HOW INNOVATIVE IS THE NEW OHADA ARBITRATION FRAMEWORK APPROVED ON THE 23 OF NOVEMBER 2017?

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ABSTRACT

In 2017, OHADA[i] adopted a new Uniform Act on Arbitration (UAA)[ii], repealing the previous Uniform Act dated 11 March 1997. This reform is part of an effort to promote and consolidate alternative methods of settling disputes, further illustrated by a new Uniform Act on the Common Court of Justice and Arbitration (CCJA) Rules of Arbitration being revised. The new Arbitration Act aims to make the OHADA space more attractive for dispute resolution. This paper sets out the main aspects of this reform, complemented by the new CCJA arbitration rules. Security, flexibility and efficiency seem to be the essential aim of this new Act. This applies to the different phases of the process of accessing arbitration, from the beginning of the start claim, and through the arbitration process. However, the new arbitrations is not without some lapses as shall be examined in due course.

Keywords: Arbitration, OHADA, Uniform Act on Arbitration Law, Innovation, Revised CCJA Arbitration Rules, Enforceability of arbitral awards and mediation

INTRODUCTION

Africa has been able to attract considerable foreign investment in the recent past, which has also contributed significantly to the fast growing economy in the region. According to the International Monetary Fund (IMF), two of the main reasons as to why the economies of many countries in the region of Sub-Saharan Africa continue to perform well, are improved business environments and continued strong infrastructure investment in the regions[iii].

However, an increase in investment has also meant an increase in disputes, raising questions about how those disputes should be resolved. Surveys suggest that while African parties often include international arbitration clauses in contracts with foreign parties, the foreign parties mostly avoid agreeing to arbitrate in Africa. According to the World Bank, the ability to enforce arbitral awards is one of the important factors driving investment decisions[iv]. And one of the issues faced by parties entering into contracts with African parties is how likely it is that foreign arbitral awards will be recognized and enforced by African courts[v].

Arbitration is a contractual method of resolving disputes where parties agree to entrust the differences between them to the decision of an arbitrator or a panel of arbitrators, to the exclusion of the courts, and they bind themselves to accept that decision, once made whether or not they think it right[vi]. Ray Turner argues that arbitration as an accepted means of finally resolving disputes in a wide range of areas of commercial and other activity, each area of activity tends to have its own requirements or traditions relating to awards, or to their style of presentation. Accordingly, each arbitration proceeding can also have its own peculiarities which might demand a particular format or sequence for the contents of the award or awards[vii].

Since cross-border trade and investment transactions involving parties from different legal and cultural backgrounds[viii], is the basis of the arbitration, adoption of appropriate national arbitration laws should be part and parcel of any economic reforms in order to attract and promote competitive economy and direct foreign investments (FDI). Reform in arbitration laws also need to be connected to judicial reforms particularly in ensuring the minimization court's intervention[ix].

At the same time, national arbitration laws need to follow international norms. Parties to the disputes including states have a tendency to choose an arbitration seat whose arbitration law follows the international norms to which most States are accustomed, for example, the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), or the Uniform Act adopted by members of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires ("OHADA")[x].

Founded 20 years ago, the Organization for the Harmonization of Business Law in Africa (OHADA) is a group of 17 African States who have joined efforts to enact unified legislation in all areas of business law in order to promote investments by fostering legal certainty across member States. The OHADA Treaty acknowledged the importance of arbitration as a modern business dispute resolution mechanism, and in 1999 a first Uniform Arbitration Act was enacted and the Common Court of Justice and Arbitration (CCJA) was created in Abidjan. Almost 18 years later, on 23-24 November 2017, the OHADA Council of Ministers adopted a new Uniform Arbitration Act (UAA) along with new Arbitration Rules for the CCJA. These two texts were published in the OHADA Official Journal on 15 December 2017 and became applicable on 15 March 2018 in all 17 OHADA States.

Together, the two documents offer a new framework for alternative dispute resolutions in OHADA countries. The avowed purpose is to further attract investors and foster confidence in OHADA-seated arbitrations (most notably by considerably streamlining court application schedules) to capitalize on the economic growth of the continent. The reform also tackles some criticism levelled at OHADA arbitration in the not-so-distant past.

The new UAA and revised CCJA rules do address certain issues that have cast a shadow on OHADA arbitration in recent years and reflect current trends in international arbitration (including promoting CCJA investment arbitration), one fails to be completely reassured that all is now well with OHADA arbitration.

This article will briefly examine the most welcomed features of the new OHADA Arbitration framework[xi], before turning to some unanswered questions and, alas, new causes for concern. This article addresses the first two texts before looking at the most welcomed features and shortcomings of the new law.

APPLICABLE LAWS

Innovations of the new Uniform Act on Arbitration Law

The new Uniform Act applies to any arbitration proceedings commenced after its effective date for which the seat is in an OHADA Treaty Member State (Benin, Burkina Faso, Cameroon, CAR, Comores, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, DRC, Senegal, Chad, Togo). It supersedes the Uniform Act of 11 March 1999.

A desire for broad implementation of the Uniform Act to disputes involving States and private parties. In response to the current local reality since many disputes are between OHADA Member States and private parties, the scope of the Act has been expanded on two counts. In addition to States, local governments and public establishments, any legal entity governed by public law may henceforth be a party to arbitration[xii]. Also, it is now clearly stated that arbitration can be initiated on the basis of an arbitration agreement or an investment-related instrument, including an Investment Code or bilateral/multilateral investment treaty[xiii].

By default, arbitration proceedings will be heard by a sole arbitrator[xiv] and problems with forming an arbitral tribunal must be resolved within a limited timeframe that encourages the swift formation of the tribunal.

Court appointments of arbitrators must now be made within 15 days (save where Member State laws provide a shorter timeframe) and the court's decision is not subject to appeal[xv];

- For challenges to arbitrators, national courts now have a period of 30 days to issue a decision. If this timeframe is not respected, a request for challenge to an arbitrator may be brought before the CCJA by any party[xvi];
- appeals to the CCJA are possible only against decisions to dismiss a request for challenge, whereas previously no appeals were possible[xvii];
- In order to discourage parties from engaging in delaying tactics, the new Act contains the option of raising any grounds for challenge to an arbitrator within 30 days from discovery of the fact that motivated the requesting party to seek challenge[xviii]. The Uniform Act also establishes an obligation for the parties to act

promptly and fairly[xix] and gives the tribunal certain tools to avoid gridlock in the arbitration proceedings, in particular in case of a party's default[xx].

In terms of the chronology of arbitration proceedings, the new Uniform Act has an article that specifically addresses multi-tier clauses, because the tribunal must verify, if the parties so request, that the step prior to arbitration was followed and if that step was disregarded, suspend the proceedings for an interval the tribunal deems appropriate to allow for correction of the omission[xxi].

The principle of Kompetenz-Kompetenz has been clarified, the new Uniform Act provides that if no reference has yet been made to the arbitral tribunal or if no request for arbitration has been submitted, the national court must decline jurisdiction unless the arbitration agreement is manifestly invalid (this was already true) and also, under the revised Act, if it is manifestly inapplicable. A period of 15 days is provided for the seized court to make a final ruling on its jurisdiction. A final appeal may be brought before the CCJA[xxii].

The arbitrator's duty of independence and impartiality has been strengthened, with an obligation set out in article 7 to disclose, at any point in the proceedings, any and all circumstances that might create legitimate doubt about the arbitrator's independence or impartiality.

The new Uniform Act expressly gives the arbitral tribunal the power to order interim or conservatory measures and extend its powers. A request for interim or conservatory measures may be brought before a national court only in cases involving duly demonstrated and recognised urgency, and the reference in the former Act to cases where the request is to be executed in a non OHADA State has been removed. Preventive seizures and judicial securities are excluded from the arbitrators' powers (as they are under French law)[xxiii].

The Uniform Act now provides that the parties may expressly waive the right to file an application to set aside (save where this would be counter to international public policy) (article 25§3), and thereby becomes one of the rare texts (along with French law) allowing such waiver, subject to international public policy. The competent court has 3 months to issue a decision thereon; if it does not, an appeal can be brought before the CCJA within the following 15 days[xxiv].

In terms of exequatur (enforceability), if the national court has failed to issue a decision 15 days after such request was referred, exequatur is deemed to have been granted[xxv]. In this case, the party seeking enforcement must ask the head Registrar or competent authority of the relevant State to have the enforceability statement added to the award[xxvi]. There is provision for direct appeal to the CCJA of decisions declining exequatur. A decision granting exequatur cannot be appealed[xxvii].

Revised CCJA Arbitration Rules

Given its dual role as a supreme court of the OHADA area and arbitration centre, the CCJA has been criticised because the same members may make decisions on arbitration proceedings administered by the CCJA and hear applications to set aside those same arbitration proceedings.

To respond to these criticisms, the revised Rules establish certain safeguards:

- Members of the Court with the same nationality as a State that is directly involved in an arbitration must remove themselves from the Court panel in the case at hand, and are replaced by the CCJA president.

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OHADA arbitration has moved towards including investment arbitration. The revised Rules allow the CCJA to administer arbitrations based on an investment instrument, investment code, or a bilateral/multilateral investment treaty[xxviii]. The CCJA's aim is for CCJA dispute resolution clauses increasingly to appear in bilateral investment treaties (there are already a few, such as in the Guinea-Chad, the Guinea-Burkina Faso, and the Benin- Chad treaties).

In terms of CCJA appointment of arbitrators, appointment criteria have been changed to include the seat of arbitration and arbitrator availability[xxix].

The procedure for appointing the arbitrator(s), when handled by the Court, has been set out in greater detail and clarified in the Rules. The Secretariat General provides each party with an

identical list drawn up by the Court with at least three names, which each party sends back with the arbitrator names listed in order of preference (striking out rejected names). After the time frame set by the Secretariat General has expired, the Court appoints the arbitrator or arbitrators based on the names approved on the aforementioned lists, and in keeping with the parties' order of preference. If appointments are not possible using this procedure, the revised Rules grant the CCJA a discretionary power to appoint one or more arbitrators[xxx].

According to the revised Rules, the CCJA Secretariat General now includes a copy of the request with all attached exhibits[xxxi] when notifying respondents of the date of receipt of a request for arbitration naming them as defendants, in order to speed up the starting phase. For the same reasons, the deadline for responding to the request has been shortened (from 45 to 30 days[xxxii]. Four new articles specifically address the questions of third party introductions, voluntary interveners, multiple contracts and multiple parties[xxxiii].

The arbitral tribunal's powers have been reinforced in terms of admitting evidence[xxxiv]. The tribunal can ask the parties to provide factual explanations to the tribunal, to present evidence it deems necessary to resolve the dispute[xxxv] or even decide to hear witnesses, experts instructed by the parties or any other person, in the parties' presence or absence, provided they were duly summoned[xxxvi].

The CCJA has been given broader powers in terms of scrutiny of draft awards. The powers are now quite similar to those of the ICC International Court of Arbitration. Like the ICC, the Court can suggest purely formal changes, and now may also draw the tribunal's attention to claims that do not seem to have been addressed, to mandatory references that do not appear in the draft award, or to the lack of reasons or an apparent contradiction in the reasoning, but cannot, however, propose a line of reasoning or substantive solution to the dispute[xxxvii]. The Court has one month to complete its scrutiny of the draft award[xxxviii].

An award must now be reasoned, and the consent of the parties is no longer adequate to waive this requirement[xxxix]. The failure to provide reasons for the award now qualifies as a ground for setting the award aside[xl], as well as an improperly constituted tribunal or improperly appointed sole arbitrator[xli].

In the interests of accelerating procedure, the CCJA now hands down its decision on setting awards aside within 6 months of receiving the referral[xlii]. Decisions on exequatur are issued by the CCJA President (or a judge with specifically delegated authority) no more than 15 days after the request has been filed[xliii], in line with the Uniform Act. For awards on interim or conservatory measures, the time frame is 3 days[xliv]. The grounds for setting awards aside are now the same as those in the Uniform Act; this should avoid conflicts between review of awards issued under CCJA rules and review of awards issued within the scope of the Uniform Act but not under CCJA rules. Lastly, under the revised Rules, the CCJA President's decision to grant exequatur can no longer be appealed on any basis[xlv].

WELCOMING FEATURES OF THE NEW OHADA ARBITRATION FRAMEWORK

Expanding OHADA arbitration to investment arbitration and the parties to the arbitration

The purpose of the reform is to encourage and secure the investments made in the OHADA zone. To this end, two main developments were introduced by the OHADA legislator.

Investment Arbitration:

Henceforth, arbitration in the OHADA zone can be based on an investment instrument[xlvi]. This instrument may be a Code of investment in force in a State party or a bilateral or multilateral investment treaty.

Previously, OHADA arbitration was established on the basis of an arbitration clause or an arbitration agreement; being specified that the new UAA defines these two concepts without however specifying the mandatory terms, thus devoting the free writing of the arbitration agreement[xlvii].

In addition, the UAA reinforces the requirement of formalism for any arbitration agreement and also allows the use of the "convention by reference" mechanism[xlviii].

In addition to the traditional openness of OHADA law to any arbitration having its seat in one of the OHADA States and to legal persons under public law, the reforms extend the scope of the OHADA arbitration law to include investment arbitration. Investment arbitration is usually defined as an arbitration forum that hosts disputes between a State or one of its entities, and a foreign private entity carrying out an investment in that State[xlix].

Although the creation of the International Centre for the Settlement of Investment Disputes (ICSID) is part of this approach, other forums have gradually opened up to this issue too. It is in this light that the UAA includes bilateral investment treaties (BITs) and investment codes as new bases for arbitration. This step, provided for in the UAA, is reiterated by the new CCJA Arbitration Rules, which expressly authorize the Court to administer arbitration proceedings based on BITs or national investment laws.

It should be noted that, in practice, the Court of Arbitration of the CCJA has accepted several investor state disputes on the basis of an arbitration agreement, particularly in the absence of specific, relevant common provisions. Therefore, the new Act only crystallizes and completes the evolution of the Court's internal practices and that of other forums such as ICSID, which have now freed arbitration agreements from being the sole pathway to arbitration. Arbitration under the UAA and the CCJA forum offers a big comparative advantage in that it is close to the host countries of the investments, geographically and from the point of view of the OHADA legal system with which they are familiar.

Therefore, the OHADA law of arbitration (through both its normative part (UAA) and its institutional body (CCJA)) is well positioned in the field of investment arbitration. If accepting legal instruments relating to investments and establishing certain correlative, institutional guarantees by the CCJA characterize a certain openness of OHADA arbitration, it is important to consolidate this trend as much with substantial arguments (definition of the notions of investment, investor, etc.) as with procedure (transparency of procedure, admission of amicus curiae, etc.)

The parties to the arbitration :

Any public legal entity may now resort to OHADA arbitration[l] i.e. the state and all its public dismemberments. This change is a small revolution because, previously, in international matters, the UAA limited this possibility only to local authorities and public institutions.

In addition, the UAA is intended to apply to any arbitration where the seat of the tribunal is in one of the States parties[li]. Through this measure, we hope that the States parties will be in alignment with the international standards in this area. Indeed, the United Nations Convention on transparency in arbitration based on treaties between investors and States[lii] has only been signed by four[liii]of the OHADA State parties and none has so far ratified it.

The extension of OHADA rules to mediation[liv]

The tempting offer of OHADA arbitration does not stand in the way of other alternative dispute resolution methods. It does not forbid prior dispute resolution. If such situation should occur, the Court will suspend proceedings pending the completion of the dispute resolution step (or its failure to do so, if necessary)[lv].

The example of mediation is a good one, especially as mediation is now the subject of uniform legislation in the OHADA space. At first glance, it should be noted that this does not apply to mediation undertaken voluntarily by an arbitral tribunal for the purpose of providing an amicable settlement of a dispute. The Uniform Act on Mediation (UAM)[lvi] governs institutional or ad hoc mediation, which is conventional, or which involves the intervention of a third party, an independent dispute settlement procedure, or a prior method of arbitration. In the latter case, supplementing the UAM, the UAA unequivocally states that "no arbitral or judicial proceeding relating to a dispute already arising, or which may arise later, is given effect by the arbitral tribunal or the state court until the conditions that go with it have been met."

This procedure does not preclude, according to the text, initiating parallel proceedings for provisional purposes, or purposes that cannot be considered as a waiver or termination of the mediation. It is compulsory to execute the agreement resulting from the mediation and it may be enforced or endorsed by the competent court and taken back in the form of an award of agreement by the arbitral tribunal. This provision, which demonstrates the effectiveness of

OHADA mediation and the institutional dialogue between methods of dispute resolution, also applies to mediation proceedings initiated without arbitration being in progress.

There is no real consensus between arbitrators on the question of whether provisions for mediation in multi-tiered dispute resolution clauses in particular, is one of jurisdiction or admissibility. Too often respondents use pre-litigation mandatory mediation requirements as delay tactics, even where it is obvious that the parties will not reach an amicable settlement through mediation, and the issue would be better treated as one of admissibility. The UMA and UAA seem to provide an adequate level of flexibility. The UMA starts with the bright-line rule that pre-litigation requirements must be fulfilled, and that a court or tribunal will have to give them effect. It does, however, also aptly reserve the possibility for courts and tribunals to issue interim and provisional measures, even as they direct the parties to comply with pre-litigation steps, therefore striking a welcomed balance. The UAA adds for its part, that if mandatory steps have been initiated (but not necessarily fully complied with), a tribunal may acknowledge their failure.

The arbitration proceedings: reliability, flexibility and promptness

The new OHADA Arbitration Act presents a reliable, flexible and prompt arbitration procedure. Before looking at these aspects, it's important to major components of an arbitral proceeding namely Respect for the pre-arbitration phase: the multi-third clause, the jurisdiction of the court and the obligations of the parties.

Respect for the pre-arbitration phase: the multi-third clause:

The UAA requires the application of the provisions of a so-called multi-third clause which would be contained in an arbitration agreement[lvii]. This clause provides for the respect of an amicable resolution step between the parties prior to the arbitration. It should be noted that the arbitral tribunal of its own cannot rule on this matter, one of the parties having to apply for it.

In our view, this measure is not of great interest because the judge cannot raises it of his own and there is no sanction on the parties in the event of non-compliance with this clause.

The parties may therefore stand for a multi-third clause in the convention and choose not to respect it and move directly to arbitration without the risk of any procedural defect.

The jurisdiction of the court:

Under the aegis of the old text, the arbitral tribunal ruled on its own jurisdiction and, if applicable, on any matters relating to the execution or validity of the arbitration agreement according to the competence-competence principle.

Henceforth, the competent judge in a State party may decide on the jurisdiction of the arbitral tribunal prior to the referral of that court or if no request for arbitration has been made, in the event that the arbitration agreement is clearly inapplicable. Previously, that agreement also had to be clearly null.

The competent judge in the State party is required to rule within 15 days[lviii] and his decision may only be appealed to the CCJA in cassation.

The obligations of the parties:

The parties are held in the conduct of the arbitral proceedings, of an obligation of speed and loyalty; they must also refrain from any dilatory tactics.

From now on, if one of the parties fails to appear at the hearing or produce documents without a legitimate ground, the arbitral tribunal may continue the proceedings and decide on the basis of the evidence at its disposal[lix].

While the need for this measure should be welcomed, it is unfortunate that the UAA remains silent on the question of the exchange of scripture between the parties, and that the notion of legitimate motive has not been clarified by the OHADA legislator who missed the opportunity to reinforce the contradictory nature of the arbitral award.

Reliability, flexibility and promptness:

It offers arbitration with institutional support from CCJA. Without the parties having to opt for the CCJA arbitration rules, they have the opportunity to benefit from the support of this institution. This is the case if no process of challenge is provided for by the parties or carried

out by the competent court within 30 days. If so, the challenge application may be brought before the CCJA.

The arbitral procedure's reliability is assured by the obligation of independence and legal dedication of arbitrators. In particular, these requirements make it possible to avoid conflicts of interest and leads to arbitrators recusing themselves if necessary. The parties also enjoy equal treatment during the proceedings, allowing them to assert their respective rights. The litigant parties are received regardless of their quality or status. The reliability and flexibility of the procedure are also measured by the openness in using international law as the applicable law in case the parties are silent on the choice of law. From the point of view of procedural rules, the parties may refer to the rules of an arbitration centre of their choice or determine a procedural law that suits them. These provisions show the opening of the "OHADA space" to "non-OHADA systems" and to international best practices in arbitration.

The promptness of the arbitration procedure is demonstrated through the competitive deadlines proposed at all stages of the procedure. If the parties disagree, or there are insufficient contractual terms on the appointment of the arbitrators, the parties have between 30-75 days to do so with the intervention, if necessary, of the competent court. Likewise, the arbitration tribunal must be constituted within six months, unless otherwise agreed. The parties nevertheless have the option to extend the legal or contractual period. More generally, the parties are encouraged to act with speed and loyalty in conducting proceedings. They must refrain from using delay tactics, otherwise they risk a sanction and/or closure of the proceedings, if necessary.

The outcome of the procedure: safety and efficiency

Previously, the principle was that of early termination of the arbitral proceedings[lx]. The final award was the exception in the same way as the acquiescence to the request for discontinuance or transaction.

Henceforth, the arbitral proceedings are concluded either by a final sentence, namely the complete sentence which extinguishes the entire dispute, or by a closing order; given that the concept of a closing order did not exist in the former UAA[lxi].

Through this mechanism, the OHADA legislator states that the arbitrator is no longer bound by the time limits contained in the arbitration agreement. The arbitrator may therefore choose not to give a definitive sentence before the expiration of the time limit and request that the time limit be extended. This is a genuine reservation to one of the major advantages of the arbitral proceedings, the speed of the procedure that can now in theory last indefinitely.

The new OHADA arbitration Act guarantees security and efficiency in the arbitration procedure. Whether it is the result of an agreement between the parties during the proceedings or a decision arising from the court hearing, the arbitral award has the authority of res judicata as soon as it is given. This award may be protected by a provisional enforcement to allow the parties to benefit quickly from the effects of the decision, without affecting the full judgment, including various remedies. This provisional enforcement remains valid even when an action for annulment is brought against the award in question.

As a general rule, the arbitration award must be enforced. The decision on the application for enforcement is obtained before the competent court within 15 days. It is deemed acquired in the case of silence of the court. It is subject to a recourse of annulation (cassation) only before the CCJA and only in case it is negative.

The award rendered by the CCJA is not subject to opposition, appeal or judicial review. It may, however, be subject to a review or an action for annulment before the competent court

The judgement rendered by the said court is subject to review proceedings only before the CCJA. The flexibility of the OHADA arbitration procedure results from the fact that waiver clauses to the action for annulment may be provided by the parties, provided that they are not in conflict with international public policy. The new CCJA Rules do indeed address concerns raised in the famous ***Getma v. Guinea case***[lxii]. The 2014 EUR 34 million Getma award was set aside by the CCJA in 2016 on the ground that the fee arrangement agreed upon between the tribunal and the parties was in breach of CCJA rules. The arbitrators then took the unusual step of writing an open letter questioning the CCJA's impartiality before seeing a D.C. court uphold the decision to set-aside the award. The D.C court found that there had been no evidence of bias at the CCJA and that the fee arrangement was in breach of CCJA Rules. In the wake of this unfortunate episode, the CCJA Rules now explicitly provide that any fixing of

fees without the CCJA's approval is null and void, but that this is not a ground to set-aside an award.

The new Act therefore reinforces the OHADA space as a very attractive place of international arbitration, especially for investors doing business, or planning to do business in Africa[lxiii].

Enforceability of arbitral awards[lxiv] within the OHADA area

The new Article 30 of the UAA sets out two main principles: a very general one for all those who are familiar with international arbitration law and another, more innovative, one aimed at thwarting judicial practices that delay the enforceability of arbitral awards.

If the resumption of the provisions of former Article 31 of the Uniform Act of 1999 was not a big surprise, confirming that exequatur is denied to any award obviously in breach of an international public policy rule, it is noteworthy that it is no longer a requirement that such international public policy rule be shared by all OHADA Member States. The removal of this requirement seems appropriate since the extent of the limitation was difficult to understand in practice. Nonetheless the key point in this regard remains jurisprudence, since the consistency of the international public policy issue will be clarified on a case-by-case basis in future judgments ruled by the Abidjan-based OHADA Court (CCJA) on the matter[lxv].

In an innovative way, Article 30 attempts to overcome the difficulties litigants may face when trying to enforce an arbitral award in an OHADA Member State. Indeed, the exequatur procedures are sometimes incredibly and needlessly long and complex, which reduces the effectiveness of the award and could be seen as a State judge taking revenge on an arbitral proceeding that removed the dispute resolution from his jurisdiction. From now on OHADA permits the possibility of a tacit exequatur, which is undoubtedly a novel concept. It would, however, be naive to assume too readily that this will solve the problems of enforceability of arbitral awards.

First, although the recognition of a tacit exequatur meets a legitimate need on the part of litigants, the 15-day timeline over which it is deemed to have been granted by the court is too short, given the objective functioning of some courts within the OHADA region, and will affect judicial staff as well as litigants. It is common sense that a rule perceived as unreasonable is

rarely applied without some resistance. Secondly, the State judge may take time in exercising his discretion to assess whether the conditions are or are not fulfilled for declaring a request for an exequatur admissible, thus delaying the achievement of enforcement. Finally, the issuance of the enforcement formula by the court clerk could prove a new source of delay in case of tacit exequatur, and become a cause of frustration for the parties struggling to enforce an arbitral award.

Indeed, these possible difficulties illustrate a major deficiency in the legal system set up by OHADA, namely the absence of a Uniform Act harmonising the commercial procedures within the Member States. Such an Act would have the merit of unifying the litigation both formally and substantively, and thus allow the CCJA to exercise its full jurisdiction without the result that procedural rules – because they come under national laws leave national judges with the possibility of indirectly counteracting the effects of the harmonised substantive law.

The new CCJA ruling concerning immunity from execution of public corporate bodies

Immunity from execution of public corporate bodies is governed in OHADA states by article 30 of the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures[lxvi]. However, any debt which is certain, due and owed by state corporations or firms, regardless of their legal form and mission, shall give rise to a set-off against debts which are also certain, due and owed them, subject to an agreement of reciprocity.

The debts of the state corporations and firms referred to in the preceding paragraph may only be considered certain, within the meaning of this article, where they arise from either an acknowledgement by the said corporations and firms of the debts or from a writ which is enforceable within the territory of the State where the corporations and firms are located.

The CCJA has applied this provision in absolute. In this context, even semi-public companies engaged in commercial activities were protected by the court through the all-encompassing expression of 'public enterprises', which extended immunity from execution to semi-public companies, explaining that these companies, being nevertheless partially public, enjoy immunity from execution despite their commercial activities.

This was the case in the CCJA ruling of 7 July 2005 (No. 043/2005 ***Aziablévi Yovo v Togo Telecom***[lxvii]). The facts in this case were simple: the Togolese semi-public mobile phone company, Togo Telecom, was condemned to indemnify some of its employees for unfair dismissal.

With the Togolese courts having authorised the seizure of the Togo Telecom bank account for the payment of the amount of the said indemnity, the appeal introduced by Togo Telecom before the CCJA offered this court the opportunity to state that even semi-public companies engaged in commercial activities enjoyed immunity from execution.

The OHADA court has modified its position since a decision handed down on 26 April 2018 in the ***Mbulu Museso*** **case**[lxviii] **(**Ruling No. 103/2018 of 26 April 2018**).**The facts here were also simple: the justiciable beneficiary of the ruling made a seizure of garnishment on the amount owed to Grands Hotels du Congo by many banks in Kinshasa.

Arguing that the Grands Hôtels du Congo enjoys immunity from execution according to article 30 of the above-cited uniform act, the Democratic Republic of Congo internal courts released that seizure.

Following an appeal against this released decision, the CCJA issued its ruling in 26 April 2018. The CCJA determined the beneficiaries of the immunity from execution and, as per article 30 of the Uniform Act in subsection 2, indicated a first category of public entities that enjoy immunity from execution. This category comprises state, public corporate bodies and public enterprises, regardless of their form and mission.

The CCJA specified in the same ruling that for the other public entities, the criteria to take into consideration is the nature of the activity of such entities and the form in which these entities carry on those activities.

As for the semi-public entities, the CCJA specified that the semi-public corporate bodies, as is the Grands Hôtels du Congo, do not enjoy immunity from execution, owing to the commercial nature of their activities, even though the state is a shareholder of such a company.

Applying this CCJA ruling in a decision rendered on the 26 June 2018, the president of the tribunal of the first instance of Douala Bonanjo in Cameroon, in a case where the Cameroonian national aircraft Camair-Co was seized by an England creditor, the president of the court indicated that, as the state of Cameroon was the only owner of the aircraft company, the latter enjoyed immunity from execution, in accordance with article 30 of the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures.

It follows from this decision that a public entity belonging to a state, because that state is the only shareholder of that public entity, enjoys immunity from execution, even though its activities are of commercial nature. Yet the CCJA ruling nevertheless specifies that a semi-public company where the state has 50 per cent of the capital, and the other 50 per cent belongs to non-public persons, this semi-public company does not enjoy immunity from execution.

Even though one must acknowledge that the CCJA has evolved in its jurisprudence concerning immunity from execution, it is important for that supranational court to reach the position put forward by the 2004 United Nations Convention on jurisdictional immunities of states and their property. According to articles 13, 14, 15 and 16 of that convention, not yet in force but already introduced in the domestic law of a country such as France, the immunity from execution of a state or of other public corporate bodies disappears when such state or other public entity has undertaken commercial activities.

Hence, more than the public nature of a company, or the public nature of the state or the other public entities, the commercial nature of their activities should also, in the OHADA territory, be the decisive criterion to restrict, or not, their immunity from execution. In other worlds, the principle here should remain immunity from execution in favour of states or of public corporate bodies in OHADA; but as stated in the 2 December 2004 United Nations Convention on jurisdictional immunities of state and their property, the commercial activities of a public corporate body should give rise to the restriction of such immunity.

THE NEW OHADA ARBITRATION FRAMEWORK IS STILL WANTING

Perhaps the most disheartening feature of the new UAA, however, is that the language of Article 1 related to the territorial scope remains unchanged: it is limited to arbitrations with their seat in an OHADA State Party. The reality is that the vast majority of arbitrations with respect to disputes in OHADA countries, particularly those involving foreign investors, will be seated in third-party countries.

The drafters of the new UAA could at least have seized this opportunity to clarify the language of Article 34, which unfortunately also remains unchanged and still provides that "arbitral awards rendered on the basis of rules other than those of the present Uniform Act shall be recognized in the States Parties in accordance with any international conventions that may be applicable and, failing any such conventions, in accordance with the provisions of this Uniform Act." While this language has been read to include awards rendered in third-party countries, the clash with the territorial scope of Article 1 remains. Short of a rewriting of Article 1, a straight-forward, broad, reference in Article 34 to awards rendered in countries other than the OHADA country in which recognition or enforcement is sought would have made things considerably easier for arbitration practitioners.

Article 34 of the UAA could have benefitted from further clarification on two grounds. First, it provides a complex and unsatisfactory system where recognition of foreign awards will be granted, depending on the particulars of the case, on the basis of either applicable multilateral agreements (such as the ICSID and New York Convention), bilateral agreements, or the UAA itself. Second, it addresses recognition only, and is silent on enforcement. An argument that it applies mutatis mutandis to enforcement, while highly plausible, is of course unsatisfactory. The fact that the New York Convention criteria for enforcement are more stringent than those of the UAA further leads to the paradoxical result that seeking enforcement of an award in a OHADA State party may be easier if that State is not a signatory to the New York Convention (5 out of 17 OHADA States are still not signatories of the New York Convention).

Also, a number of timeframes have been aggressively streamlined. For instance, a national court now has fifteen days to rule on a request for exequatur. If the court does not issue a ruling

within those fifteen days, exequatur is deemed to have been granted. The UAA expressly provides that a decision declining exequatur is subject to direct appeal to the CCJA, and that a decision granting exequatur cannot be appealed. What the UAA fails to provide for, unfortunately, is the situation in which a court fails to rule within fifteen days on an award for which, for whatever reason, a party has a legitimate argument that it should not be granted exequatur.

Furthermore, more could be done to raise awareness of OHADA arbitration among local arbitration stakeholders and within the legal and business communities but there are always budgetary constraints. For instance, ERSUMA (the regional school in Benin which trains judges and officers of OHADA Member States) suffers from budget constraints that impedes the delivery of training sessions to stakeholders. That said, partnerships with foreign universities, international organisations and law firms are developing fast and these connections facilitate dissemination of information about OHADA law and arbitration. It is hoped that the partnership between the ICC and OHADA, formalised in June 2016, will achieve its objective 'to promote, professionalise and standardise the practice of arbitration' in OHADA Member States[lxix].

Moreover, the enforcement of awards rendered under the Uniform Act regime is complicated by a lack of uniformity of procedure across all OHADA Member States. To enforce a Uniform Act regime award, the 'competent state judge' must issue an order of exequatur converting the award into an order enforceable within the domestic jurisdiction. There is, however, no uniform exequatur across all OHADA Member States. Instead, parties must apply for exequatur in each state where enforcement will be sought. Further complicating matters, not all OHADA Member States have designated their 'competent judge' for this purpose[lxx].

These issues are unique to arbitration under the Uniform Act regime and do not arise under the CCJA regime. CCJA regime awards are enforced by an order of exequatur issued by the CCJA (not a state court), and that order is binding and enforceable across all OHADA Member States. This is one advantage of the CCJA regime over the Uniform Act regime.

CONCLUSION

OHADA Arbitration has come a long way since 1996. The reform of OHADA arbitration has brought much needed clarity to several aspects of OHADA's dispute resolution framework, including the scope of arbitration agreements, the expeditious conduct of the arbitration, the procedure for appointing and challenging arbitrators as well as added clarity on the recognition and enforcement regimes of arbitral awards. As a testament to OHADA's efforts to enhance its attractiveness as a business-friendly territory, the revised framework for arbitration was also supplemented by the introduction of a new Uniform Act on Mediation, modelled on the 2002 UNCITRAL Model Law on International Commercial Conciliation[lxxi], which was adopted on 23 November 2017 and which also entered into force on 15 March 2018. With these amendments, dispute resolution in the OHADA region has embarked on a promising trajectory. Overall, however, despite the shortcomings pointed above, the reform provides a solid framework for arbitration in OHADA countries. Experience will hopefully alleviate the limited concerns raised in this article.

While the operation of these provisions in practice remains to be tested, the reforms are a timely and welcome development in the context of the development of arbitration in Africa, a field which continues to attract growing interest. In this light, the enhancement of operational efficiencies within OHADA arbitration as provided for in the revisions are likely to enhance further the credibility of the supranational framework and attract yet more attention from the legal and business community towards arbitration in Africa.

Ultimately, for OHADA arbitration to emerge as a strong regional contender for African-related disputes, what is needed is reform of the OHADA system. In particular, concerns over conflicts of interest and impartiality, and predictability of recognition and enforcement of arbitration agreements and awards (especially where state parties are involved) all need to be addressed. Without this, confidence in the system will remain low, and parties will continue to prefer international alternatives

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20. R. Rajesh Babu, "International Commercial Arbitration and the Developing Countries", AALCO Quarterly Bulletin Vol. 2(4) (2006), p. 397.

ENDNOTES

[i] OHADA is: ''Organisation pour l'Harmonisation en Afrique du Droit des Affaires'' (Organisation for the Harmonisation in Africa of Business Laws), which is a uniform set of business laws and implementing institutions adopted by 17 states in West and Central Africa.
[ii] This UAA entered into force on the 15 of March 2018
[iii] "Regional Economic Reports: Africa", International Monetary Fund (2 November, 2016), available at: <http://www.imf.org/external/pubs/ft/reo/reorepts.aspx?ddlYear=-1&ddlRegions=11>.
[iv] 2 Sophie Pouget, "Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment", The World Bank (October, 2013), available at: <http://documents.worldbank.org/curated/en/554271468340163221/pdf/WPS6632.pdf>.
[v] Steven Finizio, Thomas Fuhrich, "Africa's Advance", African Law and Business, July 07, 2014, available at: https://www.africanlawbusiness.com/news/5068-africas-advance.
[vi] The Government of India v Cairn Energy India Pty Limited, Ravva Oil (Singapore) PTE Ltd, Videocon Industries
Limited [2014] 1 AMCR 760 (p. 24).
[vii] Ray Turner, Arbitration Awards: A Practical Approach, Blackwell Publishing, Oxford, 2005, p. xx
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[x] Despite the growing number of disputes involving African interests, the majority of Africa-related arbitrations are not conducted using the OHADA arbitration framework. This is, in part, due to inherent flaws in the OHADA arbitration regime and to the perception that arbitrations seated in OHADA Member States are not sufficiently certain in form, substance and enforcement. The system has to change if OHADA arbitration is to become a strong regional contender.
[xi] Laurence Franc-Menget and Merlin Papadhopulli, "OHADA Arbitration Reform – Publication Of The New Uniform Act On Arbitration And The Revised CCJA Arbitration Rules", https://hsfnotes.com/arbitration/2017/12/22/ohada-arbitration-reform-publication-of-the-new-uniform-act-on-arbitration-and-the-revised-ccja-arbitration-rules/, consulted on 31/12/2021 at 11am.
[xii] See article 2
[xiii] See article 3
[xiv] See article 5
[xv] See article 6§5
[xvi] See article 8§1
[xvii] See article 8§2
[xviii] See article 8§3
[xix] See article 14§4
[xx] See article 14.
[xxi] See article 8-1
[xxii] See article 13§2
[xxiii] See article 14§13
[xxiv] See article 27§2

[xxv] See article 31§5
[xxvi] See article 31§6
[xxvii] See article 32
[xxviii] See article 2.1§2
[xxix] See article 3.3§1
[xxx] See article 3.3§2
[xxxi] See article 5§4
[xxxii] See article 6§1
[xxxiii] See articles 8-1, 8-2, 8-3, and 8-4
[xxxiv]see article 19
[xxxv] See article 19.1§3
[xxxvi] See article 19.2
[xxxvii]See article 23.2§1
[xxxviii] See article 23.2§2
[xxxix]See article 22.1§2
[xl] See article 29.2§2(f)
[xli] See article 29.2§2(b)
[xlii] See article 29.4§3
[xliii]See article 30.2§1
[xliv] See article 30.2§5
[xlv] See article 30.4.
[xlvi] Section 3 of the UAA.
[xlvii] See Section 3-1 of the UAA. Section 3 of the UAA.
[xlviii] This mechanism consist in indicating in a contract, a reference to another document containing the arbitration agreement.
[xlix] Mouhamed Kebe, "The new OHADA arbitration act: Key issues to be aware of", Africa Arbitration Review OCTOBER 2020, p.8.
[l] Section 2 of the UAA.
[li] The UAA applies both to civil and commercial disputes and primarily to ad hoc arbitrations i.e. outside any arbitration center.
[lii] The Convention on Transparency was adopted on December 10, 2014 and entered into force on October 18, 2017 (the "Transparency Convention").It applies to any arbitration between an investor and a State on the basis of an investment treaty.
[liii] Benin, Cameroon, Congo, Gabon.
[liv] First and foremost, the Uniform Mediation Act, which by virtue of the OHADA Treaty, becomes directly applicable in the 17 State Parties, will apply to all mediations commenced after 15 March 2018, irrespective of the date of signature of the applicable mediation clause. It applies to ad hoc and institutional mediations alike, be they initiated by the parties, a national court, an arbitral tribunal, or an administrative entity.
[lv] Aurélie Chazai CHAZAI & PARTNERS, "FOCUS ON THE OHADA REFORM OF ARBITRATION LAW" MARCH 5, 2018
[lvi] The UMA enshrines the hallmarks of modern mediation: confidentiality, timely court validation of settlements, and independence of the mediator from the parties. In addition, a mediator cannot act as expert or arbitrator in the same dispute absent an agreement of the parties to the contrary.
[lvii] Section 8-1 of the UAA.
[lviii] Section 13 of the UAA.
[lix] Section 14 of the UAA.
[lx] Former section 16 of the UAA had the arbitral proceedings terminated by the expiration of the arbitration period.
[lxi] The court shall make a closing order when:
> the applicant withdraws his application, unless the defendant opposes it and the arbitral tribunal acknowledges that it has a legitimate
interest in the final settlement of the dispute;
> the parties agree to terminate the proceeding;
> the arbitral tribunal finds that the continuation of the proceedings is, for any other reason, superfluous or impossible;
> the initial or extended arbitration period has expired;

> there is acquiescence in the application, discontinuance or transaction.
[lxii] ICSID Case No. ARB/11/29
[lxiii] David Sutton, et al, Russell on Arbitration, 24th edition, Sweet & Maxwell, 2015, para 3-018, p. 108
[lxiv] F.D.J Brand, "Judicial Review of Arbitration Awards", Stellenbosch Law Review Vol. 25(2), (January, 2014), pp.
247-264.
[lxv] Assuming the court will be seized of such cases much more than it has been so far.
[lxvi] The said provision states as follows: Compulsory execution and protective measures shall not apply to persons who enjoy immunity from execution.
[lxvii] Arrët N° 043/2005 - Affaire : Aziablévi YOVO et autres c/ Société TOGO TELECOM
[lxviii] Cour Commune de Justice et d'Arbitrage, Chambre 3, Arrêt N° 103-2018 du 26 avril 2018
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[lxxi] Gus Van Harten, Investment Treaty Arbitration and Public Law, (OUP, 2006), p. 153