

TOGO

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction	Lomé, as the capital city.
Civil law / Common law environment?	Civil law. The Uniform Arbitration Act is a treaty which applies in all member-States of the OHADA, to which the Togo is a party.
Confidentiality of arbitrations?	The Uniform Arbitration Act does not expressly provide for confidentiality, although certain set of arbitral rules on which the parties can agree (such as the CATO Rules and the CCJA rules provide for confidentiality. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common, but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal's discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Togolese bar rules prohibit fee arrangements pursuant to which the lawyers' fees are exclusively determined on the basis of the outcome of the dispute. Otherwise, they provide that the lawyers' fees are freely agreed upon between a lawyer and its client. Third-party funding is not codified in Togolese arbitration law, but it is likely to be accepted.
Party to the New York Convention?	No
Other key points to note	∅
WJP Civil Justice score (2017-2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The OHADA Uniform Arbitration Act was revised on 23 November 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Togolese arbitration law is not based on UNCITRAL Model Law strictly speaking, but most of the core principles underlying the Model Law are applied under the Uniform Arbitration Act.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Ordinary courts handle jurisdictional challenges and the annulment and enforcement of awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction and national courts seized with a matter potentially falling within the ambit of an arbitration agreement must refer such matter to the arbitral tribunal save if the arbitration agreement is manifestly void or inapplicable.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only limited grounds set out in the Uniform Arbitration Act, which are similar to those provided for in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether Togolese courts are bound by the foreign court's set-aside decision has not been settled yet, although we believe that such setting aside would not be a ground for non-enforcement in Togo.
Other key points to note?	<p>Arbitration agreements are to be signed by all parties in principle, although the Uniform Arbitration Act leaves room for a binding effect of the arbitration agreement on non-signatories.</p> <p>Based on the decision rendered by Togolese courts, we would assess the arbitration friendliness of Togo at about 40%.</p>

JURISDICTION DETAILED ANALYSIS

1. Legal Framework

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The arbitration law is not directly based on the UNCITRAL Model Law. However, as explained below, all the core principles underlying the UNCITRAL Model Law are in the texts which form part of the Togolese arbitration act (these principles include the binding nature of the arbitration agreement, the autonomy of the same, the competence-competence principle, etc.).

The Togolese Republic is a member of the Organization for the Harmonization of Business Law in Africa (“OHADA”). The OHADA system provides for a uniform set of rules in various branches of commercial law that are directly applicable to its Member States. As of the date of this publication, ten Uniform Acts have been enacted, as a result of their adoption by the OHADA’s Council of Ministers. They apply in the OHADA region and are largely based on French law. Their respective subject matters range from commercial law, bankruptcy, arbitration, financial and commercial accounting, securities, and enforcement proceedings.

The Uniform Arbitration Act (“**Uniform Arbitration Act**”) applies to arbitrations whose seat of arbitration is in a Member State of the OHADA.

In addition to the institutions developed within the framework of the OHADA system (such as the Common Court of Justice and Arbitration located in Abidjan, Ivory Coast). Togo has created the Court of Arbitration of Togo (“**CATO**”) by enacting Law No. 89-39 of 28 November 1989 instituting a Court of Arbitration to provide arbitration facilities for commercial disputes in the region. On 1 January 2011, the CATO Rules were adopted in conformity with Law No. 89-39 and the Uniform Arbitration Act of 1999. Because this institution has been created by law, this chapter will refer to certain of features of the CATO Rules, where these can provide helpful comparison with the Delos Arbitration Rules.

Togo is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). The provisions of the Uniform Arbitration Act therefore govern the recognition and enforcement of arbitral awards.

Togo is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”), which it has ratified on 11 August 1967. The ICSID Convention has entered into force on 10 September 1967. In addition, Togo has entered into four bilateral investment treaties, two of which are currently in force.

In addition to these international instruments, article 8 of the Togolese Code of Investments provides that disputes between an investor and the State (or between States) arising out of the interpretation or the application of the provisions of this Code shall be submitted to the national courts or to international arbitration.

1.2 When was the arbitration law last revised?

On 23 and 24 November 2017, the Council of Ministers adopted the Uniform Arbitration Act on Mediation, the Uniform Arbitration Act, and the Revised Rules of Arbitration of the Common Court of Justice and Arbitration (“**CCJA**”). The objective of the revision was to modernize the arbitration framework by enhancing the transparency and effectiveness of arbitrations for arbitrations conducted in OHADA Member States. Unless otherwise specified herein, this chapter will focus on the revised Uniform Arbitration Act.

2. Arbitration Agreement

Articles 3 and 4 of the Uniform Arbitration Act concern the arbitration agreement. Article 3 states that an arbitration may be introduced either on the basis of a contractual arbitration agreement, or of an instrument

concerning the protection of investments containing a univocal agreement from the State to arbitration, such as a treaty or the Togolese Code of Investments.

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The Uniform Arbitration Act does not specifically provide for a method to determine the law governing the arbitration agreement. In addition, since Togo has not ratified the New York Convention, the conflicts of law rules provided at Article V.1 (a) do not apply to determine the law governing the validity of the arbitration agreement.

However, Article 4 of the Uniform Arbitration Act expressly states that the validity of the arbitration agreement is not affected by the nullity of the underlying agreement and has to be assessed pursuant to the intention of the parties without any reference to any national law.

Article 4(2) suggests that a Togolese court reviewing the validity of an arbitration agreement will not need to conduct a conflict of laws analysis to determine the law governing the arbitration agreement's validity and existence. Rather its assessment of the existence and validity of the arbitration agreement will be based exclusively on the parties' intention as evidenced in the record. However, we are not aware of a decision rendered by Togolese Courts which has confirmed this interpretation.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

As explained above, Article 4 of the Uniform Arbitration Act specifically provides that the arbitration agreement is independent from its underlying contract. The rules of the Court of Arbitration of the Togo contain a similar provision. Indeed, Article 9(4) of the CATO Rules provides that unless the parties have agreed otherwise, allegations that the agreement underlying the arbitration clause does not exist or is void do not preclude the arbitrator's jurisdiction to determine the matter if she or he considers the arbitration clause to be valid. In other words, the arbitrator remains competent to determine the parties' respective rights and obligations, even if the underlying contract is void or does not exist. This is confirmed by Article 31(2) of the CATO Rules which provides that an arbitration agreement providing for CATO arbitration is distinct from the other provisions of the contract. Similarly, and as a result of the foregoing, we believe that even if an agreement containing an arbitration agreement providing for the DELOS Rules of Arbitration was void, this would not affect the enforceability of the Delos arbitration agreement.

2.3 Formal requirements for the validity and/or enforceability of the arbitration agreement

Article 3-1 of the Uniform Arbitration Act states that an arbitration agreement can either take the form of an arbitration clause inserted in a contract, or of a specific arbitration contract ("*Compromis d'arbitrage*"). Irrespective of the option chosen, the arbitration agreement must be in writing or in any other manner which would allow it to be evidenced, such as through an incorporation by reference.

2.4 Application of arbitration agreements to non-signatory parties

The Uniform Arbitration Act does not provide for any specific provision dealing with the application *ratione personae* of arbitration agreements. To our knowledge, there are no decisions by Togolese courts which recognize that a non-signatory to a contractual arbitration agreement may be bound by it. However, Articles 8(1) and 8(2) of the CCJA arbitration rules provide for joinder and voluntary joinder.

With respect to investment arbitration based on instruments other than contracts, the Uniform Act does not specifically refer to it, although it is admitted in practice. Article 3 of the revised Uniform Act henceforth provides that an "*arbitration may be based on an arbitration agreement or an instrument pertaining to investments, in particular, an investment code or a bilateral or multilateral investment treaty*". Accordingly, the nationals from signatory countries to such treaties may have recourse to arbitration when these instruments so provide.

2.5 Are there restrictions to arbitrability? In the affirmative:

Article 2 of the Uniform Act provides that « *Any person, whether an individual or a corporation, may have recourse to arbitration with respect to the rights of which one may freely dispose of.*

States, local authorities and public entities may be parties to an arbitration although they are not allowed to rely on their domestic law to challenge the arbitrability of a dispute, their right to arbitrate or the validity of the arbitration agreement”.

Accordingly, are not arbitrable only those matters that relate to rights that cannot be freely disposed of. By contrast, commercial, civil, administrative matters may be the subject of an arbitration, and public entities may arbitrate.

However, in practice, Togolese judges are reluctant to admit that disputes which have arisen out of an employment contract are arbitrable.

3. Intervention of domestic courts

The Uniform Arbitration Act restricts the Domestic courts’ right to intervene in arbitration proceedings to supporting the same. In particular, the principle of “competence-competence” is fully recognized in the Uniform Arbitration Act. Indeed Article 11 and 13 of the Uniform Arbitration Act provide that the arbitral tribunal has exclusive jurisdiction to rule on its own jurisdiction, and that courts should decline to exercise jurisdiction over the dispute unless the arbitration agreement is manifestly inapplicable or invalid. The insertion of the adverb “manifestly” shows that any dispute possibly falling within the ambit of an arbitration agreement shall be referred to arbitration, unless its inapplicability or its invalidity is so evident that it only requires a summary examination to be characterized.

The Uniform Arbitration Act also imposes a very short time limit within which this decision has to be rendered. Indeed, if the court fails to decide on whether the arbitration is manifestly inapplicable or invalid within 15 days from its seizure, the matter shall be referred to the arbitral tribunal for a decision on its own jurisdiction.

However, in practice, Togolese courts do not decline their jurisdiction and they allow the arbitration to proceed in parallel to the domestic litigation proceedings before them. Even when the award has been rendered, the parties pursue the proceedings by challenging the award or the judge’s decision which has declined jurisdiction. It then falls on the Common Court of Justice and Arbitration to harmonise the law as it is the supreme court of the member-states in the context of disputes relating to the Uniform Acts.

3.1 How do courts treat injunctions by arbitrators enjoining stays of litigation proceedings?

To the best of our knowledge, no anti-suit injunction has ever been issued by an arbitral tribunal to a Togolese domestic court.

As far as arbitrations before the Common Court of Justice and Arbitration are concerned, all jurisdictions of a member State have the obligation to decline jurisdiction in the presence of an arbitration agreement. Because this obligation is set forth in Article 23 of the OHADA treaty, it is mandatory for all jurisdictions of the 17 member-States.

3.2 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The Uniform Arbitration Act dedicates its second Chapter to the constitution of the arbitral tribunal. In principle, the parties are free to choose the rules governing the constitution of the arbitral tribunal (Article 6 of the Uniform Arbitration Act).

The Uniform Arbitration Act vests the domestic courts with the power to act in support of the constitution of the arbitral tribunal when such constitution is blocked by the refusal of a party to designate its own

appointed-arbitrator, or if the parties are unable to agree on the designation of the sole arbitrator or of the third arbitrator (Article 6 of the Uniform Arbitration Act).

The Uniform Arbitration Act also provides that the decision to appoint an arbitrator should be rendered within 15 days from the court's seizure. This ensures a speedy constitution of arbitral tribunals even if a party seeks to frustrate the process. In an additional effort to speed up the constitution of the arbitral tribunal, decisions from domestic courts in this respect are not subject to appeals or other recourses (Article 6 of the Uniform Arbitration Act).

However, the Republic of the Togo has not yet designated the judge which has jurisdiction to assist in the constitution of the arbitral tribunal, although, in the absence of any designation the provisions of the Togolese code of civil procedure shall apply to determine which judge is competent to take a specific decision.

3.3 Challenge to arbitrators

When the parties have not agreed upon a set of rules prescribing the conditions to challenge an arbitrator, such a challenge is brought before the appropriate domestic courts (Article 8 of the Uniform Arbitration Act). The decision dismissing the challenge can only be challenged through a direct "*appeal*" before the CCJA.

A challenge can only be introduced on the basis of circumstances that have arisen or have become known after the arbitrator's designation (Article 8 of the Uniform Arbitration Act).

3.4 Do courts have the power to issue interim measures in connection with arbitrations?

Pursuant to Article 13 of the Uniform Arbitration Act, the existence of an arbitration agreement does not prevent the parties from requesting interim or conservatory measures from the applicable domestic courts, if urgency so requires. In this regard, Article 13 clarifies that a court's decision to grant any such measure shall not equate to an assessment of the merits of the dispute, for which the arbitral tribunal has exclusive jurisdiction.

Unlike other arbitration laws, Article 13 of the Uniform Arbitration Act does not preclude courts from ordering conservatory and interim measures after the arbitral tribunal's constitution. As a result, even once the arbitration tribunal has been constituted, the parties remain free to request interim and conservatory measures from domestic courts, provided that such request is justified by urgency.

4. Confidentiality of the proceedings

There are no provisions in the Uniform Arbitration Act providing that the arbitration proceedings shall be confidential. Accordingly, it falls on the parties to agree on the degree of confidentiality which they want for their arbitration, either indirectly by making a specific choice of arbitration rules providing that the arbitration shall be confidential or directly by entering into a non-disclosure agreement specifically covering the arbitration.

In any event, pursuant to Article 18 of the Uniform Arbitration Act, the deliberations of the Arbitral Tribunal must remain secret.

5. Award

Article 19 states that the arbitral award should be rendered in accordance with the rules chosen by the parties. The award is rendered by the majority of the arbitrators composing the arbitral tribunal. It must be signed by all arbitrators. If a minority of the arbitrators refuse to sign the award, this refusal should be mentioned and the award will have the same effect as an award signed by all arbitrators.

The award must mention the items set out below:

- The names and first names of the arbitrator(s) that have rendered the arbitral award;

- The date on which the award has been rendered;
- The seat of the arbitration;
- The names of the parties as well as their domicile or place of incorporation;
- The names of the parties' counsel or any person who has represented or assisted them;
- A summary of the parties' claims, their arguments and the procedural steps.

The arbitral award must be reasoned.

The rendering of the awards terminates the mission of the arbitral tribunal.

5.1 Recourse against arbitral awards

5.1.1 What recourses are available if a party is dissatisfied with the award?

Under Article 25 of the Uniform Arbitration Act, an arbitral award cannot be challenged through appeal, opposition or a petition to quash, unlike a Togolese judgment.

It can only be subject to setting aside proceedings before the domestic courts. Article 25 recognizes that parties may waive their right to challenge the arbitral award, provided that the award is not contrary to international public policy.

The arbitral award can also be subject to a third party opposition by any party not involved in the dispute and whose rights have been prejudiced by the award. Any third party opposition must be filed before the domestic court that would have had jurisdiction in the absence of an arbitration agreement.

Finally the arbitral award can also be subject to an application for revision before the arbitral tribunal in instances where the discovery of new facts that would have had a material impact on the outcome of the dispute became known but that remained unknown to the arbitral tribunal at the time it rendered its decision. The application for revision must be brought to the arbitral tribunal that ruled on the matter, and failing that, before the domestic that would have had jurisdiction in the absence of the arbitration agreement.

5.1.2 Can parties waive the right to seek an annulment of the award?

Although the Uniform Act of 1999 did not provide for such a right, Article 25(3) of the 2017 Uniform Act provides that the parties may agree to waive the right to have the award set aside, unless the award violates international public policy, a possibility that is reiterated in Article 29.2 of the CCJA Rules of Arbitration.

With the 2017 reform of the Uniform Arbitration Act, parties to any arbitration, including the CATO or DELOS arbitrations, will have the right to waive their right to apply for the setting aside of the award.

5.1.3 Grounds for annulment

As per Article 26 of the Uniform Arbitration Act, an award will be set aside if:

- The arbitral tribunal's decision is not based on an arbitration agreement, or it is based on an expired or null arbitration agreement;
- The arbitral tribunal was not properly constituted or if the sole arbitrator was not properly designated;
- The arbitral tribunal ruled without complying with the mandate conferred upon it; or
- Due process was violated;
- The arbitral award is contrary to international public policy;
- The arbitral award fails to provide the reasoning on which it is based.

Under Article 27 of the Uniform Arbitration Act, an action to set aside can be filed as soon as the award has been rendered. However, a setting aside application is inadmissible if it has not been lodged within one month following service of order granting leave to enforce the award ("*exequatur*").

Pursuant to Article 28 of the Uniform Act of Arbitration, an application to set aside suspends the enforcement of the award. However, an arbitral tribunal may also order provisional enforcement of the award, thereby allowing parties to immediately take enforcement measures against the award debtor.

5.1.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

There is no distinction between domestic and international arbitrations under the Uniform Arbitration Act.

An arbitral award becomes enforceable once a party obtains an order granting it leave to enforce (“*exequatur*”) from the domestic courts. This order is obtained by the filing of an *ex parte* request by the party wishing to enforce the award. Such an enforcement title will not be granted if the court finds that the award is manifestly contrary to international public policy. Pursuant to Article 31 of the Uniform Arbitration Act, the court before which an application for enforcement has been lodged has 15 days to rule on the request, failing which, the award will be deemed to have become enforceable.

No recourse exists against the decision granting leave to enforce the award. However, the decision that denies leave to enforce can be challenged by filing a petition before the CCJA.

The enforcement and recognition of the award are considerably facilitated.

5.1.5 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The enforcement of an award in the Togo is made pursuant to Article 34 of the Uniform Arbitration Act, which provides that the arbitral awards rendered pursuant to rules which differ from the Uniform Arbitration Act may be recognized and enforced in the member-States, pursuant to the conditions set forth in the international conventions potentially applicable and, failing such conventions, pursuant to the same rules provided from in the Uniform Arbitration Act.

Because the Togo is not a party to the New York Convention, a commercial award will not be enforced pursuant to the rules provided therein, but pursuant to the rules set forth in the Uniform Arbitration Act. We are not aware of any case law which has addressed the issue of the enforcement in the Togo of a foreign award which has been annulled at the place of the arbitration, but we believe that Togolese courts would likely apply the same reasoning as the French courts in the *Putrabali* and *Hilmarton* cases given that the annulment of a foreign at the seat is not a ground for refusal of enforcement pursuant to Article 34 of the Uniform Arbitration Act.

6. Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

The Uniform Act does not contain any provision specifically addressing contingency or alternative fee arrangements. However, Article 55 of the West African Economic and Monetary Union rules provides that “*lawyers’ fees for the services performed shall be freely agreed upon by the lawyer and his client. They may be the subject of a written agreement. Failing any such fee arrangement, the lawyer’s fees shall be determined pursuant to the rules established by the applicable bar*”. Although Article 62 of the Bar Rules of the Togolese bar provides that the lawyers’ fees are freely fixed between the lawyer and his client, Article 64 of the same prohibits arrangements whereby the lawyer shall be exclusively remunerated on the basis of the amount of damages awarded.

6.1 Funding arrangements

Third-party funding is not formally provided for under Togolese law but is not forbidden either.