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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ*)*** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

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On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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CEMAC AND OHADA INTEGRATION LAWS: COMPLEMENTS AND CONFLICTS IN THE RESCUE OF DISTRESSED BANKS IN CAMEROON

DR. KWATI EVELYN BANINJOYOH*

Abstract

We live in an increasingly inter-connected world, provoked by a need for countries to work together in a macro-regional context. The result of this need, is gradually wiping away the prints of geo-political segmentation of the world, after the Second World War giving way to regional groupings. The proliferation of regional integration groups as a vehicle for investments even in the banking sector has pushed the CEMAC[1] regulator to relinquish some of her powers of supervision to the OHADA[2] law maker. The objective of this paper is to highlight the extent to which the combine treatment of banking crises by the CEMAC and OHADA institutions has impacted the banks' rescue efforts. In handling collective proceedings of distressed banks, it is expected that the combined efforts of both institutions should enhance the bank's chances of survival more than ever before. This research which is doctrinal makes a critical analysis of the laws and an in-depth examination of a case in hand. Results reveal that the intercourse between these organisations has given rise to certain inconveniences which are slowing down the management of banking crises. More sacrifices would have to be made by the banking police and member states governments for the harmonious functioning of the two in the treatment of distressed banks in Cameroon.

Key words: Bank, Rescue of Distressed Banks, Integration Laws.

Introduction

The post pandemic era has witnessed a strong increase in regional integration[3] activities to catch up with the devastating effect of distancing measures on regional

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[1] CEMAC is the French acronym for the Central African economic and monetary community, made up of Cameroon, Central African Republic, Chad, Democratic republic of Congo, Equatorial Guniea and Gabon. Created in 1992 to replace the defuncked UDEAC, CEMAC aims to promote peace and the harmonious development of its member states, in the framework of establishing an economic and monetary union.

[2] The French acronym OHADA stands for Organisation for the Harmonisation of Business Law in Africa. Founded by a treaty in 1997 at Mauritius OHADA is made up of 17 countries including Benin, Burkina Faso, Cameroon, Chad, Central African Republic, Comoros, Equatorial Guinea, Gabon, Guinea Bissau, Guinea Conakry, Ivory Coast, Mali, Mauritius, Niger, Senegal, Togo and most recently Democratic republic of Congo. The principal objectives of this organization as enshrined in its article 1 of the treaty are to unify and modernize business law in its member states by elaborating and adopting specific aspects of business law through the instrumentality of Uniform Acts, and to promote arbitration as a means of settling contractual disputes.

[3] Regional integration is a process in which neighbouring countries enter into an agreement in order to upgrade cooperation through common institutions and rules to facilitate common economic and political objectives. Today it has typically taken the form of political economic initiative where commercial interests are the focus for achieving

integration objectives.[4] This shift in regional integration is nowhere more urgent than in Africa, where the impact of her relatively small economies, assumed her global market share,[5] was still very low albeit her significant market size.[6] Africa has by this move, become a continent of regions, with over 200 Organizations[7] for regional cooperation and countries belonging to as many as four different Organizations.[8] Membership to one or the other regional group is dictated by the demands most especially of economic growth, the quality and quantity of domestic and foreign investment being an important indicator of that growth. [9] Integration laws have thus become the inevitable strategy to strengthen the attractiveness of investments including those of the banking sector. The role played by banks[10] in alimenting the commercial sector and the severity of their insolvency on the entire society has led jurisdictions across the world to carve out special regimes even at sub-regional levels for this very important institution.[11] From the late 19th century,[12] banks began to emerge as the major creditors of corporations and, became the first victims of the bankruptcy of their borrowers and of economic depressions.[13] After 1975 and less than two decades later, countries of CEMAC[14] were not spared the spread of this canker-worm which hit the banking sector with great repercussion on

broader socio-political and security objectives. Regional integration may be organised either through supranational institutional structures or through intergovernmental decision or a combination of both. See generally JSTOR 'Regional integration', available at www.en.wikipedia.org, accessed in March 2022; 2011, "Regional economic integration", available at www.opentext.wsu.edu accessed in March 2022; MOHAMED (T.L.), "Integration and harmonisation of business laws: issues, challenges and opportunities for ECOWAS", 2005, a paper presented at an the international conference of ministers of justice and attorney generals of west African Countries, Abuja, Nigeria; MOYE (G.), "CEMAC integration or coexistence?" 2004, Annales de la Faculté des Sciences Juridiques et Politiques, vol.8, pp.29-47; POUGOUE (P.G.), "OHADA, instrument d'intégration juridique", 2001, Revue Africaine des Sciences Juridiques, vol. 2, No 2, pp.11-30; MARTOR (B.), "The OHADA legal harmonisation process: the benefits for Africa's development", in the applicability of the OHADA treaty in Cameroon, Buea, 2003, p.21.

[4] United Nations conference on trade and development, 'International tax reforms and sustainable investment', World investment report 2022. pp. iv-v.

[5] In terms of exports and imports Africa's share remains very low comparatively.

[6] DE MELO (J), and TSIKATA (Y), 'Regional integration in Africa:challenges and prospects', Fondation pour les etudes et recherches sur le developpement international, 2014, pp.1-2.

[7] The World Bank, 'Sub-Saharan Africa: From crisis to sustainable growth', the World Bank long term perspective study, 1989, p.149.

[8] The expectation of different nations is that, multiplying membership in these different regional groups will enable them draw the benefits of the partnership and make them more attractive for investments. Cameroon for example is member of the African union (AU), CEMAC, OHADA, African Intellectual property organisation (OAPI), the Inter-African Conference on Insurance Markets (CIMA), just to name a few. Information available on www.integrate-africa.org, accessed in June 2022.

[9] ALPHA (O.K.), "Assessing Regional Integration in Africa", Economic Commission for Africa, foreword, 2004, P.ix.

[10] The notion of banks here does not exclude micro finance institutions that have come to fill the lacuna in the functioning of the banks addressing reaching areas that had been strategically excluded by the banks.

[11] This trend has formed the basis for recent reforms by the CEMAC legislator who has consolidated all the options for the treatment of banking crises in a single legislation. See to this effect Regulation No 02/14/CEMAC/UMAC/COBAC of 25th April 2014 relating to the treatment of crises in credit institutions in Central African States.

[12] This period marked a series of bank failures including in Victorian Britain, thousands of bank failures in the US during the 1930 depression.

[13] WOOD (P.R.), *Principles of international insolvency*, Law and Practice of International Finance, 2nd edition, London sweet & Maxwell, 2007, P. 28.

[14] CEMAC stands for Communauté Economique et Monétaire de l'Afrique Centrale, the central African sub-region comprising six countries including Cameroon. See footnote 1.

the entire economy. The special regimes for banks were configured in such a way that when a bank fails and all attempts at out of court restructuring are not successful, there is nothing more to do other than liquidate the bank and assist creditors to escape the ordeal.[15] This attitude is fast changing and the courts intervention henceforth is not only to liquidate the bank but also in organizing rescue procedures.

Previous texts[16]governing the banking sector had emphasized on the protection of depositors with quick liquidations organized to maximize returns to creditors. The ministerial committee of CEMAC has improved on the framework for the treatment of banking crisis to the satisfaction of researchers[17] and investors. These measures are the object of CEMAC Regulation N° 02/14/CEMAC/UMAC[18]/COBAC[19] of 25th April 2014, relating to the treatment of Banking Crisis in CEMAC.[20] The new regulation which is both preventive[21] and curative[22] has laid down three options for stabilizing a bank which is in crisis and three options for organizing collective procedures for the clearing of debts.[23] These options can also be classified as those which are non-judicial or out-of-court measures under the supervision and control of COBAC and measures which are judicial under the supervision of the competent court[24] and regulated by the OHADA Uniform Act on collective proceedings for the clearing of debts hereinafter abbreviated UACPCD. This last option is our bone of contention in this paper as it presents a total shift from the traditional manner in

[15] WOOD (P.R.), op.cit., p.28.

[16] The depositors' interest had loomed high in the Convention of 17th January 1992 on the harmonisation of banking regulations the Central African States and its annexes; COBAC regulation No 2009/01 of 1 April 2009 fixing the minimum net capital for credit establishments; the Convention of 1998 establishing a savings guarantee fund for deposits in Central Africa.

[17] KELESE (G. N), 'Regional integration laws and banking security in Cameroon', Ph.D thesis, 2013, *University of Dschang,*

[18] UMAC is the monetary union of CEMAC as distinct from the economic union UEAC.

[19] COBAC stands for the banking commission of central Africa, and it's the sub-regional institution of CEMAC that has been assigned nearly the full range of powers that national prudential supervisory authorities have in member countries. It is in charge of off-site and on-site supervision and issues prudential regulation.

[20] Some of the major pitfalls in the former practice were the fact that measures for the treatment of banking crisis were contained in disparate legal frameworks necessitating recourse to different pieces of legislation both regional and domestic to have the exact picture of the regime. Secondly, conflicts between the organs responsible for the liquidation of a bank had led to open confrontations before the courts sometimes extending the length of the proceedings to unprecedented lengths. Bureaucratic hurdles, poor regulation in the qualification and functioning of the bank liquidator, ambiguity in the distinction between the properties of the bank which formed the assets to be liquidated from those which did not came to fuel the challenges. Most of these worries by jurists and investors have received statutory settlement in the new regulation. Precisely, the new law has consolidated measures for the treatment of banking crisis in a single regime; some of the bureaucratic hurdles have been dealt with, while the conflict between co-liquidators in banks liquidations has been permanently settled. Salient innovations in the procedure include the introduction of disciplinary measures as a way of stabilizing banking crisis, a special restructuring option for banks of a particular nature, increase in the scope of preventive measures, incorporation of court supervised rescue arrangements and proper regulation of the organization and functioning of organs such as the provisional administrator and the banks liquidator.

[21] These include preventive measures, disciplinary measures and restructuring measures handled by COBAC; see the CEMAC regulation, articles 7-15, 16-25 and 26-84 respectively.

[22] Curative procedures include preventive settlement, legal redress and liquidation of assets under the court; CEMAC regulation,, articles 85-106.

[23] NAH (T.F.), "The pragmatism of CEMAC bank distress rescue measures: a treatment dose in function of the level of distress", *International Journal of Law, policy and social review*, vol.3, issue 3, 2021, p. 25.

[24] Collective proceedings for insolvency under OHADA law are supervised by the court which has jurisdiction in commercial matters; UACPCD, article 3.

which banks insolvency has been handled in the past. This measure not only introduces the court as the supervisory organ but brings in an intercourse of two regional regulators which may make or mar the survival of the bank as the measures in themselves are both complementing and conflicting. The judicially supervised proceedings under OHADA law may enhance the treatment of distressed banks, but with hurdles which are general to all regional integration efforts as well as those particular to the banking sector.

A Judicially Supervised Procedure

One of the highlights with the collective procedures for clearing debts under OHADA law is the fact that they are judicially supervised.[25] The regulation of banking crisis under CEMAC regulation has often been out of court with COBAC as general overseer of these procedures. The introduction of the court to handle the proceedings involving distressed banks comes with a lot of legal implications and limits.[26]

Seizing the competent court[27]

There is a flexible blend in the parties competent to seize the court for bank rescue proceedings though shrouded in uncertainties of the precise steps to follow.

A wider scope for those to initiate proceedings

The UACPCD, provides a wider scope for those competent to seize the court in the event of collective proceedings. In case of preventive settlement, the debtor shall file a petition alone or jointly with one or more creditors[28] while in the case of a reorganization, the court may be seized either by the debtor[29], a creditor[30] or legal department.[31] Under CEMAC regulation, the court is seized in the event of a preventive settlement by the legal adviser of the bank after prior authorisation of COBAC. A bank willing to go through collective proceedings begins with a prior authorisation of COBAC by the legal adviser of the bank.[32] The legal adviser is appointed by the general assembly of shareholders and carries out duties of administration, direction and representation when the bank is in difficulty. Where the bank is put under reorganisation, the court is seized by the legal adviser of the bank in two petitions. The president of the competent court thereafter seizes COBAC for the examination of the application. Unlike under the Uniform Act, the

[25] KWATI (E.B.), *the regulatory framework for the rescue of insolvent companies under OHADA law: the case study of Cameroon*, Ph.D thesis, University of Yaoundé II, Soa, 2015, pp.214-221.
[26] KUPKA (E.), 'Principles and guidelines for effective insolvency and creditor rights systems', The World Bank, 2001, pp.76-78.
[27] The Uniform Act has empowered the court competent in commercial matters to handle collective proceedings. UACPCD, article 3. In Cameroon this court happens to be the high court; Judicial Organisation law, article 18.
[28] UACPCD article 6.
[29] Ibid article 25.
[30] Ibid article 28.
[31] Ibid article 29 para 2.
[32] CEMAC regulation, article 88.

creditors of the bank or other organ like the legal department have no right to initiate an action concerning a bank. This measure expresses the intention of the CEMAC regulator to preserve the sovereignty of COBAC as much as possible over the affairs of banks. COBAC is bent on keeping a firm grip over the procedure by not allowing certain provisions which are deemed inconsistent with the practice to interfere. This is not strange though given that creditors usually do not have a say in initiating proceedings concerning bank rescues. But at least the Monetary Authority, who is also vested with powers to commence proceedings in favour of banks before COBAC, can be given such powers to seize the court as well. His powers can be extended to include seizing the competent court.

A Complex Procedure

The problem of seizing the competent court is further complicated by the CEMAC regulator in the steps involved in seizing the court. For both preventive settlement[33] and reorganisation,[34] there is a prior seizing of COBAC, a procedure which assumes the dimension of a preliminary enquiry in criminal trials. We see COBAC in this procedure playing the role of the examining magistrate in preliminary inquiry.[35] COBAC has to appreciate the aptitude of the bank to achieve the aim of returning to normal conditions of operation. In order to do this, COBAC shall gather any information judged useful to study the application.[36]

COBAC has two months to rule on the application from the date of reception of the application or two months from the date when supplementary information got to them.[37] This is the same timeframe given to COBAC to rule on the application for special restructuring. This is time enough for COBAC to pass a well informed decision as to whether the matter deserves to be taken to court. This preliminary phase is important for obvious reasons. COBAC is the supervisory body for banks. Their involvement is necessary. It is in the interest of the financial system that banks which are no longer performant should be exited as fast as possible. In the phase of appreciating the achievability of the rescue proceeding, COBAC will not hesitate to initiate liquidation where they are convinced that normal conditions of operation can no longer be achieved. When liquidation is engaged early enough, returns to creditors are better maximised. It would be useless to seize the court for reorganisation or preventive settlement when there is no hope of rescue. However

[33] Preventive settlement is a procedure designed to avert insolvency or a cessation of activity and to permit the clearing of debts by a composition agreement; UACPCD, article 2 paragraph 2. For this procedure to apply, the company must not be insolvent.
[34] Reorganisation according article 2 paragraph 3 of the UACPCD, is a procedure designed to save the insolvent company and to clear its debts by way of a composition with creditors. For the procedure to apply, the company must be insolvent but not irremediably compromised.
[35] In a criminal trial, preliminary inquiry is conducted for two reasons. The aim of the examining magistrate is determine whether there is sufficient evidence to warrant the accused to be taken to court; secondly it is intended that the establishment of culpability and guilt as well as sentence is based on the best possible evidence.
[36] Article 89 for preventive settlement and article 92 for reorganization.
[37] CEMAC regulation, article 89 paragraph 3.

the two months stretches the timeframes in the collective proceedings as opposed to other enterprises. These two months represent for the bank crucial moments and we note here that the bank may already be insolvent at this time. To remedy the situation, the lawmaker has given room for COBAC to engage summary proceedings to rule on the application. By the time the two months at COBAC elapses, another enterprise that went through the court should be rounding off its preventive procedure by then.

The Notification of COBAC's decision

The decision of COBAC is notified to the bank and to the Monetary Authority[38] in the case of preventive settlement. In the case of reorganisation, COBAC's decision is notified to the president of the competent court and the Monetary Authority.[39] According to article 2 of the UACPCD, preventive settlement is a procedure designed to avert insolvency or a cessation of activity and to permit the clearing of debts through a composition agreement. Preventive settlement is opened to the debtor who is experiencing financial or serious economic difficulties, but not yet insolvent. The fact that the bank is not yet insolvent may explain the reason why COBAC does not directly notify its decision to the competent court. However the two months within which COBAC takes to appreciate the application is time enough for the bank's situation to deteriorate into full insolvency. Unless COBAC finds that a court procedure is not necessary then there is no reason why the decision approving the preventive settlement should not be notified to the court directly. Apparently it would be the duty of the bank represented by its legal adviser or the Monetary Authority to notify the court. To harmonise the procedures as much as possible COBAC should notify their decisions to the president of the court and the Monetary Authority whether in respect of preventive settlement or reorganisation. The Uniform Act defines reorganisation as a procedure designed to save the company and to clear its debts by way of a composition with creditors.[40] The element of distinction is that the bank requiring reorganisation is already insolvent at the time that COBAC is petitioned for its authorisation.

The preliminary procedure at COBAC also poses a problem of fixing the suspect period or the provisional date of insolvency in the case of reorganisation. The Uniform Act provides that the competent court shall set the provisional date for the insolvency failing which such insolvency shall be deemed to have occurred on the date on which the decision was recorded.[41] The suspect period is necessary to determine the responsibility of management for insolvent trading. Liability for insolvent trading will arise if it can be shown that the director of the company

[38] The Monetary Authority is the minister in charge of finance in the member state where a credit establishment has its head office. The CEMAC regulation, article 1 paragraph 4. The Monetary Authority is responsible for supervising and implementing COBAC regulations to credit establishments in his state.
[39] Ibid. article 89 paragraph 5.
[40] UACPCD, article 2 paragraph 3.
[41] Ibid. article 34.

traded while the company was insolvent or his transaction for the company actually caused the insolvency of the company.

The Argument for Court Supervised Procedures

Judicially supervised proceedings come with a series of advantages and disadvantages.[42] The main advantage of a court procedure is that it has the ability to impose a stay or statutory freeze on individual creditor enforcements. Secondly, a judicial procedure has the power to bind dissentient creditors. Once the application to be admitted to collective proceedings is received by the court, the president of the court passes a ruling which suspends all actions and claims against the debtor by creditors. No creditor has the power henceforth to enforce any claim or take action against the debtor or attach the debtor's asset. Court supervised proceedings may crystallise any preference rules permitting the judicial administrator to recover any asset transferred preferentially to creditors. Court procedures have the advantage of finality reason why they take long to be concluded. Also, court proceedings may mitigate the risks of lender liability common in private workouts. In this way, it may encourage new financing from other creditors as a measure for facilitating the rescue of the bank. Court actions are capable of international recognition by foreign jurisdictions.

The judicial procedure can also be counter-productive for the bank.[43] Firstly since it is done in court there is publicity of the distress of the debtor. The public declaration of the debtor's insolvency is a negative publicity to business. This becomes worse when it is a bank that is involved. Secondly the statutory freeze can prejudice creditor protections. Also formal or court supervised proceedings are usually more costly, more lengthy and in most jurisdictions have a low rate of success. An alternative to judicially supervised collective proceedings are private consensual debt restructuring procedures also known as a private work out. This is an agreement between a distressed debtor and his creditors or usually bank creditors. Most experienced practitioners in insolvency proceedings opine that the private restructuring is faster, safer, and cheaper than the formal or court supervised proceedings.[44] But it lacks the finality and authority that epitomises judicial proceedings and more often than not, resort is made to the courts for enforcement of decisions of a private work out.

The Notion of Insolvency (cessation of payment)

It would appear that the CEMAC regulator had purposed the measures of collective proceedings when the bank has attained a state of cessation of payment. Under CEMAC regulation, a bank is in cessation of payment when it cannot make

[42] JENS-HINRICH (B.), et.al. 'The choice between judicial and administrative sanctioned procedures to manage liquidation of banks: a transatlantic perspective', Oxford Business Law Blog, 2018, available on www.law.ox.ac.uk, accessed in June 2022.
[43] KUPKA, (E.), op.cit. pp.64-68.
[44] WOOD (P.R.), op.cit. p.39.

payments immediately or within a period of 30 days.[45] Cessation of payment will also apply to a bank whose approval has been withdrawn. Cessation of payment is a very determinant factor as to the choice of procedure to apply. Nah[46] notes that the CEMAC regulator provides quite a restrictive definition to the notion of cessation of payment. Cessation of payment actually translates to the notion of insolvency and is defined under the UACPCD as the status of the debtor who is unable to pay its due debts out of its available assets, excluding situations where reserves of credit or payment moratoria granted by creditors enable the debtor to settle due debts.[47] The revised Uniform Act of 2015, is more flexible in defining cessation of payment and is a shift from the definition in the 1999 Uniform Act which limited the cessation of payment to available assets and did not take into consideration the assets made possible by credit reserves or payment moratoria by creditors. The exception provided in the revised Uniform Act touches both the notion of available assets and the time of payment. The availability of credit reserves implies that there is hope of liquidity from where payments can be made. Also, payment moratoria or extensions of deadline granted by creditors will mean that debts which would normally become due will no longer fall due. The CEMAC regulator does not take into consideration contingent assets of the bank and will hold the bank insolvent once there is a failure to make payment either immediately or within 30 days. The restrictive nature of the definition under the regulation is understandable given the objective of a bank unlike other companies governed by the ordinary procedures. Banks are established to collect deposits and make payments. It is part of their daily activity to make payments. The inability to make payment therefore touches on the *raison d'etre* of the bank. This is not the case with other enterprises involved in other sectors and whose inability to pay is only incidental to their original objective.

Also, the definition of cessation of payment under the CEMAC regulation totally conflicts with the objective of preventive settlement under the Uniform Act. Preventive settlement aims at averting insolvency or cessation of payment and cannot be opened for a bank that cannot make immediate payment. The condition of substance to be admitted to the procedure for preventive settlement is that the bank is not yet insolvent. It may be argued that the thirty days deadline provided in the definition of cessation of payment may open up the scope for preventive settlement for distressed banks that will not be in a state of cessation of payment within thirty days. This argument seems superfluous since it is not clear from the provisions of article 86 if the thirty days deadline relates to that provided by the creditor or the deadline is fixed by the CEMAC regulator within the scope of the procedures. If the latter option is correct, then it would mean that there is no place for preventive settlement for banks under the Uniform Act.

[45] CEMAC regulation, article 86.
[46] NAH (T.F.), op. cit. pp.24-31 at p.29.
[47] UACPCD, articles 1-3 and 25.

Easy Access to Court in Collective Proceedings for Banks

A well-functioning and predictable insolvency court provides for easy access to the courts, quick disposition of insolvency cases, preserving assets and maximising their value. [48] The law is the weapon of the weak and the court is the agent for employing the weapon of the law.[49] Article 3 of the UACPCD provides that conciliation, preventive settlement, reorganization and liquidation of assets proceedings shall fall under the jurisdiction of the court having competence in commercial matters. This court shall be the court of the place where the debtor has his principal establishment or place of business or where the debtor has his registered office. If the principal place of business or registered office is abroad, the procedure shall take place before the court where the debtor has his Centre of Main Interest, (COMI). Each state party has been given the responsibility for designating the competent court in commercial matters.

This is one of the provisions that leave the determination of the court in charge of commercial matters to domestic legislation.[50] Within the context of Cameroon, the High court has been given the huge responsibility to oversee matters relating to collective proceedings.[51] In the judicial organisation of courts, a high court shall be located in every division of Cameroon. This implies that the collective proceedings involving a bank would be heard in the high court that enjoys territorial jurisdiction over that bank. This measure is bound to decentralise the procedure and accelerate the treatment of the proceedings. This is a sharp contrast with proceedings that before now were heard by COBAC alone for all the banks within the sub-region.

The law maker has anticipated the possibility of proceedings that concern more than one member state or cross border proceedings. This is the case where the debtor has his registered office in one member state and his principal establishment or COMI in another member state. Such a situation may provoke issues of conflict of jurisdiction common in international or cross border insolvency. The Uniform Act provides a way out of this dilemma. Any enforceable decision pronounced in the territory of a state party in accordance with this Uniform Act, shall be *res judicata* on the territory of the other state party.[52]

[48] POUGOUE (P.G.), « Les figures de la sécurité juridique », 2007, *RASJ*, vol.4, No. 1, FSJP, UY II, pp.1-8.
[49] TENE (D.D.), « L'accès au juge et le droit des procédures collectives OHADA », Masters dissertation, University of Dschang, 2011, p.2.
[50] ANOUKAHA (F.), ' L'OHADA en Marche', *Annales de la Faculté des sciences juridiques et politiques, University of Dschang, Tome 1*, Yaoundé, Presses Universitaires d'Afrique, 2002, p. 20 ; SOH (F.D.R.), Le Débiteur à l'épreuve des procédures collectives d'apurement du passif de l'OHADA, Ph.D thesis, University of Dschang. 2012 P.43.
[51] This is contained in s.18 (b) (new) of Law N° 2011/027of 14 December 2011 to amend certain provisions of Law N° 2006/015 of 29 December 2006 on Judicial Organization in Cameroon.
[52] UACPCA, article 247.

It is also possible under the Uniform Act for several proceedings to be opened against the same debtor in different member states. While the main proceeding is in the state where the debtor has his principal place of business or registered office, the secondary proceeding is the one opened after the opening of a main proceeding and in a state other than the state where the debtor has his registered office or principal place of business. The main proceeding shall apply to all the assets of the debtor in the territory of state parties while the secondary proceeding shall apply to assets located in the state where the secondary proceeding is initiated.[53] The courts involved in the different proceedings are enjoined to cooperate as much as possible whether directly or through a trustee for the smooth conduct of the proceedings.[54] The trustees involved in the different proceedings are bound by the duty of mutual exchange of information concerning the status on filing, verifying of claims and measures aimed at putting an end to the collective proceedings[55].

The Court is Only an Exceptional Measure

The CEMAC regulation is categorical as to the exceptional nature of the procedures for preventive settlement and reorganisation. No procedure for preventive settlement or reorganisation shall be opened in favour of a bank placed under the regime for provisional administration or special restructuring. This provision appears strange given that before the competent court is seized with respect to collective proceedings the decision emanates from COBAC. The provision seems to express worry that even after provisional administration or special restructuring would have been initiated, COBAC can notify the court to carry out collective proceedings in total disregard of the restructuring going on. It is hard to know who this provision is actually targeting. It might be COBAC as well as the Monetary Authority. The provision may be intended to prohibit the Monetary Authority from by-passing the restructuring which is already going on and seizing the court. This fear may be legitimate given that the competent court to hear collective proceedings is the court of the place where the debtor has his principal office. The Monetary Authority of the place where the competent court is found may assume powers and act in total disregard. The provision may also intend to curb the powers of COBAC who though being the regulator may feel they can swap from one procedure to the other. Not even third parties can infringe this procedure.

An Unhealthy Cohabitation

As long as the legal landscape for banks' insolvency in Cameroon is defined by the existence of multiple regional groupings with overlapping and replicated provisions and institutions, efficiency will remain a mirage. Bank rescues cannot also be achieved in a situation where the constituent agencies are pulling in different

[53] UACPCD, article 251.
[54] Ibid. Article 252-1
[55] See generally article 252.

directions. The efforts of the regional bank regulators to sail distress banks out of troubled waters is weakened both by challenges common to most integration efforts as well as conflicts specific to the banking sector.

The Limits of Regional Integration

Roadblocks to regional integration for bank rescues in Cameroon could be general or specific giving rise to the same result.[56]

Institutional and Functional Overlap

There is a considerable overlap of the regional groupings, both institutionally and functionally.[57] This duplication of economic blocs is essentially of individual Country's own making. In the course of elaboration of laws, the probability of conflicts, contradictions and confusions are rampant. Multiplicity of organizations leads to wasteful duplication of efforts, increases the burdens imposed on member governments, and diminishes collective success.

Proliferation and duplication of functions give rise at the regional level, to conflicts over mandates and to divided loyalty among governments. At the government level they impose heavy financial and administrative burdens. Budgets and special accounts are mounting. As a result, their executive find it difficult to implement the tasks already assigned to them let alone plan for future activities.

Overwhelming Cost of Management

The institutions budgets are invariably too small for the tasks governments assign to them. Even if governments were to eventually pay, their contributions would not be sufficient to enable the executive to carry out their mandated tasks. Insufficient funding thus prevents institutions from making better use of the resources they receive.

There are other administrative and financial burdens on Governments. Most institutions are mandated by charters to hold several high level conferences annually. In any given year, these add up to a sizable agenda. CEMAC and OHADA conferences together with other regional and International conferences cost governments money, which cannot be justified by the benefits derived from them.

The Suppression of State Sovereignty

[56] MZUKISI (Q), 'the challenges of regional integration in Africa: in the context of globalisation and the prospects of a united states of Africa', institute for security studies, paper 145, 2007

[57] African development bank group, 'central Africa regional integration strategy paper 2019-2025, 2019, p.24.

In the process of regional integration, the factual attributes of sovereignty is lost.[58] This new global political structure makes obsolete the classical concept of a system of sovereign states to conceptualize world politics. Sovereignty becomes looser and the old legal definitions of the ultimate and fully autonomous power of a nation state are no longer meaningful. Barely one year after the formation of the OAU/AU, African States solemnly resolved against a revision of the colonial boundaries and endorsed the perpetuation of the status quo.[59] Extra-territorial application of policies is tantamount to unlawful interference in the internal affairs or an infringement of sovereign independence and equality of States. Nowhere has this attribute of sovereignty been more acute than in Africa. Sacrificing it in the interest of regional integration is easier said than done.[60] Sovereignty has become endemic to Africa and is greatly affecting even good intentions of the regional integration process.[61]

Absence of Political Will

The effect of failure to incorporate agreements reached by different integration schemes into national plans weakens the purpose of various zones. In other words, there have been the lack of full commitment or disparities in the level of commitment, because follow up of the decisions taken at the sub-regional levels, is left to the Head of State or to a few ministers or bureaucrats, without involving the private sector and the public and other stake holders. This has played down the value of the collective agreements or protocols arrived at to expedite trade and harmonize policies at sub-regional levels. Furthermore, there is the problem of arbitrary application of the laws by some unscrupulous court officials.

Absence of maintenance of basic infrastructure facilities such as the court, Information and Communication Technology (ICT), hampers effective sub-regional economic cooperation and slows down success in generating user savings, more competitive exports and cheaper exports. Lack of such infrastructures, is a detriment both to investments and the effective functioning of regional groupings especially in the banking sector.

Poor Access to Regional Institutions

There is usually little or no free access to regional institutions. The institutions belong to the community and access to them must be allowed for obvious

[58] OMOTAYO, O, 'challenges in achieving regional integration in Africa', keynote address, Southern Africa development forum on progress and prospects in the implementation of protocols in Southern Africa, UNECA-SA, Lusaka, Zambia, p.6

[59] This is by virtue of the Cairo Declaration on the intangibility of frontiers of 1964, as later reinforced by the Kinshasa Resolution on the respect for sovereignty and territorial integrity of Member States of 1967.

[60] Sovereignty came as the most precious benefit of independence after long years of colonial rule. Countries of Africa in particular are reluctant to relinquish that sovereignty for the purpose of regional cooperation.

[61] ILYAYAMBWA M., M., (2011), regional integration versus national sovereignty: a southern African perspective, nomos verlagsgesellschaft mbH, availa

reasons. One of the nerve centres of the OHADA region is the court. All final appeals from member states courts of appeals lie in the Common Court of Justice and Arbitration (CCJA) in Abidjan. However, the inaccessibility of this court to lawyers and litigants resident outside Abidjan, almost tantamount to a denial of justice. Not even the provision that, the court may meet in any member State with the latter's consent, can avail the fears of litigants. This provision gives no guarantee as it is only mandatory, leaving the decision of such meeting to the discretion of the court.

Integration Laws are Adopted and Implemented Out of Context

Excessive dependence of African economies on imported laws works against the viability and strength of sub regional economic cooperation, even when comparable alternatives are available within a sub-regional preferential arrangement. The elaboration of regional laws fails to take into consideration the contextual realities of the region. Most of the laws of CEMAC and OHADA including those touching the banking sector are French inspired. It becomes difficult for implementing organs to apply these provisions within a context not suited for it. Foreign laws should be used only as guidelines to inspire the elaboration of domestic laws.

Contradictions are set in by the complementary clauses provided by the various Treaties establishing the Organizations. Complementary clauses defeat the goal of harmonization as national laws are allowed to run simultaneously with regional laws. Disparities exist in the management of banks collective proceedings under OHADA by limitations placed by the CEMAC regulation.

Conflict of Jurisdiction

Konate[62] had noted that technicalities based on jurisdictional issues are leading to a protracted and ultimately ineffective insolvency process.[63] Judges spend an enormous amount of time dealing with the misinterpretation of jurisdiction issues. The involvement of two regulators in the management of the crises of a bank has further heightened the tension that exists in the intervening organs.

COBAC and the Monetary Authority

COBAC the regulatory and supervisory arm of the regional central bank[64] carries out prompt corrective actions to ensure that banks in the country and sub-region are adhering to instructions laid down by it, while the local ministry of finance does the

[62] INSOL Africa Roundtable tackles key market issues, Insolvency and Restructuring-International, (2010), p.3, available at https://www.insol.org/page/242/africa-roundtable, accessed in April 2022.
[63]The World Bank, 'strengthening financial regional institutions and intermediation in the CEMAC region', combined project information, 2018, available on www.worldbank.org, accessed in June 2022.
[64] MAYOUE (F.B.D.), *La BEAC dans le système institutionnel de la CEMAC*, Mémoire de DEA, Université de Dschang, 2010, p.57.

same in the member states. This arrangement however hampers both bodies from fully carrying out their duties. Firstly, COBAC is reported to have limited resources especially human[65] and considering the large geographical area that they cover they cannot always take prompt action to correct an anomaly in the system. Secondly, having two regulators may create problems with the demarcation of jurisdiction which may lead to a situation where certain areas may be neglected or even the possibility of duplicating roles. Considering the importance of prompt corrective action which in most cases serves to restore stability and confidence, having two regulators only goes to delay prompt action.

The Implementing Organs

Under the CEMAC regulation, the provisional administrator is the expert appointed to take over the running of the bank in restructuring. The secretary general of COBAC or his deputy proposes to COBAC a panel of at least three candidates among whom a choice is made. Where it is urgent, this proposal is dispensed with and the president of COBAC shall nominate a provisional administrator pending ratification by COBAC.[66] The list of potential provisional administrators is prepared by the Monetary Authority or failing which COBAC does so.[67]

The provisional administrator is a physical person, qualified expert and endowed with ethics required by banking regulation for delivery of licences to exercise duties at the head of a bank and must not be the object of condemnation, incompatibilities, deficiencies, and restrictions by the banking regulation.[68] Under the UACPCD, the judicial administrator is required to be a certified public accountant or be empowered by national legislations. These technical requirements seem conflicting. COBAC requires specific qualities in the provisional administrator by reason of the sensitive and peculiar nature of the banking enterprise. The need for a bank expert is more crucial at the time the bank is in distress. It is doubtful if the judicial administrator required to handle the rescue of ordinary companies is sufficiently qualified to handle a bank rescue. It may be necessary for pragmatic reasons for CEMAC to require that the expert appointed by the court to manage the preventive settlement or reorganisation of the bank should be the provisional administrator as defined under the CEMAC regulation.

The appointment of the provisional administrator terminates the powers of the board of directors and the chairman. He is transferred the powers of administration, direction and representation of the enterprise. He undertakes the daily running of the enterprise by virtue of powers conferred on him by the shareholders with the aim of

[65] International Monetary Fund, 'Report on the Observance of Standards and Codes (ROSC): Cameroon', 2000, available on www.imf.org. Accessed in June 2022.
[66] CEMAC regulation, article 28.
[67] Ibid. Article 29.
[68] Ibid. article 30.

returning the bank to normal conditions of functioning. The Uniform Act on the other hand clearly states that no judicial administrator may represent or advise one of the parties either the debtor or his creditors in bankruptcy proceedings in which he is appointed. The judicial administrator acts as a facilitator for the negotiation of the composition plan proposed by the debtor. But in the course of his activities, he carries out important duties for the debtor company which is similar to administration and representation. The precision of the OHADA regulator in this provision is to emphasise the neutrality and independence of the judicial administrator as much as possible as both parties are concerned. The Uniform Act requires him to be independent, neutral and impartial. He must both provide collateral securities to these three requirements as well as attest to it by signing a declaration of independence neutrality and impartiality.[69]

The same conditions of incompatibilities apply to the provisional administrator as the judicial administrator under the UACPCD. The provisional administrator can get assistance by consulting an expert firm, an independent expert, an employee or other person recruited to this end. Such a person would be appointed deputy provisional administrator. COBAC must be informed through application of the provisional administrator of reasons why he needs an expert or assistant. The judicial administrator on the other hand may be assisted by any individual of his choice.[70]

Hybrid Jurisdictions

The problem of hybrid jurisdictions in the treatment of ailing banks has created unnecessary conflict of jurisdiction.[71] The cohabitation of OHADA and CEMAC laws and institutions has not helped matters in the safe exit of insolvent banks with each institution insisting on the prevalence of its own laws.[72] The conflict of law and jurisdiction that existed[73] with respect to the resolution of bank insolvencies had led to unforeseen hurdles which stretched the duration of the proceedings far beyond the anticipation of the law maker.

[69] UACPCD article 4-1.

[70] Ibid article 4-6.

[71] In the liquidation procedure of a bank, the regional law makers had envisaged the appointment of two liquidators, one by COBAC and the other by the court. In the exercise of their function was common for these organs to get into the way of each other. MEDAMKAM (T.S.J.), *La sécurité du déposant dans le système bancaire de la CEMAC*, mémoire de DEA, l'Université de Dschang, 2006, 46-48. Medamkam noted that the co-existence of two liquidators in the liquidation of a bank exposed the ambiguity with respect to their precise terms of reference. The CEMAC law maker had provided that the COBAC appointed liquidator will handle the liquidation of the business entity of the bank while the court appointed liquidator will handle the other remaining assets of the company (The Convention on the harmonisation of banking regulation in CEMAC, 1992, article 17). There was also uncertainty as to what constituted 'the other assets' of the insolvent bank outside the business entity. See also KELESE (N.G.), Regional integration laws and banking security in Cameroon, Ph.D, thesis, University of Dschang, 2013, pp.425-430.

[72]This same difficulty had been identified within the UEMOA. DIENG (S.), *Procédures de sauvetage et coexistence de normes dans l'espace OHADA : le cas des établissements de crédit,* thèse de Doctorat en Droit, l'Université Toulouse 1 Capitole, 2014 P.1.

[73] It should be recalled hear that within the CEMAC zone, this conflict has been resolved. See Regulation No 02/14 /CEMAC/UMAC/COBAC, article 114.

In the abstract to her thesis, Salimata Dieng[74] captures this regrettable conflict that regional integration has imposed between the *Union Monétaire Ouest Africaine*, UMOA and OHADA. Due to the danger caused to the economy by systemic crises, and in keeping to the requirement of the World Bank concerning the insolvency of banks, UMOA has elaborated a number of special rules pertaining to the prevention and treatment of difficulties in banks. These rules contradict portions of OHADA laws which regulate the prevention and treatment of crises of enterprises including banks.

In *Société Civile immobiliere GUENET (SCI GUENET) c/ Liquidation de la Banque Meridien BIAO Cameroun (Liquidation BMBC),*[75] the plaintiff sought to obtain the cancellation of an order of nullity delivered by the insolvency judge in the sale of land, asset of BMBC liquidation, to the plaintiff by the co-liquidator appointed by COBAC. BMBC was admitted to liquidation on the 7th of November 1996,[76] and acting through its liquidator sold a piece of land, the object of the dispute, to the plaintiff on the 30th of December, 1997. In 2010, the court-appointed co-liquidator filed and obtained a decision from the official receiver nullifying the said sale of land on grounds that it was conducted in violation of articles 150 and 151 of the UACPCD, (i.e., without the prior authorisation of the official receiver). Amongst the key issues raised in their arguments, the plaintiffs challenged the jurisdiction of the insolvency judge in the conduct of insolvency proceedings involving a bank. They indicated that the official receiver was the creation of OHADA and that apart from the fact that the law cannot apply retrospectively, the proceedings of insolvent banks was governed by COBAC regulations[77] harmonising banking activities within CEMAC and its annexes; that the COBAC regulation does not make mention of an official receiver, talk less of his functions and that the decision admitting BMBC to liquidation was done in accordance with COBAC regulations and did not appoint an official receiver. Consequently, the liquidator had been guided by the COBAC regulations when the sale was concluded.

After considering the arguments of parties involved, the court held dismissing the petition that, the plaintiff cannot rely on the error in the decision to foster an illegal cause and that since the notarial deed of sale of land had no evidence of the authorisation of the official receiver, the latter was right to treat it as nullity. The proliferation of regional organisations though laudable may be an indicator of the failure of African states to genuinely commit to a single, well-thought-out and implementable program.[78] The competing objectives and programmes of these

[74] DIENG (S.), op.cit., p.1.
[75] TGI du Wouri, Jugement Civil No 082/Com du 08 Avril 2013.
[76] TGI du Wouri, Jugement Civil No 117 du 07 Novembre 1996.
[77] Convention of 17th January 1992.
[78] FAGBAYIBO (B.), "Exploring legal imperatives of regional integration in Africa": the comparative and international law journal of Southern Africa, 2012, pp. 64-76.

institutions ensure that member states are unable to wholly adhere to the supranational programmes of the various institutions they belong to. This lack of coordination provides an avenue for non-commitment to supranational objectives.

Conclusion

Past efforts at regulation of banking crisis have often focused on protecting depositors against preserving the bank as a going concern. Maiden texts on the subject reveal the fear of the CEMAC regulator to hamper on this delicate sector of the economy. The tendency today however is to elaborate more debtor friendly provisions with the aim of rescuing the distress enterprise. The OHADA legislator as early as 1999 had laid down debtors friendly procedures in an attempt to rescue most of the ailing firms under its jurisdiction. It was high time for credit establishments to align with the rest of the corporate sector by removing barriers to the bank's chances of survival. The six member states of CEMAC being members also of OHADA indicated that the CEMAC regulator did not need to search too far to find the solution. The coexistence of these two institutions in the management of distressed banks has raised more conflicts than complements. A lot has to be done to translate the good intentions of the regulators into desired results. For this to happen, the independence and autonomy of CEMAC and OHADA from influence of Member States must be guaranteed; the terms of reference of the intervening organs in the procedure must be clearly defined and respected to curb overlap and jurisdictional issues; shorter timeframes should be provided for acts carried out by the parties involved in the procedures; COBAC should be ready to make compromises in favour of the court given that they are the ones needing the services of the court; the regulator should be hard on sanctions against any authority who acts in a manner that jeopardises the success of the procedure; human resource at COBAC should be improved upon to facilitate on the spot checks to banks within its jurisdiction and for early detection of crisis.

Most of these recommendations would require the commitment and willingness of member states governments and that of Cameroon in particular to translate the regional aspirations into national reality

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