CCJA, n° special (Jan. 2003) at 37, Ohadata J-02-06, <http://www.ohada.com/jurisprudence/ohadata/J-02-06.html>.

U.S. \$1.4 million.<sup>72</sup>

Local practitioners and scholars complained that this 2001 decision unfairly favored the creditor. These experts emphasized that a creditor who has won before the judge responsible for urgent matters (a “juge des référés” in Francophone Cameroon) will receive payment from the debtor, or will seize and sell recovered goods. The creditor can then disappear or become insolvent, thus leaving the debtor no practical recourse should the judge’s decision be reversed on appeal.<sup>73</sup>

The CCJA reviewed its *Epoux Karnib* decision in a 2003 case, where a plaintiff-creditor had again won before the “juge des référés.” The defendant-debtor appealed all the way to the CCJA, and the intermediate national courts refused to stay execution. On appeal to the CCJA, the debtor invited the CCJA to interpret its earlier decision narrowly. In this second case, the creditor, after winning at the first level, had not yet started execution proceedings, allowing the CCJA to limit the *Epoux Karnib*’s barring of stays to those cases where execution had been commenced.<sup>74</sup>

This case demonstrates the CCJA’s intermediate authority. The debtor, a nonparty to *Epoux Karnib*, knew of the CCJA’s earlier judgment and requested that the court refine that decision rather than just ignoring it. Similarly, the national courts respected the CCJA precedent and applied it rigidly. This 2003 case, reflecting and reinforcing the CCJA’s intermediate authority, is towards the top of the formal sector.<sup>75</sup>

b. Audiences of intermediate authority in the formal sector.

In the 2003 post-*Epoux Karnib* case, the CCJA clearly was influenced by the critiques emanating from its constituencies within the legal profession, and their clients. The CCJA’s stakeholders were directly involved in convincing it to revisit its opinion in *Epoux Karnib*, and, because they sought a technical modification rather than ignoring the 2001 decision, they appear to have respected the court’s hyper-technical 2003 decision. This source of intermediate authority is additional to the impact of institutional-specific contexts discussed

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72. *Id.* The appellant is the Société Générale de Banques en Côte d’Ivoire, a subsidiary of Société Générale, <http://www.sgbci.ci/banque/index.html>.

73. See, e.g., François Ipana, *L’Arrêt Epoux Karnib: Une révolution? Question d’interprétation* (2002), Ohadata D-02-07, at 8 (republished from 10 REVUE CAMEROUNAISE DU DROIT DES AFFAIRES (Jan.–Mar. 2002), <http://www.ohada.com/doctrine/ohadata/D-02-07.html>); see also LES GRANDES DÉCISIONS, *supra* note 60, at 388.

74. *SOCOM c/ SGBC, CCJA, arrêt n° 013/2003* (Jun. 19), Ohadata J-04-105, <http://www.ohada.com/jurisprudence/ohadata/J-04-105.html>. The decision of the CCJA concerning UA on Simplified Procedures art. 32 is only *obiter dicta* but is treated as a holding. See, e.g., Mamadou Diakhaté, *Observations sur la jurisprudence de la Cour Commune de Justice et d’Arbitrage (CCJA) relative à l’interprétation de l’article 32 AUPSRVE (exécution provisoire)* (2002), Ohadata D-05-14 at 2–3, <http://www.ohada.com/doctrine/ohadata/D-05-14.html>.

75. The amount at issue is the equivalent of over U.S. \$400,000 in interest. *SOCOM c/ SGBC*, *supra* note 74.

above in reference to narrow authority.<sup>76</sup>

Most legal professionals within the OHADA territory also seem to have had little difficulty accepting the CCJA's flexible but sophisticated definition of the extent of the jurisdiction of the "juge des référés," as described in the regional court's Rent Opinion. The "juge des référés" was the judge that Francophones were accustomed to seeing decide urgent matters, so it was easier to avoid a highly technical and rigid understanding of that judge's jurisdiction with respect to evictions than to modify the entire structure of French-inspired national judicial systems.

Because members of the national appellate bench were involved within the constituencies, whether seeking modification or demonstrating acceptance of a CCJA decision, some of their influence was relatively top-down. Members of the appellate bench are treated with at least a modicum of respect and can be considered to be elites even within the formal sector. Within the context of that sector, however, the members of the constituencies also came from the relatively lower classes of elites, that is, from the bottom of the formal sector. Scholars, lawyers earning their livings through their profession, lower-tier judges, and even law students can be considered to be part of the elites, but these legal professionals are typically not senior governmental officials, for example. Thus, for purposes of the formal sector, their criticism or approval is "bottom up."<sup>77</sup> Some appeared to embrace a very technical approach that they attribute to the CCJA; others sought an outcome compatible with realities on the ground. Intermediate authority does seem both reflected in and reinforced by litigation similar to the original CCJA decisions, although views on actual or probable CCJA interpretations seem to have differed, especially towards the lower end of the formal sector. Rejection of the CCJA is not necessarily involved, however: we saw that national trial courts may well not have known of the actual CCJA Rent Opinion, and appear to have anticipated that this court would pronounce a much less flexible and more formal understanding of the jurisdiction of the "juge des référés."

### 3. Extensive Authority in the Formal Sector

#### a. Existence of extensive authority in the formal sector.

The CCJA has extensive authority if its decisions have a wide influence throughout the legal profession. We have seen that the CCJA's intermediate authority is significantly an extension of its efforts to establish its narrow authority.<sup>78</sup> Similarly, this court, whose narrow and intermediate authority

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76. See *supra* Part III.B.1.b.

77. In some cases, the impetus may come from clients, and thus the "constituencies" of the CCJA includes business people. Because both the *Epoux Karnib* facts and the Rent Opinion's definition of "judgement" require a technical approach to law, however, the impact of and reaction to the CCJA's decisions concern most immediately the legal profession.

78. See *supra* Part III.B.1.a (asserting that evidence of the CCJA's narrow authority is found in its intermediate authority).

evolved case by respected case, has been able to build its extensive authority through rigorous decisions that tend to reflect reality, and that thus are respected first by actual and potential litigants, and ultimately by the entire legal profession.

The existence of extensive authority thus presupposes the CCJA's ability to affect local legal norms, and the CCJA does appear to have influence within member states, even beyond the power of its judicial precedents. For example, a CCJA decision has moved Cameroon to modify its own domestic law because interpreting the judge for urgent matters to be the "juge des référés" created a problem in Anglophone Cameroon. In the British-influenced regions, which do not have such a specially trained judge, the practical solution of deeming the trial court's senior judge (President) to be the judge in urgent matters created an anomaly. In effect, a judge of the court of first instance, the lowest (trial) court within the classic judicial system, could reverse the decision of an appellate court. To resolve this conundrum, the government of Cameroon passed a new domestic law applicable throughout the country,<sup>79</sup> which refers only to the judge responsible in matters of urgency, without leaping to the assumption that this judge necessarily is a "juge des référés".<sup>80</sup> In Cameroon, such a judge can now be appointed at whichever level is hearing the case: at the high court (trial court for matters above a certain threshold) or at the court of appeals, not only at the court of first instance.

Inherent in this example is the concept of legal rigor. The CCJA's insistence on French-style legal rigor has contributed to its authority among legal professionals who have been able to obtain that court's decisions. The CCJA's interpretations regarding urgent matters could have left the Anglophone legal practitioners to muddle through to some practical but technically indefensible solution. Instead, the CCJA's reputation for clarity and technical rigor arguably influenced domestic norm-entrepreneurs to push for an equally rigorous solution. This is what Cameroon's legislative branch provided to the formal sector, on a top-down basis. Because this outcome is consistent with the norms throughout that sector, legal professionals involved with formal-sector clients easily and willingly adopt it, perhaps especially at the top of the sector. There, norm-consistent statutory change will reinforce and reflect the CCJA's authority among those professionals, just as does any CCJA decision that tracks norms from the global North.<sup>81</sup>

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79. Loi n° 2007/001 (Apr. 19, 2007) (establishing a judgeship in charge of litigation concerning execution of court judgments); see generally Martha Simo Tumnde, *Cameroon Offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts*, in UNIFIED BUSINESS LAWS 57, *supra* note 51, at 76–77. The author is also indebted to the Honorable Joseph Fonkwe Fongang, who at the time served on Cameroon's Supreme Court and subsequently became now Attorney General of Cameroon's South-West Region, for pointing out this legislative modification. Email from Justice Fonkwe, to author (Oct. 19, 2007) (on file with author).

80. UA on Simplified Procedures art. 49 ("le président de la juridiction statuant en matière d'urgence," meaning "the presiding judge of the court that decides urgent matters").

81. See *supra* Part III.A.3 (discussion of multinational subsidiary).

At the ground level, from the bottom up, local jurists' efforts to analyze, discuss, and distribute the CCJA's decisions reflect the court's extensive authority. Even in the formal sector, however, the rigorous and highly technical CCJA interpretations of Uniform Acts may not have penetrated the commercial environment. Because there was no litigation in the nephew–uncle example,<sup>82</sup> the CCJA had no opportunity to consider the proper interpretation of the relevant statutory provisions in the context of local norms.<sup>83</sup> Even if these facts had been appealed to the CCJA, however, past history suggests that the CCJA would have applied French-law rigor, not the different local understanding.<sup>84</sup> Such a result, based on norms from the global North, when contrary to norms at the bottom of the formal sector, is unlikely to benefit from extensive authority there. To the extent that OHADA generally, and the CCJA specifically, seek to facilitate prodevelopment moves such as capital formation, and thus to the extent that they seek predictable application of the OHADA laws, they should strive to match the interpretation of the OHADA texts to local norms. Thus, a realistic—and rigorous—application of OHADA's Company Law to a dispute on the uncle–nephew facts would require the court to acknowledge that the nephew had no liability, because the relevant entity was the uncle's family and not the technical business organization. Matching to local norms is important not only at the top of the formal sector where each transaction tends to be substantial, but also towards the numerically important bottom of that sector.

Finally, CCJA interpretations of Uniform Acts are difficult to obtain for all levels of legal professionals, even senior appellate national-system judges, perhaps especially in the Anglophone regions but even in the Francophone ones.<sup>85</sup> Decisions that are unknown cannot be respected. Consequently, it is impossible to claim categorically that the CCJA has extensive authority throughout the formal sector. We see mere intimations of extensive authority, particularly towards the bottom of that sector.

b. Audiences of extensive authority in the formal sector.

Assuming that the CCJA does have at least some extensive authority, to an important extent support for the court's decisions and their dissemination has come from unrelated international organizations, such as the World Bank. The European Union, through its own grants, has similarly supported the OHADA project and is at least a substantial resource behind major collections of

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82. See *supra* Part III.A.3 (discussion of the uncle–nephew example).

83. Consider, for example, Company Law art. 891 (concerning the responsibility of a company's representatives).

84. The *Epoux Karnib* case is an example of the CCJA not recognizing the differing realities between the OHADA territory and the inspiration for OHADA laws—France. See *supra* Part III.B.2.a (discussing *Epoux Karnib*).

85. The Vice President of the South-West Region's Court of Appeal proposes having CCJA decisions sent to Cameroon's political capital, Yaounde, from which they would be further distributed. Interview with Mbeng Martin, Vice President, Court of Appeal in Buea, South-West Region, Cameroon (June 10, 2013).

OHADA documents and scholarship. Thus, the CCJA's influence on the OHADA territory stems significantly from those international organizations, rather than directly from the CCJA or its stakeholders.

The international organizations were part of the overarching sociopolitical context that encouraged the OHADA member states to adopt the OHADA Treaty. The document was a manifestation of the Washington Consensus, designed to reduce political pressures—at least somewhat—both within OHADA generally, and on the CCJA specifically.

These exogenous sociopolitical players exercise top-down influence, although they can facilitate the work of elites who, in the context of the formal sector, will at least in part be bottom-up players. Not only the highly placed legal professionals, but also those from the lower strata of the formal sector participated in a series of workshops held in 2005 in the South-West and North-West Regions of Cameroon. The local bar associations—relatively bottom-up influences—were the initial power behind seminars introducing the Uniform Acts to these Anglophone regions, primed by the joint efforts of a local highly placed academic and an academic from the global North. Already for the second of these workshops, the local judiciary—a relatively top-down influence—closed the courts for the day so that all legal practitioners would be able to attend the seminar.<sup>86</sup> A well-respected former president of the national bar noted that the OHADA laws were introducing rigor to the national judicial system.<sup>87</sup>

The elites as local constituencies, in particular the legal professionals, indeed are important sources of extensive authority. For example, to induce revision of the domestic statute on urgent matters, local legal professionals reportedly raised the topic with the local authorities. The OHADA structure itself has worked hard to extend the organization's and its institutions' influence. The principal goal of one of those institutions, ERSUMA, is to disseminate information and training about business law, including educating the legal profession about the CCJA's decisions.<sup>88</sup> These decisions have been collected into unofficial reports, and they have been extensively discussed in the civil-law friendly versions of textbooks, and in articles. However funded, much of the work has been accomplished by scholars and legal professionals from OHADA's member states. Thus, this evidence of CCJA authority appears to be sourced in substantial part by exogenous, top-down actors, but also by local

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86. The Dean of the University of Buea's Faculty of Social and Management Sciences, Professor Martha Simo Tumnde, and I provided the impetus for the series, using a small grant from a European donor.

87. Very Senior Barrister and Bâtonnier Emeritus J.K. Sendze's Remarks at workshop in Barmede, North-West Region, Cameroon (Dec. 5, 2005).

88. OHADA Treaty, *supra* note 2, art. 41 (concerning ERSUMA). To appreciate some of OHADA's efforts to make scholarship available with the support of external donors, see ERSUMA's website, <http://www.ohada.org/ersuma.html>; for an example of ERSUMA's efforts, see also, e.g., [www.revue.ersuma.org](http://www.revue.ersuma.org) (last visited Oct. 31, 2014) (providing a link to ERSUMA's legal journal on OHADA matters).

constituencies that are partially top-down, and, in the formal-sector context, bottom-up.

### C. Current Reality in the Informal Sector: Nonelites and Narrow, Intermediate or Extensive Authority

At the border between the formal and informal sectors, it is hard to identify in which sector a particular economic actor is operating, and the actor may be active in both sectors. In some of these cases, the assumptions about the bottom of the formal sector described in part III.B, above, may hold for economic actors at the top of the informal sector. But when the activity is unambiguously in the informal sector, the CCJA's authority is weaker to the point of being nonexistent. This principle applies with particular force to workers deep in the informal sector; for ease of discussion those are the workers who are the subject of this part III.C.

There is enough separation between the bottom of the informal sector and the top of the formal one that the CCJA's lack of authority in the former will have limited negative impact on its authority in the latter—just as the court's authority in the formal sector has not, to date, influenced positively its authority at the bottom of the informal sector.

#### 1. Narrow Authority in the Informal Sector

The mere existence of informal-sector economic actors is evidence against the CCJA's narrow authority there. Informal-sector plaintiffs are highly unlikely to appear before a national court of first instance, although it is technically a pathway to the CCJA. Instead, they use self-help, the police for its *ad terrorem* value, and local official or unofficial customary courts.<sup>89</sup> Courts of first instance are less desirable options. Their locations often require out-of-pocket travel expenses, and their unreliable scheduling typically causes loss of worktime due to multiple appearances.

It also is unlikely that such plaintiffs will bring before an official customary court a matter technically under an OHADA Uniform Act. These courts have limited jurisdiction, although as a practical matter such courts do handle some business-related cases technically governed by OHADA's Uniform Acts. Note that Cameroon permits appeal from the customary court to a special bench of the court of appeal,<sup>90</sup> from which, in turn, further appeal would be to the CCJA.

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89. See generally Dickerson, *Tax*, *supra* note 28, at Part I.B.2.a.

90. See generally Dickerson, *Future Performance*, *supra* note 48, at 301–02 (discussing the use of the official customary courts, the use of appeals to a special bench of the Court of Appeal, specifically in Cameroon, and noting that customary courts, in fact, exercise a broader jurisdiction than is technically permissible); see also 2 MINISTRY OF LOCAL GOV'T [CAMEROON], CUSTOMARY COURTS, MANUAL OF PRACTICE AND PROCEDURE FOR COURT CLERKS ¶ 14, at 6 (1965) (although the provision applies by its terms to land and marriage, the language suggests that debts less than 69,200 fca, being roughly U.S. \$140, can be heard by a customary court). According to Senior Barrister Peter Tumnde Moneh, customary court jurisdiction, in fact, does not extend to such debts, but the lay judges in the Anglophone region are known to hear disputes outside their jurisdiction. Interview with Barrister Peter Tumnde, in Limbe, South-West Region, Cameroon (January 2012). See also

The plaintiff from the bottom of the informal sector thus, formally, has access to the CCJA; however, given the cost of the formal proceedings before the court of appeal and the CCJA, it is highly improbable that such an appeal would ever occur. Indeed, no case that started at a customary court anywhere within OHADA's jurisdiction has ever been appealed to the CCJA.<sup>91</sup>

Even were an informal-sector plaintiff to start a suit in an official customary court, and even if the case technically were governed by the OHADA Uniform Acts, it is in any event implausible that the customary court would apply any of these acts. Customary-court judges are not legally trained, and even in the formal sector, let alone the informal sector, CCJA interpretations are hard to locate.

Deep in the informal sector, far from its permeable border with the formal sector, the CCJA thus appears to have no narrow authority, even before considering the CCJA's inhospitability to local norms.<sup>92</sup>

## 2. Intermediate or Extensive Authority in the Informal Sector

Given that the CCJA at best has negligible narrow authority in the informal sector, it likely also lacks intermediate and extensive authority. I have found no evidence of an audience of informal-sector legal professionals reflecting or reinforcing any such authority.

These observations are important because of the significance of the informal sector. The CCJA's norm-formation capabilities, and ultimately its prodevelopment structures, are not factors for a crucial segment of its members' national economies.

## IV CONCLUSION

The CCJA's authority is meaningful only if it actually affects the lives of a broad spectrum of private economic actors within OHADA's territory, not just the OHADA Treaty's member states. There is considerable evidence that, in the formal sector, private litigants before the CCJA expect its decisions to be enforced, although the court remains leery of threatening member states or their affiliates when these are parties to litigation. Among both the elites and nonelites of the formal sector, there also is evidence of respect for CCJA precedent, and even some indication of a broader CCJA influence, nudging municipal judicial systems towards a rigorous and technical, perhaps norm-sensitive, application of the rule of law. By contrast, in the informal sector that represents a significant portion of the member states' economies and employs

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Conversation with Chief Registrar Luku Jean Marie, of the Court of Appeal, in Buea, South-West Region, Cameroon (Nov. 19, 2010). Debt between economic actors is governed by the GCL. Therefore, it is potentially appealable from a court of appeal to the CCJA. See Dickerson, *Entrepreneurs*, *supra* note 29, at 198–200 (concerning customary courts).

91. CCJA Letter, *supra* note 44.

92. See *supra* Part III.A.3 (discussing the impact of local norms on the CCJA's authority).



an important proportion of workers, there is no appreciable evidence of CCJA authority.

These realizations are derived from an IC-focused analysis that initially appears not to fit the CCJA well, as this institution is in many ways more like a federal supreme court, a domestic court, than like a classic IC. Nevertheless, the authority template proves sufficiently capacious to include the CCJA and in fact emphasizes this court's subsidiarity. For example, the development of the CCJA's authority depends not only on major international donors, but significantly on actions by local courts and sheriff-bailiffs, and by practicing lawyers and their clients. The power to create the CCJA's authority is sourced not only at the most elite levels of commerce and the legal profession, but also at the least elite levels of the formal, national legal systems. Because of this subsidiarity, the analysis underscores that the CCJA's audiences will more easily respect formal laws and their interpretation if these conform to local commercial norms—which vary depending on the sector, formal or informal, and on the stratum within the sector.