The revised framework for OHADA Arbitration: a leap into the future?

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Introduction

The Organization for the Harmonization of Business Law in Africa ('OHADA') is an intergovernmental organisation for legal integration aimed at addressing the "*legal and judicial insecurity in Member States*". OHADA was established by the Treaty of Port Louis, Mauritius on 17 October 1993, and revised on 17 October 2008 in Quebec, Canada. Today, Cameroon, Chad, Congo and 14 other mostly francophone African states, are members.

The new OHADA arbitration framework, published on 15 December 2017 in the Official Journal of OHADA, came into force on 15 March 2018. In accordance with the revised arbitration framework, the Uniform Act on Arbitration Law ('Uniform Act') and the Rules of Arbitration of the Common Court of Justice and Arbitration ('CCJA Rules') replace previous versions dated 1999 and 1996 respectively. This reform aims to make the OHADA region a more attractive business environment through an efficient dispute resolution offering.

The Uniform Act is directly applicable to all OHADA Member States. Parties can commence ad hoc or institutional arbitration administered by an institution other than the CCJA under the Uniform Act subject to the seat chosen being within an OHADA Member State. Parties are welcome to initiate proceedings administered by the CCJA under the CCJA Rules subject to either of the parties being domiciled in a OHADA Member State, or alternatively, if the contract is wholly or partially enforced. Overall, the amendments conform respectively with rules and regulations of key arbitration jurisdictions and arbitral institutions.

In this article, we intend to reflect on the former framework for OHADA arbitration and provide an overview of the key features of the revised arbitration framework.

Former framework for OHADA Arbitration

The previous iteration of the Uniform Act and CCJA Rules have attracted much criticism over the years. For example, certain domestic courts were found to wrongfully uphold their jurisdiction despite the existence of an arbitration agreement governing a dispute between the parties. This issue has now been addressed in the Uniform Act as it includes clarification on the scope of the *compétence-compétence* principle under article 13.

Furthermore, the CCJA, as an institution, has also faced criticism due to a situation dubbed as creating conflicts of interest. The CCJA, which supervises arbitral proceedings, is tasked with confirming appointment of arbitrators as well as reviewing the form of arbitral awards. A conflicts situation could arise in situation where the CCJA, also acting as a judicial authority, has the power to rule on challenges to the validity or enforceability of awards reviewed by itself.

The critiques and concerns grew over the OHADA regime after the case of *Getma International and Others v Republic of Guinea* (19 November 2015). In summary, the CCJA ruled to set aside the arbitral tribunal's award on the ground that the arbitrators breached their arbitral mandate by directly negotiating with the

parties an increase in their fees, higher than the cap imposed by the CCJA. This decision attracted a lot of attention at the time for two reasons. Firstly, the harsh consequences for the award creditor (Claimant) who had to witness the annulment of the arbitral award. Secondly, because the arbitrators deciding the case published an open letter to the arbitration community publicly criticising the CCJA's decision. Concerns over the OHADA regime crystallisation after the Claimant sought enforcement of the award in before a US court. The US court refused to confirm the arbitral award and found that the fee arrangement was in fact in breach of the CCJA Rules. Following this unfortunate turmoil, the CCJA revised its rules to provide that any fixing of fees without prior approval of the CCJA is null and void, though it would not be a ground to set-aside an arbitral award. The primary concern as a result of this case was the lack of respect towards party autonomy, a key attribute to international commercial arbitration. As a result of this case, it was questioned whether parties in the future would avoid increasing the arbitrators' fees without the consent of the CCJA and more importantly, whether the CCJA would be able to attract high quality international arbitrators to hear its cases.

Revised framework for OHADA Arbitration

As the goal of OHADA is to eliminate "*legal and judicial uncertainty*", the Uniform Act and the CCJA Rules go a long way to achieve this noble objective. The provisions of the Uniform Act take into consideration important principles and are inspired by the UNCITRAL Model Law on International Arbitration. The scope of the Uniform Act applies to arbitrations seated within the OHADA territory; if either of the contractual parties is domiciled in the OHADA territory; and, for the settlement of contractual disputes where the contract is, partially or totally applied in the OHADA territory. A very welcome development regarding the scope of application of the Uniform Act's *ratione materiae* is that it now covers investment arbitration. Additionally, other noteworthy changes, further discussed below, include, increased focus on arbitrator impartiality, a clearer process for appointing arbitrators and stricter time limits for enforcement of awards. While the reform constitutes a push towards greater flexibility (1) and more efficiency (2), the need for a secure and unified enforcement regime is prevalent (3).

1- Flexibility

Investment Arbitration

The new reforms extend the scope of OHADA arbitration to also include investment arbitrations. The Uniform Act now includes bilateral investment treaties ('BIT') and investment codes as new bases for OHADA arbitration. The Uniform Act goes further to confirm the ability of public entities to consent to arbitration upholding the consensual nature of arbitration (Articles 1 and 2). This is mirrored in the CCJA Rules, which afford the Court an arm's length jurisdiction, which is understood to include arbitration proceedings premised on BIT's or national investment laws (Article 2.1). Unfortunately, the new provision does not expressly refer to either BITs or investment codes. In order to adhere to standards of international best practice, these provisions will have to be supplemented with tailored provisions dedicated to investment arbitration.

Multi-party Arbitration

The scope of OHADA arbitration is now more conformed to standards of international best practice as both the Uniform Act and the CCJA Rules now cover scenarios involving multi-party disputes and parallel proceedings. Under sections 8.1 of the Uniform Act and 21.1 of the CCJA Rules, the arbitrators now have

the power to suspend proceedings and instruct the parties to exhaust all alternative dispute resolution mechanisms prescribed as part the parties' dispute resolution agreed framework. The CCJA Rules take a step further in permitting joinder of additional parties under certain conditions (Article 30).

2- Efficiency of the proceedings

The Uniform Act aims to enhance the efficiency of the proceedings from the latter's very early stages. New provisions have been dedicated to the settlement of claims during the preliminary stages of the proceedings. To achieve this goal, the Tribunal may, at the request of the parties, ensure that all efforts for amicable settlement have been exhausted prior to further engaging in the proceedings. Additionally, as evidenced in other leading arbitral laws and institutional rules, the Uniform Act prescribes that parties shall avoid any delay tactics and ensure that their conduct is fair and prompt. Moreover, the CCJA Rules enable the Tribunal with powers to either end or continue the proceedings notwithstanding having either of the parties failing to submit its claims or appear before the Tribunal.

Under the new Uniform Act, unless otherwise agreed, the arbitral tribunal shall be composed of either one or three arbitrators. In the event of a three-member tribunal, and where the parties have only agreed on the appointment of two arbitrators, the appointment of the presiding arbitrator "shall be made, upon request of a party, by the competent judge in the State Party" (Article 5(a)). This position is also reflected in the CCJA Rules, however "*[i]f the parties fail to agree within thirty (30) days of notification of the request for arbitration, the arbitrator shall be appointed by the Court*" (Article 3.1).

The revised OHADA arbitration framework has introduced specific obligations in order to ensure more transparent arbitration proceedings. Article 7 of the Uniform Act and Article 4.1 of the CCJA Rules require arbitrators to disclose to parties any circumstance which may give rise to justifiable doubts as to their impartiality and independence. In these circumstances, arbitrators may only continue their arbitral mandate subject to the written approval of the parties. Article 4.1 of the CCJA Rules requires a party who wishes to challenge the appointment of an arbitrator to do so during a period "not exceeding 30 days from the discovery of the fact which gave rise to the challenge." Additionally, in order to ensure an expeditious resolution to the challenge of an arbitrator, the Uniform Act provides that should the competent court not render a decision within 30 days, the parties may refer the challenge to the CCJA.

3- Arbitral Award enforceability

Enforcing an award under the Uniform Act remains a delicate task due to the lack of a unified enforceability regime across all OHADA Member States. To enforce an arbitral award under the Uniform Act, the award must be compatible with the requirements of the domestic jurisdiction in which enforcement is sought. In accordance with the Uniform Act, the 'competent state judge' must issue an order of exequatur (Article 30.1). The issue remains that there is presently no uniform exequatur regime or cross-border enforcement passport across OHADA Member States. Accordingly, parties must apply for exequatur separately in each Member State in which it wishes to enforce the award. Additionally, we note that not all Member States have designated a 'competent state judges' institution for this purpose.

It is worth noting that the foregoing enforcement issues, found under the Uniform Act, do not arise under the CCJA Rules. Arbitral awards issued under the CCJA are enforced through an order of exequatur by the CCJA which is binding on all OHADA Member States. Investors looking for effective court decisions on enforcement of awards will undoubtedly welcome this feature of OHADA arbitration.

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, 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.

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