**REMEDIES AND ADMINISTRATIVE REVIEW IN AWARD PROCEDURES FOR PUBLIC PROCUREMENTS IN SELECTED AFRICAN COUNTRIES**

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1. – The origin of the research and the questionnaire

Not much scientific literature is available on public procurement remedies in African countries[[1]](#footnote-1). The present research started with a questionnaire distributed to some students and former students of master programs organized by the University of Torino and the ITCILO (the training centre of the ILO, an agency of the UN) on public procurements management for sustainable development[[2]](#footnote-2).

A questionnaire was prepared (annexe 1), both in English and in French, with the idea of covering the main issues of a remedies system but also to use a case method[[3]](#footnote-3) for testing the effectiveness of remedies in similar situations. However, the case method was coupled with some systematic questions, with inevitable reference to a doctrinal language: we are well aware of the flaws this part of our questionnaire may imply, but we were backed by two main reasons. First, the language problem was reduced, since all participants were very skilled in French or in English and, above all, their legal systems use those two languages as official languages (e.g. the UEMOA countries use French officially, as well as UEMOA directives themselves are officially written in French). It is true that using the same language does not mean having the same legal institutions, but undoubtedly that helps to avoid the problems which could be generated by comparing dogmatic questions in different languages. Secondly, we felt that in order to understand how a remedies system works in a foreign country it is also necessary to have a hint of the main institution involved, and the description of institutional design can hardly be achieved just based on a case method. That is because (i) judicial cases mainly resolve litigation between parties and rarely inquire into institutional mechanisms (for an example drawn from constitutional law, it is almost impossible to find a Court decision about the vote of confidence between the Parliament and the Government) and (ii) even if a sufficient number of cases were available, it would have taken too much questions in order to provide a full picture of the whole system.

The choice of respondents was another tricky point in our methodology. We were faced with a high number of former participants to the two masters, coming virtually form every African country, but we were not sure about who would have answered and with what degree of accuracy. This is why we decided not to make a selection, nor to target the questionnaires, but to send them out to all African present and former participants in the two Masters, both the French and the English one, hoping to cover the wider possible range of African States. The result was not a complete success in terms of quantity because, after a long exchange of emails, we finally received nine full and reasoned answers to our questionnaires, covering eight African countries[[4]](#footnote-4) (two were from Burkina Faso). Out of them, six were from French speaking countries (Benin, Burkina Faso, Congo Brazzaville, Mauritius, Madagascar and Togo) and only two from English speaking countries (Sudan and Tanzania). All these countries are member States of the African Union (AU). Among its objectives, the African Union is committed to coordinate and harmonize the policies between the existing and future regional economic communities (RECs) for the gradual attainment of the objectives of the Union (art. 3, letter “l” of the Constitutive Act of the African Union)[[5]](#footnote-5). Several regional economic communities exist in Africa: “Africa’s RECs do not only constitute key building blocks for economic integration in Africa, but are also key actors working in collaboration with the African Union (AU), in ensuring peace and stability in their regions”[[6]](#footnote-6). Out of the six reports coming from French speaking countries, three are from Economic community of west African States (ECOWAS) countries (Benin, Burkina Faso and Togo). The same three countries are also part of the west African economic and monetary Union (UEMOA), which is a sort of subgroup of ECOWAS representing a more integrated unit within it[[7]](#footnote-7).

Even if not explicitly pursued, the result was to have a representation of countries, both from Common law and from mainly Civil law systems[[8]](#footnote-8), which we considered a well-balanced starting point. On the other hand, the “random” choice of countries to be analysed was not only a weakness of our research, due to the lack of homogeneity, but also a key factor because we avoided any bias in the choice of models to analyse, which is often a common mistake in comparative law. The “random” nature of the chosen models will be however reduced in the future, thanks to the participation of the new Master classes to the questionnaire, which will be handed out while students attend the course and thus will presumably produce a higher level of answers.

2. – The result of the general part of the questionnaire: characters, sources, types, rules, defence rights and effectiveness

The six general questions of the questionnaire, covering the main features of any remedies system in public procurements, may be resumed in the following four points, which will be followed in order to highlight the legal systems of African countries covered in this paper. The aim is not to simply offer description of different legal systems of public procurement, but to find common features, if any, and to describe the main common models, in order to compare them with other external models, coming from international or regional institutions.

2.1. – *Characters of the legal system (Common law vs. Civil law) and main sources of public procurement legislation*

Out of our eight African countries, only one declared its complete adherence to a common law system (Tanzania) while the others are mainly following a French oriented civil law model, with two exceptions for the Mauritian mixed model (Civil law for substantial law and Common law for procedures) and Sudan (Civil law and Islamic law).

What is however most interesting are the answers to questions which reveal the influence of external legal systems onto the national legislation regarding public procurements. The most evident influence is that of UEMOA directives onto the three countries which are members of it (Benin, Burkina Faso and Togo): in all three cases directive UEMOA n. 5/2006 is often cited as the main source for remedies in public procurement local legislation (always inserted in the local public procurement code – code des marchés publics)[[9]](#footnote-9). The Benin report informs us that directive UEMOA 5/2006, on remedies in public procurement, is presently undergoing a process of reformation and is thus likely to be modified soon, with consequent amendment of all the UEMOA countries remedies system[[10]](#footnote-10).

Another important source for national legislation on remedies in public procurement in undoubtedly the UNCITRAL 2011 model law, which was in fact cited in most of the national report as a source of reference in the construction of the national remedies system[[11]](#footnote-11). As it will be seen more extensively later, the African States following the UNCITRAL model law applied all the options included in the model law, introducing a three levels system of remedies including the recourse with the contracting authority and/or a hierarchical recourse, then the recourse with an independent authority and finally, only in case of dissatisfaction also with the decision of the independent authority, a final recourse with a judicial authority. However, in certain cases (Togo), after the introduction of the second level of remedy (recourse with the independent authority), the judicial authority was never more addressed by dissatisfied supplier[[12]](#footnote-12).

Donors rules, in particular African Development Bank and World Bank are another source of law for remedies legislation in the African countries covered in this paper. Even if the questionnaire was sent out before the new World Bank procurement regulations for IPF borrowers, published in July 2016, some African countries were already applying the previous version of such regulations. In particular, Sudan and Tanzania stick very much to World Bank rules, also in the “architecture” of their remedies system, distinguishing between appeals before intention to award and after intention to award, along with a well established World Bank pattern[[13]](#footnote-13). International donors’ influence on national legislation about remedies can also be realized through studies and evaluation on countries which receive donations, which are often ranked according to the reliability of their public procurement system, included remedies regulation. This is the case, for example, of Congo Brazzaville, whose new public procurement code of 2009 was strongly influenced by a study commission financed by the World Bank and the International Monetary Fund, particularly focused onto the fight against corruption. The effects of this reform were subsequently assessed by the bank in order to evaluate the effectiveness of the reform[[14]](#footnote-14).

Finally, donors rules can also be applied instead of national rules, thus creating a double remedies regime: one for State financed public procurements and another for public procurements financed by international donors[[15]](#footnote-15). The questionnaire did not address this specific point, which is therefore not clearly developed in national reports. However, it seems that in African countries covered by the reports there is not a double remedies regime, since only national remedies were cited. In any case the analysis on this point will certainly have to be deepened in future questionnaires.

2.2. – *Type of remedies afforded to the dissatisfied bidder and rules buttressing the independence/impartiality of the institution competent to grant the remedy, setting its powers and their limits, duration and costs of the procedure*

With an amazing homogeneity, all countries covered in this research but one (Sudan[[16]](#footnote-16)) present a three-layer system of remedies, the first layer being an application for reconsideration, be it before the same contracting authority (CA) and/or with a hierarchically higher administrative body; the second a recourse before an independent administrative agency and the third a recourse before the judicial Authority. At first sight, the scheme followed is the same proposed by the UNCITRAL model law of 2011[[17]](#footnote-17), which however suggests the availability of an application of reconsideration with the same CA and then, alternatively, a recourse before an independent body or before the Judicial Authority. Instead, through a sort of “over-implementation” of the UNCITRAL model law, the countries covered in this paper have chosen to supply dissatisfied bidders with both options after the application for reconsideration, giving them the possibility to file a recourse with a non-judicial independent authority and, after that, before the judicial authority[[18]](#footnote-18).

Very often, the first layer is further composed of two steps: the first being strictly speaking an application for reconsideration before the same CA, while the second is a hierarchical recourse before a higher administrative body.

The third layer, the one before the Judicial authority, is the one which attracted the lower level of attention from our national rapporteurs, who considered it as something given and, it seems, not so much efficient particularly for reasons of costs and length of the procedure[[19]](#footnote-19). The only relevant difference among the countries examined is that in French speaking countries with a French-like judicial system, the judicial authority competent for recourses in public procurement sector is the administrative judge, while in the common law countries (Tanzania) and mixed systems (Mauritius) it is not.

More attention is given to application for reconsideration with the CA (in French: “recours gracieux”), which in some cases are doubled with appeals to a higher administrative body (hierarchical recourses). Both are parts of the so-called “recours préalable”. In the case of hierarchical recourses, the independence of the deciding persons is not required (and would not be possible), as the recourse is more perceived as the participation of interested parties into the same procedure of awarding the contract. It almost always happens that application for reconsideration with the CA entails automatic suspension of the award (e.g. it is so in all UEMOA countries, due to the specific provision of art. 10 directive 5/2005), but this feature is justified with a very short deadlines for filing the application (five working days from the publication or notification of the contested decision) an for the CA to decide (another limited number of working days). In almost all the French speaking countries (not necessarily UEMOA members) the law provides for a Person responsible for public procurement (PRPP) who sometimes is a technical expert, while other times is a political appointee (e.g. in Madagascar[[20]](#footnote-20)) and deals as representative of the CA also in case of appeals. In Congo Brazzaville, the appeal must be addressed to the PRPP, who is previously identified by law and is authorized to take final decision, subject to challenge through a hierarchical appeal.

The most interesting layer is surely the second, that is the one before the independent administrative agency. Every African country covered by this report has an independent administrative agency with the power to settle public procurement litigation[[21]](#footnote-21). Each authority has obviously not only a different name, but also a different composition and different powers. However, all of them have become a permanent feature in the remedies system for public procurement. Judging from the reports received, it seems they begin to be perceived as the best level for administering complaints of dissatisfied bidders, better than judicial Courts. Moreover, their decisions seem to be more accessible than the judicial ones, this as a result of independent administrative agency’s transparency efforts. Their websites generally include a section specifically dealing with publishing and making available their decisions[[22]](#footnote-22). However, the collection of decisions is not always periodically updated. Other times, texts of decisions are not available or downloadable (this is in particular the case of the platform putting together the public procurement data coming from the eight member States of UEMOA)[[23]](#footnote-23).

2.3. – *Defence rights granted to the applicants and to the opponent (the bidder having being awarded the contract or the preferred bidder)*

The level of defence rights is of course varying in relation to the authority where the defence rights have to be provided: they are lower at the first stage (application for consideration before the CA) and they are maximum when litigation arrives before the judicial authority. However, following a pattern already noticed in previous paragraphs, our national rapporteurs do no spend too much words for describing the rights given to aggrieved parties in the Judicial process, considering it as granted, while describing more accurately the other two phases and particularly the one before independent agencies.

In the first layer, namely the application for reconsideration and the appeal to a higher administrative authority, the right to hearing, to lodge written memos and to a reasoned decision are widely recognized, while the right to have access to all the documents of the procedure is more controversial. In some cases, it is not recognized and it is up to the CA or the higher administrative entity (in case of hierarchical recourse) to decide, while in other cases it is granted.

The second level or remedies provided by the jurisdictions examined consists of an appeal before and independent non-judicial authority. In this case almost all the guarantees typical of a judicial recourse are granted to the dissatisfied bidder and to the opponents but, again, access to documents is controversial: Togo does not grant it for appeals before the CRD, nor Mauritius for appeals before the IRP. However, that does not mean the access to documents is always denied, but only that it is at the discretion of the authority.

In both cases of application for reconsideration and appeals to an independent body, the UNCITRAL model law, art. 68, suggests to grant to applicants the right to be present, represented and accompanied at all hearings during the proceedings; the right to request that any hearing take place in public and the right to seek access to the record of the challenge proceedings, subject to the provision of article 69 which states some exceptions in order to protect confidentiality. According to UNCITRAL, thus, the right to have access to documents is the only which can be limited, even if it must be recognized in general, and that can perhaps explain the different solutions given by the several countries covered in this report. On the other hand, the UNCITRAL model law provides with the same rights both applicants in a reconsideration procedure before the CA and applicants for an appeal before the Independent body, while what happens to the countries examined in this paper is that in the first case rights granted to applicants are fewer than in the latter.

3. – The result of the case method part of the questionnaire

The second part of the questionnaire included two cases to which the national rapporteurs had to reply, explaining what would have been the result of the recourse in their legal system. The two cases were the following:

**CASE 1**. A contract for a standard built school was directly awarded to company A without the contract being advertised and without any urgency or other justification for direct award. Company B would have been ready to take part in a competitive procedure. What are the remedies available to company B? More specifically, to which avenue it may have recourse. What would be the types of remedies? Would this include interim relief, such as staying the contract implementation? If yes under which condition? Would the remedies change if the contract was already executed before the final decision is taken by competent institution? What would be the average times and cost to get to the decision? Would anything of the above change is company B is from outside the country?

**CASE 2**. A contract for chauffeur-driven car and minibus service for members of the Parliament. Under invitation to tender, the contract was to be awarded to the tender offering best value for money assessed on the weighted criteria concerning not only the price, but also vehicle fleet provided (quantity and quality), measures taken or specific to the vehicles to meet environmental requirements, staff social policy. Company B, that was placed second, claim that the first placed tender has an inferior quality. How have bids been evaluated? What is the authority/institution which can be entered by company B? (e.g. Court, independent authority, someone or board in higher position in the procuring entity, etc.). What are its powers? More specifically, is the authority/institution competent to review the application of the qualitative and functional award criteria? What type of control/check can it do? (e.g. judicial review may be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers, or it can substitute its appreciation to the one of the decision maker – substitutive control). What is the expertise of this institution? Is it specialised in public procurement? (e.g. administrative judge could not be specialized in procurement). Can it avail itself of expert witnesses?

Answers to case n. 1 were surprising in the sense that the only two countries without a French legal tradition (Sudan and Tanzania) were very neat in excluding any possible way of recourse for company B, on the basis of the fact that it did not participate to the procedure and thus was not qualified for any remedy. Not even a request for damages. Madagascar, for its part, excluded the possibility of a recourse for annulment of the contract, but not an action for damages, to be filed within 20 days from the signature of the contract. That is probably due to the fact that Madagascar does not admit the possibility of annulment of a contract once it has been concluded, even if it has not yet been executed. All the other countries admitted a remedy for annulment, following the three-layer system described above: before the CA (and in certain countries also before the higher administrative authority), then before the independent administrative authority and finally before the judicial authority. Possibility of suspension of the contract form being executed is admitted, unless the contract is already in an advanced state of execution, in which case only an action for damages is allowed, and only before the judicial authority (Benin). When the answer was given, time for a decision was assessed between 20 and 30 days and cost negligible.

Answers to case n. 2 were more homogeneous because all jurisdictions covered in this paper admit remedy in the case described, following the regular three-layer system. Also the possibility to ask for external experts is admitted by all, with the only obvious specification that experts cannot participate to the decision but only advice the independent administrative authority or the judicial authority. Where differences arose was on the most delicate point of the question, namely the type of control which the authority (be it administrative or judicial) is empowered with: in some cases (Benin) the rapporteur declared that the addressed authority can only annul the decision and order the CA to reassess the bids, without any possibility to substitute its judgment to that of the CA, while in other cases (Tanzania, Madagascar) it was explicitly stated that the authority could substitute the CA and decide himself which bid was best on the basis of the full documentation presented by bidders. The fact that this second option was chosen indifferently by Common law and Civil law countries does not help in finding the real reason, even if perhaps one can also take into account the possibility of some difficulties encountered by the rapporteurs in fully appreciating the difference between the two options, which in fact is perhaps one of the most difficult points to be resolved in any remedies system because it involves the hard question of Separation of powers[[24]](#footnote-24).

4. – A striking regularity: the growing role of regulatory bodies

The comparative analysis so far presented shows one element which seems to us of the utmost interest, namely the presence in all the jurisdictions covered by this paper of an independent administrative agency for the management of appeals against decisions of the CAs. Since we have chosen the respondents of our questionnaire in a random way, this result is not the result of a tailored selection of countries but can be considered well representative of a widespread reality in Africa. This reality can be assessed against the European situation where only a slight majority of member States has established specialised public procurement review bodies to manage the review procedures[[25]](#footnote-25).

If one tries to find out the reasons for such a striking regularity, UNCITRAL model law can be identifies as one of the most likely and powerful source of influence: as it was seen in previous paragraphs, Article 65 of the UNCITRAL model law provides for a scheme of review procedures where, after an application for reconsideration before the CA, the dissatisfied bidder can address his complaint to an independent body or to a Court and article 66 describes the procedure before the independent body. Also directive 5/2005 UEMOA provides for the recourse before an *Autorité de recours non juridictionnelle* and describes not only the procedure but also the composition of the authority.

The composition of the authority is an important feature for granting its independence, or at least its autonomy, and more generally, for characterizing the nature of the authority. As we have seen, UNCITRAL model law does not suggest anything about the composition, while directive UEMOA 5/2015, article 12.3, says that the authority is composed of members of the administration, of the private sector and of the civil society, recognized for their professionalism, independence and representativeness, and this definition entails at least two considerations.

The first is that the UEMOA model for the composition of independent authority seems to have a certain prestige also outside UEMOA, namely in other French speaking African countries because it is in fact adopted also by Madagascar and Congo Brazaville, which are not member of UEMOA. In Congo Brazaville, le *Comité de règlement des différends* is composed of six members taking part of the *Conseil de Régulation* which on his turn is composed of nine members, drawn from the administration, the private sector and the civil society; in Madagascar as well, the *ARMP* is composed of four members, one of which come from the civil society and one from the private sector. It would be very interesting to know if the circulation of the UEMOA model was due to prestige reasons, or other reasons, but it is however interesting to notice it.

The second consideration is the presence of the “*representativeness*” among the elements to be looked after in the selection of the components of the non-jurisdictional authority. Usually, independent authorities are characterized by their independence and technical competence[[26]](#footnote-26), and not for their representativeness, which is a feature typical of political bodies, very far from the standard image of independent administrative bodies[[27]](#footnote-27). However, directive 5/2005 UEMOA introduces this element, which can perhaps be perceived as an attempt to move the independent authority closer to the needs of the economic operators working in the field of public procurements. At a more general level, such a model can perhaps be traced down to a Corporatism model of economic system, where the economic groups of interest are represented in the administrative and political bodies in order to protect their interests, in a revival of the *ancien régime* idea of political representation (through intermediate organizations).

Moving to the powers of the independent authority, they include the suspension (when it is not automatic) and the annulment of the contested decision if the authority finds it is contrary to law or regulation, which is coherent both with the UEMOA and with the UNCITRAL models. Also the possibility to overturn concluded contracts is pretty widespread in the countries covered by this paper, following the new UNCITRAL model law 2011 which goes in this direction, moving from the 1994 model law which on the contrary did not allowed setting aside concluded contracts[[28]](#footnote-28). In most countries examined, the recourse to the independent authority suspends the challenged administrative act, at least if the authority decides in a certain time span, after which the suspension is terminated, and time limits are very tight (usually from 7 to 15 days).

Annexe.

Questionnaire: Supplier Remedies And Administrative Review In Public Procurement

1. Please outline the main *characters* of remedies in your country (e.g. common law or civil law approach or mix, including specific local elements if any) and this both generally and with specific reference to remedies against public authorities and entities
2. Please indicate the legal *sources* of remedies to the disaffected bidder or (potential) participant in public procurement cases (e.g. Constitution, general rules for remedies, general rules for remedies against public authorities and entities, specific rules concerning public procurement cases etc.); please, if the rules have been changed in the past decade also indicate whether this was due to some international pressure (including donors) and/or adopting foreign models (incl. from neighbouring countries or from UNCITRAL or similar institutions) perceived as corresponding to best practices;
3. Please outline the *types* of remedies avenues open to the disaffected bidder or (potential) participant in public procurement cases (judicial remedies, appeal to an independent authority, appeal to someone or board in higher position in the procuring entity, appeal for reconsideration to the decision maker) and the connection(s) between different avenues if more than one is foreseen
4. Please for all relevant types give info as to the *rules* buttressing the independence/impartiality of the institution competent to grant the remedy (e.g. personal qualifications of the members/components, tenure security, pay etc.), setting its powers (e.g. annulment of the award decision/contract, stay of the procedure, damages, etc.), and their limits (e.g. whether the competent institution checks formal irregularities only; whether it can assess the merits of the different tenders/bids), duration and costs of the procedure
5. Please outline the *defence rights* which are granted to applicant (e.g. right to access to the file of the award procedure, right to legal representation; right to fair hearing, right to lodge written pleading, right to a reasoned decision); are similar rights granted to the opponent (the bidder having being awarded the contract or the preferred bidder)?
6. Please assess the overall *effectiveness* of the remedies mechanism(s) and in case reform proposals to change the present arrangements and its reasons (incl. international pressure and/or desire to adopt foreign models)

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| --- |
| Please answer the following questions concerning two different cases. For every answer please provide the necessary references, incl. legislation, cases, literature *etc.* |

1. CASE 1. A contract for a standard built school was directly awarded to company A without the contract being advertised and without any urgency or other justification for direct award. Company B would have been ready to take part in a competitive procedure. What are the remedies available to company B? More specifically, to which avenue it may have recourse. What would be the types of remedies? Would this include interim relief, such as staying the contract implementation? If yes under which condition? Would the remedies change if the contract was already executed before the final decision is taken by competent institution? What would be the average times and cost to get to the decision? Would anything of the above change is company B is from outside the country?
2. CASE 2. A contract for chauffeur-driven car and minibus service for members of the Parliament. Under invitation to tender, the contract was to be awarded to the tender offering best value for money assessed on the weighted criteria concerning not only the price, but also vehicle fleet provided (quantity and quality), measures taken or specific to the vehicles to meet environmental requirements, staff social policy. Company B, that was placed second, claim that the first placed tender has an inferior quality. How have bids been evaluated? What is the authority/institution which can be entered by company B? (e.g. court, independent authority, someone or board in higher position in the procuring entity, etc.). What are its powers? More specifically, is the authority/institution competent to review the application of the qualitative and functional award criteria? What type of control/check can it do? (e.g. judicial review may be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers, or it can substitute its appreciation to the one of the decision maker – substitutive control). What is the expertise of this institution? Is it specialised in public procurement? (e.g. administrative judge could not be specialized in procurement). Can it avail itself of expert witnesses?

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1. With the exception, of course, of the book edited by G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013. [↑](#footnote-ref-1)
2. In particular, this paper was written thanks to the collaboration with Holacio Amevoh, Kelly B-Kode Présidentielle Banimba, Richard Théodore Combary, Anand Mudhoo, Maria Gabriel Mushi, Harisoa Nathalie Rakotomalala, Rita Mireille Ravelomanalina, Allou Saka, Almahi Suliman Adam Saeed, Gaston Yameogo. [↑](#footnote-ref-2)
3. The methological reference is to the “Common Core” project, launched in 1957 at Cornell University by R.B. Schlesinger, which was based on questionnaires referring to specific cases and asking the respondents about the results that would be reached under those circumstances. A synthesis of Schlesinger method can be found in R. B. Schlesinger, *Formation of Contracts - A Study of the Common Core of Legal Systems: Introduction*, 2 Cornell Int’l L. J. 1, 1969, 49-50, and for a more recent comment see: U. Mattei, « The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence », *in* A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Oxford, 2001, 238-56. [↑](#footnote-ref-3)
4. By the way, it is interesting to note that the African countries covered in our research are all different from those described in G. Quinot and S. Arrowsmith book, which was a lucky result of our “random” method. [↑](#footnote-ref-4)
5. https://www.au.int/web/en/constitutive-act. [↑](#footnote-ref-5)
6. http://www.un.org/en/africa/osaa/peace/recs.shtml. [↑](#footnote-ref-6)
7. S. Page and S. Bilal, *Regional Integration in Western Africa. Report prepared for and financed by the Ministry of Foreign Affair, the Netherlands*, 2001, available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4628.pdf, 6. The economic integration has always been deeper in UEMOA than in ECOWAS. This overlap shows that none of the two communities existing in this region can claim to be the sole regional integration organisation. “There is no necessary problem in having two levels of region”, i.e. a deeper unit within a broader regional economic community. [↑](#footnote-ref-7)
8. The reference to Civil law or Common law system is of course used only as a main and not accurate distinction, since most of the considered countries’ legal systems are influenced by Islamic law and by other legal families. [↑](#footnote-ref-8)
9. Art. 11 and 12 (chapter 2 « les recours ») of the directive 05/2005/UEMOA « portant contrôle et régulation des marchés publics et des délégations de service public dans l’Union Économique et Monétaire Ouest Africaine ». [↑](#footnote-ref-9)
10. The directive 5/2005/UEMOA, « portant contrôle et régulation des marchés publics et des délégations de service public dans l’Union économique et monétaire Ouest Africaine », article 11, deals with the recourse before the CA, which must be filed within five days from the publication of the contested decision and has an authomatic suspensive effect. Art. 12 addresses the recourse before a non-judicial authority, which must be filed within two days from the notification of the decision of the CA, or in case of silence of the CA, within three days from the notification of the recourse according to article 11. The authority is composed of experts from the administration and from the private sector and the civil society, who must be independent from the CA and must be chosen not only for their expertise, but also for their representativeness. The directive provides for certain procedural guarantees before the non-judicial authority and states that it must seek a friendly solution between the parties, having however the time limit of seven working days. After the time limit is expired, the recourse with the non-judicial authority has not any more the consequence of suspending the effect of the award. Article 12 finally states that member States shall provide for a judicial review of the non-judicial authority in a short time (*à bref délai*). [↑](#footnote-ref-10)
11. The influence of UNCITRAL 1994 model law onto remedies system of African countries is highlighted also by G. Quinot, « A comparative perspective on supplier remedies in African public procurement systems », *in* G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013, p. 314-315. [↑](#footnote-ref-11)
12. But in the case of Togo the reason is also that judicial relief is ineffective due to the fact that it takes a lot of time and also very costly. [↑](#footnote-ref-12)
13. See annexe III of World Bank procurement regulations for IPF borrowers (July 2016). [↑](#footnote-ref-13)
14. BAD, *Rapport principal d’Evaluation des procédures nationales de passation des marchés pour les appels d’offres nationaux dans le cadre des projets financés par la Banque.* Brazzaville: Département des Acquisitions & Services Fiduciaires - Division des Acquisitions, 2012. [↑](#footnote-ref-14)
15. G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013, p. 315-317. See also A. La Chimia, « Donors’ influence on developing countries’ procurement systems, rules and markets: a critical analysis », *in* G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013, p. 219-260, particularly pages 231 ff., which highlights different assessments of international donors’ policies in the field of public procurements, both from the point of view of economic efficiency and of political and legal fairness. The conclusion is that donors’ practices that impose burdens on the aid management capacities of partners countries need to be detected and, at best, reduced to guarantee the success of aid policies. [↑](#footnote-ref-15)
16. Sudan has an only two layers system: the bidder who decide to challenge a decision should first put the challenge before the procuring entity. The procuring entity shall respond within 30 days. If the procuring entity refuses the challenge or its new decision is not satisfying the person who makes the challenge then should be appealed before the remedies committee. The committee shall make its decision within thirty days. The decision of the committee is final and enforceable by Courts. [↑](#footnote-ref-16)
17. UNCITRAL model law on public procurement (2011), chapter VIII - Challenge Proceeedings, art. 64: « Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 66 of this Law, an application for review to the [*name of the independent body*] under article 67 of this Law or an application or appeal to the [*name of the Court or Courts*] ». [↑](#footnote-ref-17)
18. The same happens in the African countries covered in G. Quinot, « A comparative perspective on supplier remedies in African public procurement systems », *in* G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013, p. 314-315. [↑](#footnote-ref-18)
19. Also G. Quinot, « A comparative perspective on supplier remedies in African public procurement systems », *in* G. Quinot and S. Arrowsmith, *Public procurement Regulation in Africa*, Cambridge, Cambridge University Press, 2013, p. 313, notes that “The trend seems to be for Courts rarely to use their supervisory function over procurement, despite the notional existence of their review/appeal powers” and blames for that the delays, the recent origin of judicial remedies with consequent incompetence and, finally, the extensive administrative review mechanism. [↑](#footnote-ref-19)
20. In Madagascar there in only one PRPP at national level, appointed by the minister, which can on his turn appoint delegates in the major national CAs and is subject to the spoil system, being changed every time a new government is in charge. [↑](#footnote-ref-20)
21. Namely the following are the the IAAs for the countries covered in this paper: (i.) *Autorité de régulation des marchés publics (ARMP)* in Benin; (ii.) *Organe de règlement amiable des différends (ORAD)* of the *Autorité de régulation de la commande publique (ARCOP)* in Burkina Faso; (iii.) *Comité de règlement des différends (CRD)* of the *Autorité de régulation des marchés publics (ARMP)* in Congo Brazzaville; (iv.) *Section de recours (SREC)* of the *Autorité de régulation des marchés publics (ARMP)* in Madagascar; (v.) Independent review panel (IRP) in Mauritius; (vi.) Remedies committee in Sudan; (vii.) Public procurement appeals authority (PPAA) in Tanzania; (viii.) *Comité de règlement des différends (CRD)* of the *Autorité de régulation des marchés publics (ARMP)* in Togo. [↑](#footnote-ref-21)
22. For instance, the *autorité de régulation des marchés publics* (*ARMP*) in Benin published in a specific section of its website all its decisions (see https://armp.bj/index.php?option=com\_k2&view=itemlist&layout=category&task=category&id=1&Itemid=672, updated in 2016). The same is true for the *Organe de règlement amiable des différends* (*ORAD*) of the *Autorité de régulation de la commande publique* (*ARCOP*) in Burkina Faso (see http://arcop.bf/index.php/contestations, updated in 2016), the *Section de recours* (*SREC*) of the *Autorité de régulation des marchés publics* (*ARMP*) of Madagascar (last decision is dated May 19, 2016, see http://armp.mg/?q=d\_cisions\_sur\_les\_recours), the *Comité de règlement des différends* (*CRD*) of the *Autorité de régulation des marchés publics* (*ARMP*) in Congo Brazzaville (last decision dated April 18, 2017, see http://www.armp-rdc.org/index.php/fr/publications-2); the *Comité de règlement des différends* (*CRD*) of the *Autorité de régulation des marchés publics* (*ARMP*) in Togo (last decision dated Avril 28, 2017, see http://armp-togo.com/index.php?option=com\_content&view=category&layout=blog&id=43&Itemid=77); the United Republic of Tanzania public procurement appeals authority (PPAA) (for appealing cases see http://ppaa.go.tz/index.php?option=com\_content&view=article&id=69&Itemid=75). [↑](#footnote-ref-22)
23. <http://www.marchespublics-uemoa.org/index.php?option=com_contentieux&view=list&Itemid=93&lang=fr>. See also *Baromètre de la réglementation de la commande publique en Afrique. Zone UEMOA*, 2017, available at: http://www.marches-publics-afrique.com/home/les-editos-de-marches-publics-afrique/lebarometre2017delareglementationdelazoneuemoaestpublie [↑](#footnote-ref-23)
24. The comparative debate on the conundrum of how far can the judge go in substituting the decision of the administrative authority with his own decision is quite extended, also in relation to public procurement. One of the most advanced solutions, which could be tested in other countries, is the “loop” system in the Netherlands, according to which the judge can order the administration to “correct” the challenged administrative act, diving some instructions, and to come back in a short period of time (usually four months). If the administration corrects the act according to the judge suggestions, the recourse is dismissed; in the contrary case the act is annulled. See J.C.A. De Poorter “Increasing the efficiency of the administrative Court’s power: a Dutch success story?”, *in* *Scientific cooperation international Journal of Law and Politics*, Marseille, 2015, pp. 96-106; A.T. & Boekema, I.M., “Administrative decision-making in reaction to a Court judgment. Can the administrative judge guide the decision-making process*?”* in *Utrecht Law Review*, 2013, pp. 51–61. [↑](#footnote-ref-24)
25. SIGMA - OECD, *Public procurement review and remedies systems in the European Union*, Sigma paper n. 41, 2007, page. 17-18. [↑](#footnote-ref-25)
26. For a comparative review of IAA’s characteristics, see R. Caranta, M. Andenas and D. Fairgrieve (eds.), *Independent administrative authorities*, London, BIICL, 2004. [↑](#footnote-ref-26)
27. Even if the idea of a “reflective judiciary”, to be intended as a judiciary with a representative flavour, is becoming an interesting area of studies: see M. Caielli, M. E. Comba, D. Francavilla, and A. Mastromarino, *Jurisdiction and pluralism: the temptations of a reflective judiciary*, in preparation. [↑](#footnote-ref-27)
28. Also at the EU level the shift in the direction of admitting the setting aside of concluded contracts was approved with directive 2007/66: see S. Treumer, « Towards an obligation to terminate contracts concluded in breach of the EC procurement rules: the end of a status of concluded contracts as sacred cows », *in* *Public procurement law review*, 2007, p. 371. [↑](#footnote-ref-28)