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OHADA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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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

The Organization for the Harmonization of Business Law in Africa ("**OHADA**") is an international organization comprising seventeen Member States essentially in Western and Central Africa. These are: Benin, Burkina Faso, Cameroon, Comoros (East African archipelago), Congo (Brazzaville), Ivory Coast, Gabon, Guinea (Conakry), Guinea Bissau, Equatorial Guinea, Mali, Niger, Central African Republic, Democratic Republic of Congo, Senegal, Chad, and Togo.

Created in 1993, OHADA aims at harmonizing the business law of its Member States to foster investment and promote economic development in the region.

In 1999, OHADA adopted two harmonized laws[1] with regards to arbitration: the Uniform Act on Arbitration ("**UAA**"), and the Rules of Arbitration of the Common Court of Justice and Arbitration ("**CCJA Arbitration Rules**"). In 2016, OHADA initiated a reform of its arbitration laws. As of 15 March 2018, revised versions of the UAA and the CCJA Arbitration Rules came in force.

With the 2018 UAA and CCJA Arbitration Rules, OHADA offers a modern arbitration framework. The practice of arbitration is developing in particular in Abidjan (Ivory Coast), Douala (Cameroon), Ouagadougou (Burkina Faso), and Dakar (Senegal).

The remaining challenges for the development of arbitration in the OHADA zone are to increase the recourse to arbitration, to improve the knowledge of the practice of arbitration, to train local practitioners, including judges, and to grant additional resources to the CCJA.[2] In addition, many arbitration experts have called for a thorough reform of the CCJA, which acts both as an arbitral institution and as the supreme court of OHADA law matters including for matters administered by its arbitral institution.[3]

Key places of arbitration in the jurisdiction	- Abidjan (Ivory Coast) - Dakar (Senegal) - Douala (Cameroon) - Ouagadougou (Burkina Faso)
Civil law / Common law environment?	Civil law in all Member States except for English-speaking Cameroon (common law).
Confidentiality of arbitrations?	The UAA does not expressly provide for confidentiality of arbitrations. This issue is left to parties' autonomy and where applicable, the applicable institutional rules. However, all participants to a CCJA arbitration are subject to confidentiality (CCJA Arbitration Rules Art. 14). The Secretary General of the CCJA may publish CCJA awards, as long as they are

1 Article 35 of the UAA provides that it is the arbitration law of the OHADA Member States. Pursuant to Article 35 of the UAA and Article 34 of the CCJA Arbitration Rules, these texts directly enter into force in the 17 OHADA Member States 90 days following their publication at the OHADA Official Bulletin. The nature of the CCJA Arbitration Rules is herein referred to as « normative », and this text is herein referred to as a « law », as it was adopted by the OHADA sovereigns. Obviously, the CCJA Arbitration Rules will only become binding on parties that have submitted to them.

2 See, Pougoué, *L'arbitrage dans l'espace OHADA*, 2016, RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL, Vol. 380 ("**Pougoué**"), pp. 109-280, pp. 207-208 ; Bühler, Gidoin, *Le défi de la complémentarité entre le juge et l'arbitre dans l'espace* OHADA, PENANT No. 904 – 2018, pp. 275-295, pp. 293-294.

3 Pougoué, para. 104; Bühler, *Out of Africa : The 2018 OHADA Arbitration and Mediation Law Reform*, JOURNAL OF INTERNATIONAL ARBITRATION 35, No. 5 (2018), pp. 517-540, in particular pp. 532-533.

	redacted in a manner that does not allow identification of the parties to the dispute.
Requirement to retain (local) counsel?	The UAA does not require to retain counsel, local or not, for arbitration proceedings with a seat in an OHADA Member State. The same applies to arbitration proceedings governed by the CCJA Arbitration Rules. Applications to the CCJA as the Supreme Court of OHADA law need to be made by a lawyer admitted to practice law in one of the OHADA Member States (Art. 23 of CCJA Rules of Procedure), however those no longer need to be made by counsel authorised to represent parties before the Courts of Abidjan (where the CCJA is located). In practice, powers of attorneys are required before the CCJA as the Supreme Court of OHADA law (Art. 23 of CCJA Rules of Procedure). In addition, appeals made to the CCJA shall contain an address for service in Abidjan, with the name of the person who is authorized and who has consented to receive all notifications who no longer needs to be a lawyer admitted in Abidjan (CCJA Rules of Procedure Art. 28.3). Representation before the local courts of OHADA Member States is governed by the rules of procedure of each State.
Ability to present party employee witness testimony?	The UAA and CCJA Arbitration Rules do not limit the ability to present party employee witness testimony. In principle, any person capable of testifying about the facts based on his or her own perception may be a witness, including the parties themselves, although the practice of hearing live testimony of witnesses remains limited in practice.
Ability to hold meetings and/or hearings outside of the seat?	The UAA and CCJA Arbitration Rules do not limit the place where the meetings and/or hearings should be conducted. With the consent of the parties, the arbitral tribunal may hold the scoping meeting in the form of a telephone conference or video conference (CCJA Arbitration Rules Art. 15.1). Whenever a government or state entity is involved, it is likely to insist that the meetings and/or hearings be held at the place of arbitration.
Availability of interest as a remedy?	The UAA and CCJA Arbitration Rules do not limit the availability of interest as a remedy. This question is generally governed by the law applicable to the merits.
Ability to claim for reasonable costs incurred for the arbitration?	The parties have a right to claim for their normal costs of defense and the arbitral tribunal has an obligation to make such a decision, at the latest in the final award [see, CCJA Arbitration Rules Arts 24.1 and 24.3.b].[4]

[4] Art. 24.3.b) of the CCJA Arbitration Rules expressly provides that "*[t]he arbitration costs shall include [...] the normal costs incurred by the parties for their defence, following the assessment which is made by the arbitral tribunal of the related claims made by the parties in that regard.*"

Restrictions regarding contingency fee arrangements and/or third-party funding?	The UAA and CCJA Arbitration Rules do not prohibit third party funding or contingency fee arrangements. The local bar rules of the OHADA Member State may regulate contingency fee arrangements.
Party to the New York Convention?	Twelve OHADA Member States have so far ratified the New York Convention namely Benin, Burkina Faso, Cameroon, Comoros, Ivory Coast, Gabon, Guinea Conakry, Mali, Niger, Central African Republic, DR Congo and Senegal. Central African Republic made the following reservations: - This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State - This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. Congo (Brazzaville), Guinea Bissau, Equatorial Guinea, Chad, and Togo have not signed or ratified the New York Convention.
Other key points to note	The pool of experienced arbitrators practicing in OHADA countries remains limited.
WJP Civil Justice score (2019)	- Burkina Faso: 0.51 - Cameroon: 0.37 - Ivory Coast: 0.47 - Senegal: 0.55 - Other Member States: N/A

ARBITRATION PRACTITIONER SUMMARY

The Uniform Act on Arbitration ("**UAA**") governs international arbitrations with a seat in an OHADA Member State.

The UAA is in many respects a modern arbitration act. It was built and adopted in 1999 on the idea of party autonomy. The UAA recognizes the key principles of arbitration, such as (i) the validity of arbitration agreement and the principle of "*competence competence*" (Arts 4, 11 and 13); (ii) the arbitrability of "*any rights on which [any natural or legal person] has the free disposal*" including over administrative matters (Art. 2); (iii) a cooperation of the domestic courts to assist in the conduct of arbitral proceedings (such as the constitution of arbitral tribunals) where necessary (Art. 14); (iv) limited grounds for annulment of arbitral awards (Art. 26); and (v) the possibility to waive annulment provided the arbitral award is not contrary to international public policy (Art. 25 para. 3).

Within the seventeen Member States, one of the main challenges for OHADA arbitration is the training of local judges to familiarize them with arbitration in general and the UAA in particular.[5]

The OHADA arbitration laws have specific features. The first one is the exclusive nature of the Rules of Arbitration of the Common Court of Justice and Arbitration ("**CCJA Arbitration Rules**"). When applicable, those do not overlap with the UAA but they replace it. In the words of the CCJA: "*the Uniform Act on Arbitration is not one of the legal acts [...] which are applicable in this case to the specific institutional arbitration of the CCJA.*"[6] As a result, this Chapter focuses on the UAA, while touching upon the CCJA Arbitration Rules and the role of the CCJA as an arbitration institution when relevant to understand OHADA arbitration law.

The second specific feature of OHADA law is the role of the CCJA as the supreme court for OHADA law matters including arbitration law.[7] The UAA provides recourses/appeals to the CCJA as a last resort court and in support of arbitration. The development of arbitration in the OHADA region is therefore intertwined with the role of the CCJA.

Date of arbitration law?	OHADA arbitration law includes the UAA and the CCJA Arbitration Rules first adopted in 1999 and then in November 2017. The versions of these texts revised in 2017 entered into force on 15 March 2018.
UNCITRAL Model Law? If so, any key changes thereto?	The 2018 texts are inspired in general by best practices of international arbitration. Key differences from the UNCITRAL Model Law are: - No detailed provisions concerning "Interim Measures and Preliminary Orders" (UNCITRAL Model Law Art 17 to 17 J) in the UAA and CCJA Arbitration Rules; - Innovative and unique provisions concerning the power of arbitral tribunals to address non-compliance with compulsory pre-arbitral procedures at Arts 8-1 of the UAA and 21-1 of the CCJA Arbitration Rules;

5 See, n. 2.

6 Free translation of French text : "*l'Acte uniforme relatif au droit de l'arbitrage ne figure pas au nombre des actes juridiques précités qui sont applicables en l'espèce à l'arbitrage institutionnel spécifique de la CCJA*": in *Société Nationale pour la promotion agricole (SONAPRA) v. Société des Huileries du Bénin* (SHB), CCJA Judgment No. 045/2008 dated 17 July 2008.

7 To date, there exist ten uniform acts, which form the OHADA legal framework.

	- Role played by the CCJA as the Supreme Court of OHADA law including arbitration law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The UAA and CCJA Arbitration Rules refer to the "*competent court in the Member State.*" This question is governed by the rules of procedures at the seat of the arbitration. At the commencement and during the conduct of the proceedings, assistance as "*juge d'appui*" include matters of (i) constitution of the arbitral tribunal; (ii) challenge of arbitrators; and (iii) any procedural matters, including provisional measures and the taking of evidence (UAA Arts 6, 8, 13, 14). In most Member States, the "*juge d'appui*" is not defined by law. In Cameroon, Ivory Coast and Senegal, the "*juge d'appui*" is the President of the First Instance Tribunal at the seat of the arbitration. At the end of the proceedings, assistance as "*juge du contrôle*" consist in controlling the validity of the award (for annulment and/or recognition/enforcement purposes) (UAA Arts 25-28, 30-32). The "*juge du contrôle*" is generally the Court of Appeal at the seat of the arbitration for annulment proceedings, and the President of the First Instance Tribunal at the place where recognition or enforcement is sought (Benin, Cameroon, Ivory Coast, Senegal). In some Member States, the competence of the Court of Appeal v. High Instance Court v. Commercial Court is debated concerning annulment proceedings (Burkina Faso, Mali). The Supreme Courts of Guinea Bissau and Equatorial Guinea are competent to decide enforcement of arbitral awards. In other Member States, the "*juge du contrôle*" is not defined by law. This lack of definition in some Member States, and the lack of harmonization between Member States of the competent judge, create uncertainty and therefore inefficiency as it provides a potential basis for jurisdictional challenges.
Availability of *ex parte* pre-arbitration interim measures?	OHADA law does not contemplate this question. It provides that as long as the arbitral tribunal is not yet constituted or for urgent matters, the parties may submit a request for interim relief to a state court *ex parte* (UAA Art. 13 last para.). See, also, CCJA Arbitration Rules Art. 10-1. The civil procedure of each Member State governs whether an *ex parte* application ("*sur requête*") for interim measures can be made or not (see, for instance, at Book VII of the Senegalese Code of Civil Procedure).
Courts' attitude towards the competence-competence principle?	OHADA law sets out the principle of "*competence competence*" (UAA Arts 11 and 13 and CCJA Arbitration Rules Art. 10.4). The 2018 texts clarify that the arbitral tribunal "alone" is competent to rule on its own jurisdiction.

	The CCJA regularly quashes local courts' decisions failing to comply with the "*competence competence*" principle and with the principle of validity of the arbitration agreement.[8]
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Annulment grounds under OHADA arbitration law are the following (UAA Art. 26 and CCJA Arbitration Rules Art. 29.2 para. 2): a) if the arbitral tribunal has ruled without an arbitration agreement or based on an agreement that is void or expired; b) if the arbitral tribunal was irregularly composed, or the sole arbitrator was irregularly appointed; c) if the arbitral tribunal ruled without conforming to the mandate with which it has been entrusted; d) if the principle of due process has not been respected; e) if the arbitral award is contrary to international public policy; or f) if the award fails to state the reasons on which it is based. The last ground for annulment *i.e.*, failure to state reasons is additional to the grounds of the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There exists no published OHADA case law addressing this case. The 2018 UAA and CCJA Arbitration Rules impose strict and short time-limits for decisions to be rendered by the local judges in arbitration matters. Practice will show the efficiency of these legislative measures.
Other key points to note?	The 2018 UAA and CCJA Arbitration Rules impose strict and short time-limits for decisions to be rendered by the local judges in arbitration matters. Practice will show the efficiency of these legislative measures.

[8] For example :

- On 17 June 2008 (*Darn Sarr (Cote d'Ivoire) v. Mutuelle d'assurances des taxis compteurs d'Abidjan dite MATCA*, CCJA Judgment No. 043/2008), the CCJA quashed a judgment rendered by an Ivorian court which had retained its jurisdiction on the sole ground that the arbitral tribunal had not been seized, without inquiring whether the arbitration clause was « manifestly void ».
- On 22 May 2014 (*Société CANAC Senegal SA (Sénégal), Société CANAC Railway Services Inc. v. Société Transrail (Mali)*, CCJA Judgment No. 082/2014), the CCJA similarly quashed a judgment rendered by the Court of Appeal of Bamako which held that the validity of the arbitration clause depended upon the validity of the contract which contained this clause.

JURISDICTION DETAILED ANALYSIS

1. Introduction to OHADA arbitration

1.1 What is the basis for OHADA arbitration?

On 17 October 1993, the founding treaty of OHADA was concluded in Port Louis, Mauritius (the "**Treaty of Port Louis**").[9] Pursuant to Arts 1 and 2 of the Treaty of Port Louis, the harmonization of OHADA arbitration laws is both a means to harmonization of OHADA business laws, and a goal *per se*.

1.2 Where to find OHADA arbitration law?

Similar to all OHADA laws, OHADA arbitration laws were adopted unanimously by the Member States. The 2018 UAA and CCJA Arbitration Rules are available on the OHADA official website in the four official languages of OHADA *i.e.*, French, English, Spanish, and Portuguese.[10]

Practitioners may refer to the two official Guidebooks on OHADA Arbitration *i.e.*, *Guide de l'arbitrage de la CCJA-OHADA, 2ème édition de mai 2018*, and the Guidebook on OHADA Arbitration (drafted by the Consultant as part of the promotion effort following the 2018 OHADA law reform, to be published on the official OHADA website by the OHADA Secretariat in the four OHADA official languages).

Furthermore, practitioners may consult the two following books commenting the 2018 OHADA arbitration law reform:

- Fénéon, N. Aka, J-M Tchakoua, *LE NOUVEAU DROIT DE L'ARBITRAGE ET DE LA MEDIATION OHADA*, LGDJ, 2018.
- E. Acka Assiehué, C. du Pac de Marouslies, T. Lauriol, E. Raynaud, M. Tavaut, *LE RÈGLEMENT D'ARBITRAGE CCJA*, LexisNexis 2018.

1.3 What is specific to OHADA arbitration?

Practitioners should be aware of the specific nature of OHADA arbitration.

In practice, three different types of arbitration involving OHADA parties can be distinguished:

- International: although this type of arbitration involves at least one party from the OHADA region, the place of the arbitration will be outside the OHADA region. It may be conducted under institutional rules such as those of the ICC for commercial disputes and those of ICSID for investment disputes.
- Regional: this type of arbitration concerns arbitrations conducted under the CCJA Arbitration Rules with the place of arbitration in Abidjan or in another OHADA Member State. It may involve several parties from the same OHADA Member State, parties from different OHADA Member States, or a party from an OHADA Member State and another from a foreign State.

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9 On 17 October 2008, the Treaty of Port Louis was revised in Quebec (Canada). Reference is herein made to the consolidated version of the Treaty of Port Louis after revision.

10 Practical note: the OHADA official website (www.ohada.org) has blue background, whereas a well-documented yet unofficial website on OHADA (www.ohada.com) has an orange background.

- National: this type of arbitration essentially concerns domestic law disputes. It is often handled by national arbitral institutions currently present in thirteen out of the seventeen OHADA Member States[11] and may also take the form of *ad hoc* proceedings.

Secondly, OHADA law has two sources which govern two different types of arbitrations:

- The UAA generally governs arbitrations seated in a Member State (Art. 1), with the exception of arbitrations governed by the CCJA Arbitration Rules.

- When applicable, the CCJA Arbitration Rules replace the UAA. The CCJA affirmed this principle as follows: "*the Uniform Act on Arbitration is not one of the legal acts referred to above which are applicable in this case to the specific institutional arbitration of the CCJA.*"[12] This substitution of the CCJA Arbitration Rules to the UAA results from the normative nature of CCJA Arbitration pursuant to Arts 21ff. of the Treaty of Port Louis.

1.4 What was the 2018 reform of OHADA arbitration law about?

In early 2016, the OHADA Permanent Secretariat launched a reform of the UAA and CCJA Arbitration Rules (together with a mediation reform) (the "**Reform**").

The Reform consisted of an extensive field survey, a vast drafting enterprise with various meetings with OHADA experts and representatives in the region and resulted in the adoption of revised UAA and CCJA Arbitration Rules by the OHADA Council of Ministers in Conakry (Guinea) in November 2017. In accordance with the OHADA Treaty, the new texts entered into force on 15 March 2018, *i.e.*, ninety days after their publication in the OHADA Official Gazette. The new texts only apply to proceedings initiated after their coming into force.

The Reform was part of the "*Projet d'amélioration du climat des investissements*" ("*Project for the improvement of the investment climate*") and aimed at modernizing OHADA arbitration law with a view of fostering investment and promoting economic development in the region. In addition, the Reform intended to promote OHADA arbitration in the context of developing arbitration centres on the African continent, in particular in Morocco, Egypt, Nigeria, Rwanda, and Mauritius.

Considering these objectives, six principles guided the Reform. The first three focused on enhancing legal certainty by simplifying the texts, protecting the independence of arbitration, and ensuring the quality of the legal provisions. The second three focused on the need to promote OHADA arbitration, by enhancing its efficiency, increasing transparency, and implementing marketing efforts for arbitration throughout the OHADA zone.

2. The law governing international arbitration in OHADA

2.1 UAA arbitration v. CCJA arbitration ?

See, above at 1.3.

2.2 What is the importance of party autonomy in OHADA arbitration?

Party autonomy is the cornerstone of the OHADA arbitration law.

The UAA is a framework legislation. According to the UAA, the parties are free to constitute their arbitral tribunal (UAA Art. 6) and to agree directly on the arbitral procedure according to their needs including by

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11 The most active arbitration institutions are the Ouagadougou Arbitration, Mediation and Conciliation Centre (CAMC-O), the Arbitration Centre of the Cameroon *Groupement inter-patronal* (GICAM), and the Ivory Coast Arbitration Centre (CACI).

12 Free translation of French "*l'Acte uniforme relatif au droit de l'arbitrage ne figure pas au nombre des actes juridiques précités qui sont applicables en l'espèce à l'arbitrage institutionnel spécifique de la CCJA*": Société Nationale pour la promotion agricole (SONAPRA) v. Société des Huileries du Bénin (SHB), CCJA Judgment No. 045/2008 dated 17 July 2008.

referring to the rules of an arbitration institution (UAA Art. 14).[13] The parties can also choose the rules of law applicable to the merits of the dispute or authorise the arbitral tribunal to decide *ex aequo et bono* (UAA Art. 15). The parties may also waive their right to seek annulment of the award provided the award is not contrary to international public policy (UAA Art. 25 para. 3).

The same principle of party autonomy applies under the CCJA Arbitration Rules though, as institutional rules of arbitration, those are more detailed than the UAA.

3. The arbitration agreement

3.1 What is an arbitration agreement under OHADA law?

The 2018 UAA clarifies what an arbitration agreement is under OHADA law. The arbitration agreement may be in the form of an arbitration clause or of a submission agreement (UAA Art. 3-1 paras. 1-3).[14]

OHADA law is quite liberal as to the form of the arbitration agreement as long as the form allows "*evidencing of its existence.*" The arbitration agreement must be made in writing, or in any other form evidencing its existence, in particular, by reference to a document containing the agreement (UAA Art. 3-1 last para.). This last event covers the case where the arbitration agreement is not in the contract to which it relates, for example in contract chains, where the arbitration agreement is only provided in the initial contract and not in its amendments.

3.2 What is arbitrable under OHADA law?

Any rights on which any natural or legal person has the free disposal are arbitrable under OHADA law (UAA Art. 2 para. 1). OHADA law does not define what the "free disposal" on any rights means, leaving it to local courts to provide a definition.

Any legal person under public law may be a party to an arbitration seated in a Member State of OHADA (UAA Art. 2 para. 2). The 2018 UAA therefore expressly provides for the arbitrability of administrative contracts

3.3 How does OHADA law address the validity of the arbitration agreement and of "*competence competence*"?

OHADA law enshrines the principles of independence and validity of the arbitration agreement (UAA Art. 4 paras. 1-2). It provides in particular that the validity of the arbitration agreement shall not be affected by the nullity of the contract, and it shall be interpreted in accordance with the common intention of the parties, without reference to a national law.

OHADA law also clearly sets the "positive" feature of the principle "*competence competence*," *i.e.*, priority of the arbitral tribunal over the judge in the presence of an arbitration agreement. The revised UAA clarifies that the arbitral tribunal is "alone" competent to rule on its own jurisdiction (UAA Art. 11).

Pursuant to the 2018 UAA, Member States' judges have 15 days only to determine whether they have jurisdiction despite the existence of an arbitration agreement. Their decision may be challenged before the CCJA.

Practitioners should keep in mind that local courts may not declare themselves incompetent on their own motion and objections to jurisdiction must be raised by the parties.

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13 Where the parties have agreed to refer to an arbitration institution, they shall be deemed to have agreed on the application of the arbitration rules of this institution unless they have expressly agreed to exclude specific provisions in agreement with this institution (UAA Art. 10).

14 The arbitration clause is defined as an agreement whereby the parties agree to submit to arbitration disputes which may arise out of or result from a contractual relationship. The submission agreement is defined as an agreement whereby the parties to an existing dispute agree to settle it through arbitration.

3.4 To which extent is OHADA law innovative in addressing compliance with compulsory pre-arbitral procedures?

The 2018 UAA and CCJA Arbitration Rules contain new provisions which expressly deal with a recurrent issue in international arbitration, *i.e.* where the arbitration is to be preceded by a mediation or some other dispute resolution mechanism (see, UAA Art. 8-1, CCJA Arbitration Rules Art. 21-1).

OHADA law provides for the power of the arbitral tribunal to assess whether the pre-arbitral step was mandatory, and, if so, whether it has been complied with. If not, the arbitral tribunal may suspend the proceedings, and invite the parties to comply with that step within a time-limit to be fixed by the tribunal. If, however, the arbitral tribunal is satisfied with the completion of the pre-arbitral step (either because it considered it not to be mandatory, or that it had been complied with either leading to its satisfaction if the parties settled their dispute or to a failure to settle), it may end the proceedings, or pursue the arbitral proceedings.

OHADA law is innovative insofar as similar provisions addressing compliance with compulsory pre-arbitral procedures do not exist in any other arbitration law.[15]

4. Intervention of local courts

Whereas local courts in the OHADA zone have shown some distrust towards arbitration in the past, OHADA law provides recourses of their decisions before the CCJA, which has generally ensured the respect of the fundamental principles of arbitration.

Furthermore, the Reform was precisely aimed at ensuring the complementarity between local courts and arbitration.[16]

4.1 How do local courts deal with disputes referred to them in the presence of an arbitration agreement?

The "negative" feature of the principle of "*competence competence*" is also ensured by OHADA law.

In principle, local courts lack jurisdiction over disputes arising out of or in connection with an arbitration agreement unless (i) the arbitral tribunal has not been seized or no arbitral request has been filed to date, and (ii) the arbitration agreement is manifestly null or manifestly inapplicable to the case (UAA Art. 13).

As such, the CCJA has quashed two local courts' decisions failing to comply with the "*competence competence*" principle and with the principle of validity of the arbitration agreement:

- On 17 June 2008 (*Dame Sarr (Côte d'Ivoire) v. Mutuelle d'assurances des taxis compteurs d'Abidjan dite MATCA*, CCJA Judgment No. 043/2008), the CCJA quashed a judgment rendered by an Ivorian court which had retained its jurisdiction on the sole ground that the arbitral tribunal had not been seized, without inquiring whether the arbitration clause was "manifestly void".
- On 22 May 2014 (*Société CANAC Senegal SA (Sénégal), Société CANAC Railway Services Inc. v. Société Transrail (Mali)*, CCJA Judgment No. 082/2014), the CCJA similarly quashed a judgment rendered by the Court of Appeal of Bamako which held that the validity of the arbitration clause depended upon the validity of the contract that contained this clause.

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15 For a detailed analysis of these provisions, see, Bühler, Gidoin, ""*L'étape préalable" dans le nouveau droit de l'arbitrage et de la médiation OHADA*", 36 ASA BULLETIN 3/2018.

16 For a detailed analysis of the intervention of local courts in OHADA arbitration, see, Bühler, Gidoin, *Le défi de la complémentarité entre le juge et l'arbitre dans l'espace* OHADA, PENANT No. 904 – 2018, pp. 275-295.

4.2 How do local courts deal with requests for provisional or interim measures in the presence of an arbitration agreement?

In case of emergency, local courts have the power to grant provisional or interim measures in the presence of an arbitration agreement so long as such measures do not imply an examination of the merits of the case (UAA Art. 13 para. 4).

On 2 avril 2015 (*Société United Bank for Africa (UBA) (Nigeria) v. Société Beneficial Life Insurance (BLI) (Cameroun)*, CCJA Judgment No. 018/2015), the CCJA recalled this principle. The CCJA reversed a judgment of the Douala Court of Appeal which had retained the jurisdiction of the "*juge des référés*" in the presence of an arbitration clause regarding measures which required a review on the merits of the dispute.

4.3 How do local courts address the validity of arbitral awards rendered under the UAA?

Annulment of arbitral awards is only possible under limited grounds under the UAA, as presented above.

The CCJA has been controlling the local courts' compliance with these limited grounds. For example, on 6 December 2011, the CCJA reversed a Judgment of the Douala Court of Appeal that annulled an arbitral award rendered in London (*Société Safic Alcan Commodities v. Complexe chimique camerounais*, CCJA Judgment No. 02012011). In this case, the CCJA ruled that as the seat of the arbitration was London, an annulment action under the UAA was impossible. On 19 June 2003, the CCJA similarly reversed the Judgment of the Court of Appeal of the Ivory Coast which annulled an award on the ground that the arbitrators failed to comply with their mandate without providing sufficient motivation for this holding (*M. Gérard Delpech and Joelle Delpech (Côte d'Ivoire) v. Société SOTACI (Côte d'Ivoire)*, CCJA Judgment No. 010/2003).

4.4 What are the innovations brought by the Reform concerning intervention of local courts in OHADA arbitration?

The UAA provides strict time limits for local courts to decide any issue brought to them during the course of an arbitration:

- The decision to appoint an arbitrator by the competent jurisdiction shall be made within fifteen days from when it was seized, unless the laws of a Member State foresee a shorter time period (UAA, Art. 6 last para.).

- The competent jurisdiction in the Member State shall decide the challenge of an arbitrator no later than thirty days after the parties and the arbitrator have been heard or duly summoned. If the competent jurisdiction fails to render a decision within this time period, it shall be discharged, and the challenge application may be brought before the CCJA by the most diligent party (UAA Art. 8 para. 1). The decision of the competent jurisdiction dismissing the challenge application may be challenged before the CCJA (UAA Art. 8 para. 2). Any ground of challenge must be raised no later than thirty days after the fact having motivated the challenge has been discovered by the party seeking to invoke it (UAA Art. 8 para. 3).

- When applicable, the competent jurisdiction shall issue a final decision on its jurisdiction within a maximum of fifteen days; its decision may only be appealed before the CCJA in accordance with its Rules of Procedure (UAA Art. 13 para. 2).

- The competent jurisdiction shall render a decision on an application for annulment of an arbitral award within three months of its seizure. When said jurisdiction fails to render a decision within this time period, it is discharged of the case and the action may be brought before the CCJA within the next fifteen days. The latter must render a decision within a maximum time limit of six months of its seizure. In that case, the deadlines specified in the Rules of procedure of the CCJA shall be reduced by half (UAA Art. 27 paras. 2-3).

- The competent jurisdiction, seized by a request for recognition or exequatur, shall render a decision within fifteen days from the day of its seizure. If at the end of this time limit, the jurisdiction has not rendered its decision, the exequatur shall be presumed to have been granted (UAA Art. 31 para. 5).

5. The conduct of the proceedings

5.1 Who are the arbitrators and how is the arbitral tribunal constituted?

Arbitrators are natural persons (UAA Art. 5 para. 1). The arbitral tribunal shall be composed of a sole arbitrator or of three arbitrators. Absent agreement of the parties, the arbitral tribunal shall be composed of a sole arbitrator (UAA Art. 5 para. 2).

As a rule, the parties' agreement governs the appointment, revocation or replacement of arbitrators (UAA Art. 6 para. 1). When the parties fail to agree, the competent judge in the Member State acts as *juge d'appui* to assist the parties with nominating arbitrators to the arbitral tribunal (UAA Art. 6 para. 3), setting the procedure to constitute the arbitral tribunal (UAA Art. 6 paras. 4-5).

The specificity of CCJA arbitration when it comes to the constitution of the arbitral tribunal is that the CCJA Court acts as the *juge d'appui* (CCJA Arbitration Rules Art. 3.1). The 2018 CCJA Arbitration Rules (Art. 3.3) extends the autonomy of the parties to the extent that the parties are asked to indicate their preferred choice on a list of arbitrators established by the CCJA Court.

5.2 How are the arbitrators' duties of independence and impartiality ensured by the UAA?

The arbitrator shall remain independent and impartial *vis à vis* the parties and has a continuous duty of revelation to the parties of any circumstances which may affect his independence or impartiality (Art. 7 paras. 3-5).

Arbitrators may be challenged on grounds which have become known after their appointment (UAA Art. 8 para. 4). Any ground of challenge must be raised no later than thirty days after the fact having motivated the challenge has been discovered by the party seeking to invoke it (UAA Art. 8 para. 3).

In case of disagreement, and if the parties have not agreed on the challenge procedure, the competent jurisdiction in the Member State shall decide the challenge no later than thirty days, after the parties and the arbitrator have been heard or duly summoned. If the competent jurisdiction fails to render a decision within this above-mentioned time period, it shall be discharged, and the challenge application may be brought before the CCJA by the most diligent party (UAA Art. 8 para. 1). The decision of the competent jurisdiction dismissing the challenge application may only be challenged before the CCJA (UAA Art. 8 para. 2).

In principle, the arbitrator undertakes to complete his mandate until the end of the proceedings, unless he justifies of an impediment or legitimate reason for abstention or resignation (UAA Art. 7 para. 2). Where the arbitration agreement does not set a time limit, the mandate of the arbitral tribunal may not exceed six months from the date on which the last appointed arbitrator accepted his appointment (UAA Art. 12 para. 1). This time limit may be extended upon agreement of the Parties, or, at a Party's request or that of the arbitral tribunal, by the competent local court in the OHADA Member State where the arbitration is seated.

5.3 What are the guiding principles of arbitration under the UAA?

As mentioned above, Parties' autonomy is the cornerstone of arbitration under the UAA.

Procedural equality is also a fundamental principle (UAA Art. 9). In practice, if a party considers that procedural equality has been breached, it shall raise its concern formally in writing. A party who knowingly abstains from invoking, without delay, an irregularity and yet proceeds with the arbitration, is deemed to have waived its right to object (UAA Art. 14 para. 10).

Efficiency of the proceedings is a further key principle. The parties shall act quickly and with loyalty in the conduct of the proceedings and shall refrain from any dilatory actions (UAA Art. 14 para. 4).

5.4 What are the typical steps of an arbitration under the UAA?

Arbitral proceedings start at the date when one of the parties initiates the procedure of the constitution of the arbitral tribunal (UAA Art. 10 para. 2).

Absent any agreement by the parties, the arbitral tribunal may conduct the arbitration as it deems appropriate (UAA Art. 14 para. 2). Where the parties have referred to an arbitral institution, the rules of this institution will primarily govern the procedure.

The arbitral tribunal may upon the request of either party, order interim or conservatory measures, with the exception of conservatory seizures and judicial sureties which remain within the jurisdiction of state courts (UAA Art. 14 last para.).

The UAA also provides for the following prerogatives of the arbitral tribunal:

- The arbitral tribunal may invite the parties to provide it with factual explanations and to submit to it, by any legally admissible means, the evidence it believes will be necessary for the solution to the dispute (UAA Art. 14 para. 6).
- The arbitral tribunal shall, unless otherwise agreed by the parties, be empowered to decide any incidental claims concerning the verification of the authenticity of documents or forgery (UAA Art. 14 para. 11).

The arbitral procedure ends either with the rendering of a final award or with a closing order (UAA Art. 16 paras. 1-2). The arbitral tribunal may issue a closing order when:

a) the claimant withdraws its request, unless the respondent objects and the arbitral tribunal acknowledges that there is a legitimate interest in finally settling the dispute;

b) the parties agree to terminate the proceedings;

c) the arbitral tribunal finds that pursuing the proceedings has become, for any other reason, unnecessary or impossible;

d) the initial or extended arbitral time limit has expired;

e) there is an acknowledgement of the claim, withdrawal from the proceedings, settlement.

6. The award

6.1 How is the award rendered by the arbitral tribunal?

The deliberations of the arbitral tribunal shall be confidential (UAA Art. 18).

In line with the principle of party autonomy, the parties may agree on the procedure and forms in accordance with which the arbitral award shall be rendered. Absent any such agreement, the award shall be rendered by a majority vote when the tribunal is composed of three arbitrators (UAA Art. 19). It should be observed that Art. 22.3 of the 1999 CCJA Arbitration Rules granted a decisive vote to the president of the tribunal. Nonetheless, the revised UAA and CCJA Arbitration Rules did not keep this provision since in practice, the situation where two arbitrators would decide together departing from the president is rare.

The arbitral award shall be signed by the arbitrator(s). If a minority of them refuses to sign the award, this should be mentioned but the award shall have the same effect as if all the arbitrators had signed it (UAA Art. 21). The CCJA Arbitration Rules (Art. 22.4) also provide for the possibility for an arbitrator to attach a dissenting opinion to the award. On the contrary, the UAA does not contain any such provision, hence the UAA neither encourages nor prohibits such practice.

The arbitral award shall contain the following elements (UAA Art. 20):

- The holding / dispositive part;
- The first and last names of the arbitrators having rendered the award;
- Its date;
- The seat of the arbitral tribunal;
- The last and first names and trade names of the parties, as well as headquarters or registered office;
- As the case may be, the last and first names of counsel or any person having represented or assisted the parties;
- The statement of the respective claims of the parties, their pleas and arguments, as well as the procedural history;
- The reasons on which it is based; and
- If the arbitral tribunal has been empowered by the parties to decide as *amiable compositeur*, the arbitral award should state so.

For arbitrations administered by institutions, these elements of the award are generally controlled by the institution. Therefore, the UAA provides these elements to assist practitioners especially in *ad hoc* proceedings.

6.2 What are the types of arbitral awards under OHADA law?

Four types of arbitral awards may be distinguished under OHADA law:

- Partial awards: this category includes jurisdictional awards and awards deciding some of the parties' claims, including awards on provisional and interim measures;
- Consent awards (UAA Art. 19 para. 3): if the parties come to an agreement during the course of the arbitral proceedings, they may ask the arbitral tribunal to issue an award by consent.
- Final awards: those discharge the arbitral tribunal of the dispute and end the arbitral proceedings. In the final award, the arbitral tribunal decides the entirety of the claims raised before it during the course of arbitral proceedings.
- Additional award (UAA Art. 22): those awards are rendered exceptionally after the award has been issued to rectify, to interpret, or to complement the latter. If the arbitral tribunal cannot be reconvened, it will fall upon the competent jurisdiction in the Member State to decide on rectification, interpretation or complement. In CCJA arbitral proceedings, the CCJA will appoint a single arbitrator in such circumstances.

6.3 What are the legal effects of the arbitral award?

The final award discharges the arbitral tribunal (UAA art. 22).

As soon as it is rendered, the arbitral award has *res judicata* effect regarding the dispute it settles (UAA Art. 23).

Furthermore, the arbitral tribunal may grant provisional enforcement of the award if this has been requested or may reject the request through a reasoned decision (UAA Art. 24). Unless the arbitral tribunal granted provisional enforcement, where a motion for annulment is filed, OHADA law provides that enforcement shall be suspended and that the annulment judge shall also decide disputes related to provisional enforcement (UAA Art. 28).

6.4 What remedies does OHADA law provide against arbitral awards?

OHADA law provides three remedies at the seat where the arbitral award is rendered (UAA Art. 25):

- Annulment action: detailed below.
- Third party opposition: any third party before the jurisdiction of the Member State which would have been competent if there was no arbitration and when that award is prejudicial to its rights may oppose to the arbitral award.[17]
- Request for revision: a request for revision may be brought before the arbitral tribunal due to the discovery of a fact likely to have a decisive influence on the settlement of the dispute and which, before the rendering of the award, was unknown to both the arbitral tribunal and the party requesting the revision. When the arbitral tribunal may no longer be reconvened, the request for revision is brought before the jurisdiction in the Member State which would have been competent in the absence of arbitration.

6.5 What are the grounds and procedure for annulment of arbitral awards?

On a preliminary note, practitioners should be aware that OHADA law allows the parties to waive their right to seek annulment of the award provided the award is not contrary to international public policy (UAA Art. 25 para. 3).

Annulment grounds under OHADA arbitration law are the following (UAA Art. 26):

> a) if the arbitral tribunal has ruled without an arbitration agreement or based on an agreement that is void or expired;
>
> b) if the arbitral tribunal was irregularly composed, or the sole arbitrator was irregularly appointed;
>
> c) if the arbitral tribunal ruled without conforming to the mandate with which it has been entrusted;
>
> d) if the principle of due process has not been respected;
>
> e) if the arbitral award is contrary to international public policy; or
>
> f) if the award fails to state the reasons on which it is based.

The last ground for annulment *i.e.*, failure to state reasons is additional to the New York Convention.

The annulment action is permitted as soon as the award is made and ceases to be admissible if it has not been made within one month from the notification of the award having received the exequatur (UAA Art. 27 para. 1).

The 2018 UAA added time limits for courts in charge of annulment proceedings (UAA Art. 27 para. 2). The competent jurisdiction shall render a decision within three months of its seizure. When said jurisdiction fails to render a decision within this time period, it is discharged of the case and the action may be brought before the CCJA within the next fifteen days. The latter must render a decision within a maximum time limit of six months of its seizure. In that case, the deadlines specified in the Rules of procedure of the CCJA shall be reduced by half (UAA Art. 27 para. 2).

The annulment action of the arbitral award automatically entails an appeal against the decision granting the exequatur within the limits of the referral of the competent jurisdiction of the Member State (UAA Art. 32).

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[17] This remedy was used once against an award rendered in a CCJA arbitration and the CCJA rejected the action for lack of standing of the third party: *RGE and CEMAC v. CBGE*, CCJA Judgment No. 012/2011 dated 29 November 2011.

The dismissal of the annulment action automatically validates the award as well as of the decision having granted the exequatur (UAA Art. 33).

It should be noted that when the arbitral award is annulled, the most diligent party may initiate new arbitral proceedings (UAA Art. 29) (unless the award was annulled on the ground of absence of a valid arbitration agreement).

6.6 What is the framework for enforcement of arbitral awards under OHADA law?

Arbitral awards rendered under the UAA may only be subject to enforcement by virtue of an exequatur decision issued by the competent jurisdiction in the Member State (UAA Art. 30).

The conditions for enforcement of arbitral awards seated in an OHADA Member State are similar to those provided by the New York Convention:

- Firstly, the party requesting recognition or enforcement must establish the existence of the arbitral award by the production of its original award accompanied by the arbitration agreement or copies of these documents meeting the conditions required to establish their authenticity (UAA Art. 31 paras. 1-2). Where those documents are not written in one of the original language(s) of the Member State where the exequatur is demanded, the party shall submit a translation certified by a translator registered on the list of experts established by the competent jurisdictions (UAA Art. 31 para. 3). The four official languages of OHADA Member States are French, English, Spanish and Portuguese.

- Secondly, for exequatur to be granted, the award must not be contrary to a rule concerning international public policy (Art. 31 para. 4).

The exequatur procedure is not contradictory and unfolds as follows:

The 2018 UAA established a fifteen days time limit for the competent court of the Member State to render its decision on exequatur. If at the end of this time limit said court has not rendered its decision, exequatur shall be presumed to have been granted (UAA Art. 31 para. 5).

When exequatur has been granted, or in the case of silence from the competent court seized with the request for exequatur within fifteen days, the most diligent party may seize the competent authority in the Member State in order to fix formal exequatur of the award.

The decision which rejects exequatur may be appealed before the CCJA (UAA Art. 32). The decision which grants exequatur may not be appealed.

It is to be stressed that the main difference between arbitration under the UAA and arbitration subject to the CCJA Arbitration Rules is respectively the domestic v. regional nature of exequatur. CCJA awards indeed benefit from regional exequatur in the entire OHADA zone whereas exequatur will have to be granted individually in each Member State for awards renders under the UAA. Moreover, under the CCJA Arbitration Rules, interim measures should normally be readily enforceable within all Member States (CCJA Arbitration Rules, Art. 30).

With regards to arbitral awards rendered outside of the OHADA region, the UAA refers to the enforcement rules provided in the international agreements to which the OHADA Member State where enforcement is sought is a party, or, absent any such agreement, to the UAA (Art. 34). In the twelve Member States which have ratified the New York Convention, the latter will apply. Those countries are all OHADA Member States except Congo (Brazzaville), Guinea Bissau, Equatorial Guinea, Chad, and Togo.

7. Funding arrangements

7.1 Are third party funding and contingency fees allowed by OHADA law?

The UAA and CCJA Arbitration Rules do not prohibit third party funding or contingency fee arrangements.

The issue of third-party funding and of access to arbitration for impecunious parties was discussed during the Reform. Nevertheless, the OHADA legislator chose not to include any provision in the revised UAA and CCJA Arbitration Rules given the case-specific nature of these issues.

7.2 What is the *Getma* case?

In 2015, the CCJA made headlines in the arbitral community. In a dispute between the French company Getma, and the Republic of Guinea, an award was rendered under the CCJA Arbitration Rules by two French arbitrators and a Franco-Lebanese chairman, all based in Paris. The award has then been annulled by the CCJA on the ground that the arbitrators had entered into direct fee agreements with the parties.[18] In response to this highly-publicized case, the CCJA Arbitration Rules (Art. 24(4) para. 2) now expressly provide that: "*[a]ny decision on the fees made without the approval of the Court is null and void, but may not be used as a ground for annulment of the award.*"

By adding this new language, the new text provides sufficient safeguard against conduct such as the Getma scenario again serving as a ground for annulment of an award. It should also prevent unscrupulous arbitrators from making direct financial arrangements with the parties.

8. Is there likely to be any significant reform of the arbitration law in the near future?

No significant reform is expected in the near future since OHADA arbitration law was reformed in 2017. As mentioned above, the revised UAA and CCJA Arbitration Rules came in force on 15 March 2018.

[18] *Republic of Guinea v. Getma*, CCJA Judgment dated 19 November 2015, No. 1391-2015.