

**JUDGMENT  
NO.  
003/2020  
FROM 08 APRIL 2020**

*Preliminary ruling No 19 RP  
003 of 06 June 2019, lodged  
by the Cour de Cassation of  
Burkina Faso*

Parties to the main  
proceedings : STMB-TOURS  
Sarl with registered office in  
Ouagadougou (Burkina Faso)  
Faso)

C/

**The Commission of the West  
African Economic and Monetary  
Union (WAEMU)**

**Composition of the Court :**

- **M. Daniel Amagoïn  
TESSOUGUE, President,  
Judge-Rapporteur ;**
- **Mr Euloge AKPO, Judge,**
- **Mr Augusto MENDES, Judge ;**
- **M. Bawa Yaya ABDOULAYE,  
First Advocate General ;**
  
- **Me Boubakar TAWEYE  
MAIDANDA, Registrar.**
- **Me Hamidou YAMEOGO, Deputy  
Registrar**

**EXTRACT FROM THE MINUTES OF THE  
REGISTRY**

**COURT OF JUSTICE OF THE WEST  
AFRICAN ECONOMIC AND  
MONETARY UNION (WAEMU)**

**PUBLIC HEARING ON 08 APRIL 2020**

The Court of Justice of the WAEMU, meeting  
in ordinary public session on the eighth day  
of April in the year two thousand and twenty,  
in which were seated :

Mr Daniel Amagoïn TESSOUGUE, President,  
Judge-Rapporteur; Mr Euloge AKPO, Judge; Mr  
Augusto MENDES, Judge; in the presence of  
Mr Bawa Yaya ABDOULAYE, First Advocate  
General;

with the assistance of Mr Boubakar TAWEYE  
MAIDANDA, Registrar, Mr Hamidou  
YAMEOGO, Deputy Registrar;

in response to the reference for a preliminary  
ruling from the Cour de cassation du Burkina  
Faso by judgment of 13 December 2018 in the  
main proceedings between :

**STMB-TOURS**, a limited liability company having  
its registered office at Ouagadougou, 01 BP 1374  
acting through its counsel, Maître Mamadou  
SOMBIE, Avocat à la Cour, residing at  
Ouagadougou 01 BP: 4665, Tel. 70 51 78;  
**Plaintiff, on the one hand ;**

**AND**

**The Commission of the West African  
Economic and Monetary Union (UEMOA)**, an  
international institution having its registered office  
at 380, Av. du Pr Joseph KI-ZERBO, 01 BP 543,  
TEL : 50 31 88 73 à 76 Ouagadougou 01,  
represented by its President, with SCPA SOW-  
SECK-DIAGNE Avocats associés, BP : 432  
Dakar (Sénégal) and Cabinet d'Avocats  
Mamadou S. TRAORE, located at 11 BP: 721  
CMS Ouagadougou (Burkina Faso).

**Defendant, on the other hand ;**

**delivered the following judgment:**

## THE COURT

**HAVING REGARD TO** the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

**HAVING REGARD TO** Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

**HAVING REGARD TO** Additional Act No. 10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

**HAVING REGARD TO** Regulation No. 01/96/CM of 05 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

**VU** Regulation No. 01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU;

**VU** Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

**VU** Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;

**VU** Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

**HAVING REGARD TO** Order No 015/20/CJ of 25 February 2020 on the composition of the plenary session to sit in ordinary public hearing on 11 March 2020;

**HAVING REGARD TO** Preliminary Appeal No 19 RP 003 of 06 June 2019 lodged by the Cour de Cassation of Burkina Faso in the main proceedings between STMB TOURS and the UEMOA Commission;

**HAVING REGARD TO** letter No 2218/MEF/SG/CCU of 06 August 2019 containing the observations of the Togolese Republic on the preliminary ruling submitted by the Court of Cassation of Burkina Faso;

**HAVING REGARD TO** the written observations of counsel for STMB-TOURS dated 1<sup>er</sup> July 2019, filed at the Registry on 03 July 2019 under number 19 RP 003/2 ;

**HAVING REGARD TO** the written observations of counsel for the WAEMU Commission dated 15 July 2019, filed at the Court Registry on 25 July 2019 under number 19 RP003/3 ;

**HAVING REGARD TO** the summonses of the parties ;

**HEARD** the Judge-Rapporteur in his report;

**HEARD** the Board of STMB-TOURS in its oral observations;

**WITNESS** the Council of the Commission of the West African Economic and Monetary Union (WAEMU), in its oral observations;

**HEARD** the First Advocate General in his Opinion;

**Having deliberated in accordance with Community law :**

## **I- FACTS AND PROCEDURE**

Whereas, pursuant to Article 15 of Regulation No 01/96/CM laying down the Rules of Procedure of the Court of Justice of the WAEMU, the Cour de cassation of Burkina Faso, by judgment before it No 31/2018 of 13 December 2018, referred to the Cour de céans a reference for a preliminary ruling registered on 06 June 2019, under number 19 RP003, for the purpose of answering the question whether the stipulations of Article 17.2 of the contract for the provision of services of 30 August 2010 constitute a waiver of the WAEMU Commission's immunity from jurisdiction;

That this question was referred in the context of the dispute between STMB-TOURS and the Commission of the West African Economic and Monetary Union (UEMOA) before the Cour de Cassation of Burkina Faso;

Whereas the notifications were made, by letters dated 07 June 2019, in accordance with Article 27-1 of the Administrative Rules of Court;

That by Order No 020/2019/CJ of 18 October 2019 Mr Daniel Amagoin TESSOUGUE was appointed Rapporteur;

In addition to the parties to the dispute, only the Togolese Republic has submitted observations;

Considering that by contracts Nos. 076/2007/CON-COM and 087/2010/CON-COM of 31 July 2007 and 30 August 2010, WAEMU entrusted the company STMB-TOURS with the management of travel and movements of members and staff of its bodies and, where applicable, members of their families, as well as their personal effects, in particular on the occasion of postings, transfers, missions, annual leave and repatriations;

Considering that during the performance of the contract, STMB-TOURS stopped issuing notes to UEMOA because its bank Ecobank suspended its credit line for non-payment of its Billing Settlement Plan invoice;

Considering that the commission, after having served formal notice, noted the refusal to issue tickets and proceeded to terminate the contract binding them;

On 10 August 2012, the two parties signed a conciliation report which showed that STMB-TOURS still owed UEMOA the sum of 90,901,006 CFA francs in rebates and that UEMOA owed STMB-TOURS the sum of 226,575,100 CFA francs in unpaid invoices. After compensation, the balance owed by the Commission to STMB-TOURS was 135,674,094 CFA francs.

On 19 October 2012, STMB-TOURS brought proceedings against the Commission for a declaration of termination of the contract, compensation for damages and payment, and on 17 January 2013, for payment, all before the Commercial Court of Ouagadougou, which, by judgments no. 178 and no. 179 of 27 June 2013, declared that it did not have jurisdiction and referred it back for further proceedings;

Whereas STMB-TOURS has lodged an appeal against these two judgements;

On 18 April 2014, the Ouagadougou Court of Appeal handed down judgment no. 25 in which it declares that it has jurisdiction, overturns judgments no. 178 and 179 handed down on 27 June 2013 by the Ouagadougou Commercial Court and, ruling again, rejects the objection that the summons is null and void, declares that STMB-TOURS's claims are partially founded and orders the WAEMU Commission to pay it various sums of money:

- CFAF 135,674,094 and CFAF 2,155,800 in principal ;
- FCA 380,616,892 in damages ;
- FCFA 20,651,114 in respect of expenses incurred but not including costs;

That it is this judgment which was the subject of an appeal, by application received at the Registry of the Court of Cassation on 16 June 2014, in the name of and on behalf of the WAEMU Commission, by SCPA SOW-SECK and DIAGNE, partners at the Senegal Bar and Maître Mamadou S. Traoré, former President of the Bar of Burkina Faso;

Whereas the Cour de Cassation, the referring court in these proceedings, has noted that the Commission relies on grounds of cassation relating, inter alia, to the infringement of Article 15 of the Rules of Procedure of the WAEMU Court of Justice;

Whereas, on the basis of Article 15(6) of the said Regulation, the Cour de Cassation (Supreme Court) of Burkina Faso has referred to the Cour de Cécans the following question for a preliminary ruling: **"Do the provisions of Article 17(2) of the contract for the provision of services of 30 August 2010 constitute a waiver of its immunity from jurisdiction by the WAEMU Commission?"**

## **II. COMMENTS FROM STAKEHOLDERS**

Whereas the Togolese Republic, in accordance with the provisions of Article 27.1 of the Administrative Rules of the Court, has in a correspondence, received at the Registry of the Court of Ceans on 13 August 2019, pointed out that by virtue of Article 11 of the Additional Protocol N°3/96 of 10 May 1996, relating to the rights, privileges and immunities of the UEMOA, waiver of the immunity from jurisdiction enjoyed by the WAEMU Commission, as an organ of the Union, must be express and evidenced in writing by the President of the Commission expressing his clear, certain and unequivocal intention not to avail himself of that immunity;

It concludes that the waiver of immunity cannot be inferred from the stipulations of Article 17.2 of the services contract concluded on 30 August 2010 between the WAEMU Commission and STMB-TOURS;

Whereas the Commission, through its counsel SCPA SOW- SECK-DIAGNE, avocats associés and Cabinet Mamadou S. TRAORE, in its statement of case, received at the Registry on 25 July 2019, submits that it is manifest that, having regard to the provisions of Articles 26 and 27 of the Vienna Convention on the Law of Treaties and Article 22 of the Vienna Convention on Diplomatic Relations ratified by Burkina Faso and in the absence of notification of an express waiver of his immunity by the President of the Commission or his representative any declaration of jurisdiction retained by any court would be a violation of Additional Protocol No 3/96 of 10 May 1996 on the rights, privileges and immunities of the WAEMU, as well as of the Headquarters Agreement;

It adds that the waiver, provided for in Article 11.2 of the Headquarters Agreement signed between the WAEMU Commission and Burkina Faso, is made under well-defined conditions, namely that it must be express and emanate from the President of the Commission or his representative;

That, consequently, the UEMOA Commission requests a declaration that it has not waived its immunity from jurisdiction, and an order that STMB-TOURS pay the costs;

Considering that STMB-TOURS, represented by Maitre Mamadou SOMBIE, Avocat à la Cour, residing in Ouagadougou (Burkina Faso), states that the WAEMU Commission's waiver of its immunity from jurisdiction by contract is not open to debate since, by means of two service provision contracts, numbers 076/2007/CON-COM and 087/2010/CON-COM, dated 31 July 2007 and 30 August 2010, the Commission accepted that any dispute or challenge not amicably resolved would be settled by the competent court in Burkina Faso, the country in which these contracts were signed and executed and also the State in which the WAEMU headquarters are located, the Commission agreed that any dispute or disagreement not settled amicably would be settled by the competent court in Burkina Faso, the country in which the contracts were signed and executed and also the country in which the UEMOA has its headquarters; that the contract was drafted by the competent services of UEMOA, STMB-TOURS having merely affixed its signature, that consequently, the Commission is ill-advised to take advantage of its own errors;

That while the Commercial Court of Ouagadougou misapplied the law, the Court of Appeal did not, and rectified the shortcomings of the first judge; that the Court of Cassation simply wishes to comply with Article 15 of the Rules of Procedure of the WAEMU Court of Justice to determine whether or not the Commission has waived its immunity from jurisdiction in its contractual relationship with STMB-TOURS;

That if the WAEMU Court of Justice were to note that the Commission had not waived its immunity from jurisdiction, this decision would contravene the case law of the high courts of the Member States, in particular that of Senegal, and would violate the balance in the business world within the Community and give the Commission certain impunity;

### III. DISCUSSION

Whereas it should be recalled that the preliminary ruling procedure is seen as an instrument of cooperation between the Court of Justice of the WAEMU and the national courts, by means of which the former provides the latter with the elements of interpretation of Community law which they need in order to resolve the disputes which they are called upon to decide ;

Under the terms of **Article 12** of Additional Protocol No. I relating to the supervisory bodies of WAEMU, "**The Court of Justice shall give preliminary rulings on the interpretation of the Treaty of the Union, on the legality and interpretation of acts adopted by the organs of the Union, on the legality and interpretation of the statutes of bodies created by an act of the Council, when a national court or an authority with a judicial function is called upon to deal with them in the course of litigation**";

Whereas the question referred for a preliminary ruling in the present case is worded as follows by the Cour de Cassation of Burkina Faso: "**Do the provisions of Article 17.2 of the contract for the provision of services of 30 August 2010 constitute a waiver of its immunity from jurisdiction by the WAEMU Commission?**

#### - Jurisdiction

Considering that, under Article 28 of the Administrative Rules of the Court of Justice of the WAEMU, "the Court, deliberating on the reference for a preliminary ruling, shall verify its own jurisdiction [...]" ;

Under Article 1<sup>er</sup> of Additional Protocol No 1 on the supervisory bodies of the WAEMU, the Court has jurisdiction to ensure that the law is observed in the interpretation and application of Community rules; the Court therefore has jurisdiction to give a ruling on the present reference for a preliminary ruling;



- **Immunity from jurisdiction**

Considering that, in the context of its exclusive jurisdiction, the Court, which is responsible for interpreting the Treaty and subsequent texts, cannot deal with facts submitted to the national court;

That its role is limited to providing national courts with accurate interpretations of Community law to assist in resolving the disputes submitted to them;

Considering that on 30 August 2010, the WAEMU Commission and the limited liability company STMB-TOURS entered into a contract for the provision of services, article 17.2 of which states: "Failing agreement, disputes shall be settled by the competent court in Burkina Faso";

Considering that the referring court, in this case the Cour de Cassation of Burkina Faso, put a precise question to the Cour de céans, namely :

**"The stipulations of article 17.2 of the contract for the provision of services from**

**30 August 2010 constitute a waiver of its immunity from jurisdiction by the WAEMU Commission?**

Considering that immunity from jurisdiction is a privilege which allows a State, or an international organisation which benefits from it, to be removed from the jurisdiction of the judicial authorities of another State, in other words not to appear as a defendant in legal proceedings before the judges of that State, without having given its consent; That it has the effect of depriving the courts and tribunals, normally competent according to domestic law, of their power to hear the claim and that it is merely a plea of inadmissibility and not of lack of jurisdiction, the judge normally competent being in principle the correct one, which however cannot decide the merits of the dispute, because of jurisdictional immunity which constitutes a procedural obstacle, instituted with the legitimate aim of favouring comity and good relations between States;

That the West African Economic and Monetary Union (WAEMU), of which the Commission is one of the governing bodies, has been granted this privilege under

subject to waiver, in accordance with Article 11 of Additional Protocol No. 3/96 of 10 May 1996 on the rights, privileges and immunities of WAEMU, which states: **"The Union shall enjoy immunity from jurisdiction and execution in all matters, unless it expressly waives immunity in a particular case notified by the President of the Organ concerned"**;

That a headquarters agreement has been concluded between the WAEMU Commission and Burkina Faso, Article 11.2 of which provides for the possibility of the Commission waiving its jurisdictional immunity, provided that such waiver is made by the President or his duly authorised representative;

Basing ourselves on the Community act, in this case Article 11 of Additional Protocol No 3/96 of 10 May 1996 on the rights, privileges and immunities of WAEMU, it follows that the waiver of the immunity from jurisdiction of a WAEMU organ is subject to the threefold condition that such waiver be **express, that it be made in a particular case and that such case be notified by the President of the organ concerned**;

Whereas an express declaration is a clearly formulated intention, a declaration which formally expresses the openly declared and unequivocal will of its author ;

By requiring that the declaration be made "in a particular case", the legislator of the West African Economic and Monetary Union also requires a declaration that is special or specific to the waiver of immunity from jurisdiction, in other words a declaration that is out of the ordinary, i.e. specifically or exclusively reserved for the waiver of immunity from jurisdiction;

That by requiring that the said particular case be **notified by the President of the Body concerned, the legislator has designated unequivocally the person legally empowered to make known the waiver of immunity of**

It therefore follows that, in the spirit and letter of WAEMU Community law, immunity from jurisdiction is not presumed; consequently, it cannot be inferred that the stipulation of a clause conferring jurisdiction implies, in itself, a waiver of immunity from jurisdiction;

The waiver of immunity from jurisdiction must be formally expressed, i.e. be the result of an act independent of the contract, unequivocally expressing the will to waive immunity;

That this is not the case under the provisions of Article 17.2 of the contract for the provision of services concluded on 30 August 2010 by STMB-TOURS and the WAEMU Commission;

Furthermore, the contract was signed by a Commissioner acting as interim President of the Commission; nowhere does it appear from interim decision no. 372-2010/PC/DSC of 25 August 2010 that this power was granted to him;

Thus, in the absence of a specific delegation from the President of the Commission to the acting Commissioner, there can be no question of any power being granted to the acting Commissioner to waive the institution's immunity from jurisdiction;

It follows from the foregoing that the question should be answered by saying that **the stipulation of Article 17.2 of the contract for the provision of services of 30 August 2010 (between STMB-TOURS and the WAEMU Commission) does not constitute a waiver of its immunity from jurisdiction by the WAEMU Commission;**

- **Costs**

Considering that in accordance with the provisions of Article 86 in fine of Regulation No. 01/96/CM of 5 July 1996 on the Rules of Procedure of the Court, jurisdiction to rule on costs lies with the referring court, in this case the Court of Cassation of Burkina Faso;

**FOR THESE REASONS**

**The Court,**

**Ruling on the question referred for a preliminary ruling by the Cour de Cassation du Burkina Faso by judgment avant-dire droit No 31/2018 of 13 December 2018:**

**IN THE FORM :**

- declares itself competent ;
- declare the present action for a preliminary

ruling admissible; **THE FUND :**

- Declares that the stipulation of Article 17.2 of the service provision contract of 30 August 2010 (between STMB-TOURS and the WAEMU Commission) does not constitute a waiver by the Commission of its immunity from jurisdiction;
- refers the matter back to the Cour de Cassation of Burkina Faso for a ruling on costs.

**Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.**

**And have signed :**

**And signed by the Chairman and the Registrar.**

**Illegible signatures follow.**

**Ouagadougou, 08 April 2020**

**For the Registrar**

**The Deputy**

**Registrar**

**Hamidou YAMEOGO**