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The features of the arbitration proceedings under the OHADA Uniform Act on arbitration law

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This article aims to discuss the features of the arbitration proceedings governed by the OHADA Uniform Act on Arbitration (UAA) of 1999. Indeed, signed on 17 October 1993, the treaty, related to the harmonization of business law in Africa has created an organization, well known by its French acronym OHADA (Organization for the Harmonization of Business Law in Africa) whose goal is to prepare and adopt common rules, called Uniform Acts, in a number of areas related to business law, as stipulated in the Treaty, including arbitration. 17 African States, which belong to Central Africa and West Africa, are OHADA member States that the originality is to elaborate common legislation on arbitration, which came either to fill the gap for States not having legislation on arbitration or to replace the existing local laws for the States already having one but inappropriate. Thus, the interest of the reform made by the OHADA lawmaker lies in adopting a modern law on arbitration, the Uniform Act, applicable to all member States of OHADA. This Law, which marks a milestone in the process of a truly African arbitration law, without departing from the widely accepted principles in modern practice of arbitration, is still little known in some parts of the world. Considering the importance of this Uniform Act within the framework of harmonized legislation, it is worth it to undertake an overview of the features of the arbitration proceedings governed by this UAA, since it is a law on arbitration of 17 countries.

Key words: Arbitration proceedings, OHADA, Arbitration Act

INTRODUCTION

The phenomenon of globalization has intensified cross-border trade which also resulted in multiplication of disputes related to those trade activities. That situation gave rise to the need of a mechanism that could help resolving these disputes out of national courts. To meet that need, the recourse to arbitration is nowadays irresistibly seen as a preferred means to solve these cross-border disputes. That is why worldwide domestic laws and international conventions are encouraging and promoting the recourse of arbitration as the most preferred mean for the settlement of the disputes relating to international trade. Following this universal trend, the African countries of south-Sahara are no longer at the margin as it was many years ago. In effect, in the framework of the Treaty signed on October 17, 1993, at Port Louis (Mauritius), the Treaty related to the Organization for the Harmonization of Business Law in Africa, well known by its French acronym OHADA whose goal is to prepare and adopt common rules called the Uniform Act (UA) in a number of areas related to business as stipulated in article 2 of the Treaty, 17 States of central Africa and West of Africa, member States of that organization, are henceforth equipped with a Uniform Act on Arbitration (UAA) law. That law provides common legislation on arbitration for member states, which came either to fill a gap for the

States that before did not have a legal text on arbitration[1] and to replace the existing local national laws for the States that already had one but almost out of date[2], and by so doing enable them to take their place in the arena of the practice of arbitration nowadays seen as an important element of the legal landscape of the world of business. Adopted on March, 11, 1999 by the council of ministers, the OHADA lawmaker, at Ouagadougou Capital city of Burkina Faso, and entered into force on June, 11, 1999, the UA sets out a new legal framework of arbitration for all member States and therefore becoming the law applicable in these States, according to its article 35[3]. However, this law which has marked a milestone in the process of a truly African arbitration law, with widely accepted principles in the modern practice of arbitration, is still little known in some part of the world. Considering the importance of the UAA within the framework of the harmonized legislation of OHADA, it is worth to discuss the features of that UA since it is a law on arbitration of 17 countries, as we are going to explain below.

THE CHARACTERISTICS OF THE UNIFORM ACT ON ARBITRATION

The condition under which the Uniform Act is applied

Like many of the arbitration laws elsewhere in the world, the application of the OHADA UAA law is subject to conditions. In effect, the first element of that law is its scope of application. Article 1 of the UA stipulates that

> "*this Uniform Act shall apply to any arbitration when the seat of the arbitral tribunal is located in one of the member states*".

In the light of this introductory provision, it is clearly noticeable that the UAA law will be applied to all arbitrations when the arbitral tribunal seat is located in one of the member States. The situation the arbitral tribunal seat in one of the Member State is the only connecting factor retained by the OHADA lawmaker for the application of the UA provisions to any arbitration which is taking place in its jurisdiction. However, by the first reading of the above-mentioned provision, one may wonder whether the concept of the seat of arbitral tribunal used by the OHADA UAA is not referring to the geographical place where the hearing of the arbitral tribunal are held? At first glance, it may be said that this provision is the reflection of the territorial notion of the seat of arbitration, i.e. the geographic place where the hearings of the arbitration are taking place. But, by taking into account the fact that the notion of parties' autonomy characterize the UA, the notion of the seat of the arbitral tribunal should be considered rather in the light of the doctrine for which the concept of the seat of arbitration is understood as the legal environment chosen by the parties to govern the arbitration of their disputes. Moreover, article 14 of the UA seems to support this idea by providing that" the parties may directly or by reference to an arbitration rules settle the arbitration proceedings, they may also submit to the procedure law of their own choice".[4]

The subsidiary application of the Uniform Act

Although the OHADA UAA law governs in principle any arbitration which takes place in the territory of one of the Member State, its application is not automatically imposed to the parties having arbitration in OHADA territory. They may exclude it. Indeed, by stipulating in its article 1 that

> *"this Uniform Act shall apply to any arbitration when the seat of arbitral tribunal is located in one of the member States",*

it may be understood that the application of UA is not compulsory for the parties involved in an arbitration whose the seat of the arbitral tribunal is located in one of the member States. Its subsidiary nature is therefore highlight by the fact that the parties may exclude its application. This can be deduced from the words of article 1 of the Uniform Act. when using

[1] Example: Benin, Burkina Faso, Central Africa Republic, Gabon, Guinea, Mali, Niger

[2] Cameroon, Congo-Brazzaville, Senegal, Chad, Ivory Coast, Togo

[3] Ohada is constituted by the following countries: Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Comoros, Congo, DR Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo

[4] For further understanding of the concept of the seat of arbitration, see Redfern, Hunter and al on International Arbitration,(2009),p. 319-334; Zhaoxiuwen: the seat of arbitration and its determination, Frontiers of Law in China, Volume 2 Number 4, October 2007

the term 'shall apply to any arbitration'[5], it is clear that the OHADA lawmaker has open the possibility to the parties involved in an arbitration to exclude, if they wish, the application of the provisions of the UA as arbitration law and to choose another national law, even if the seat of arbitral tribunal is located in the territory of one Member State, except compulsory provisions for which the parties cannot exclude the application. Thus, the UA will not be applied automatically when the seat of the arbitral tribunal is located in the territory of one of Member State. Its application as procedure law or arbitration law (lex arbitri) will be possible only if the parties agree upon its application. Besides, unlike the laws on arbitration in others jurisdictions, the UA does not neither define the notion of arbitration nor indicate to which type of arbitration its provisions will apply. We should understand that, by using the words "any arbitration", the OHADA lawmaker wanted that the UA provisions apply to both commercial and civil arbitration.

The regime of arbitration set by Uniform Act

Sets like a law applying to any arbitration in all member states and superseding the existing national laws related to arbitration according to its article 35; the UA unifies the legal framework of arbitration in OHADA territory and has established a unique regime. Indeed, the UA does not make any difference between domestic and international arbitration, the same provisions applying to the two kind of arbitration, unlike to what prevails in most of major arbitration jurisdictions having separate regimes with provisions applying differently to domestic and international arbitration, such as France, Switzerland, China and so on. The choice of a unique regime had been justified, according to the drafters of the Uniform Act, by the strongly international nature of the Uniform Act, which was designed to apply to all Member States so that drawing a new border between OHADA and the other countries of the world was deemed useless. Making a comment on the OHADA achievements, one famous French author wrote "by unifying the regime of these two types of arbitration, the OHADA law avoids the difficulties that result from a dual track regime, on the one hand, and of determining the internationality of arbitration, on the other hand. Besides, the choice of the OHADA lawmaker for a unique regime of arbitration could be motivated by the goal of legal, economic and regional integration that the organization pursues and which realizes a unification of business law eliminating any risk of conflict of laws"[6]. The unitary solution of OHADA joins doubtless the postulate according to which "what is good for international is also good for the domestic arbitration"[7]. In this approach, the OHADA UAA law is not standing up alone; others jurisdictions in the world have also adopted a unique regime with regard to domestic and international arbitration[8].

The criterion of arbitrable disputes under the Uniform Act

Before being submitted to arbitration, it is of extreme importance to determine if the dispute is likely to be solved by the mean of arbitration or if the dispute is of the exclusive jurisdiction of courts of law. This is what is generally called by the arbitrability of the dispute. Unlike many laws related to arbitration in most jurisdictions, the UA has the particularity to not limit the recourse to arbitration only to the commercial disputes. It applies to both, commercial and civil disputes as we noticed it above. About the requirement of the arbitrable disputes, the OHADA UA has set up the requirement of free disposal of rights submitted to arbitration, i.e. the parties are allowed to resort to arbitration only for the rights that they have the free disposal of. In effect, the paragraph 2 of article 2 stipulates that

> "*any natural or legal person can resort to arbitration on the rights whose he has the free disposal*".

From this paragraph, we could understand that the OHADA UAA law submits the arbitrability of one dispute on the only requirement of the availability of the rights on which the parties are in conflict for. Thus, under the UAA law, any disputes can be submitted to arbitration provided that they are related to the rights whose the parties have free disposal and do not require the intervention of the public authority. The right that has the free disposal is aright that could be alienated (for example, sold,

[5]This Uniform Act intends to apply…

[6] Ph. Fouchard in " International Law Forum du Droit international", August 2001, p.181

[7] J.F PoudretetS.Besson« Droit Comparé de l'Arbitage International », 2002, pp.4.43

[8] It's the case of Netherlands, Germany, Canada and England

gives away to another person, bequeathed) or which can be waived. The drafters of the UA took back somewhat the words of French civil code, article 2059 regarding the arbitrability of the disputes in French domestic law, which states that" any person can compromise on the rights that he has the free disposal". However, contrary to its model, the French law, the UA does not define the rights that parties have the free disposal, leaving to each national law the duty to define those rights; what is a little bit regrettable for a law which the purpose is to unify the regime of arbitration, for it is not entirely possible to find in each member state the same meaning of what are the rights that the parties have free disposal, differences between domestic laws on this matter must not be ignored. Consequently, it would be up to the arbitral tribunal seating in one of the member states to make sure that, according to the local law, the point of contention is a right at the free disposal of parties likely to be solved through arbitration[9].

The parties to arbitration

The UA stipulates in article 2 that

> *"any natural or legal person may resort to arbitration on the rights that he has the free disposal. States and other territorial public authorities as well as public companies may equally be parties to arbitration without having the possibility to invoke their own law to contest the arbitrability of the claim, their capacity to sign arbitration agreements or the validity of the arbitration agreement".*

Thus, we could understand according to this provision that under the Uniform Act, on one hand, natural or moral persons (i.e. the companies of private law) can resort to arbitration and the legal entities of public law, namely states and other territorial public authorities as well as public companies can also resort to arbitration. It should be noted that for those legal entities of public law, the UA has introduced something very new and of great importance to the legislation of all member states because it allows them to be parties to arbitration whether domestic or international, on the one hand, but they no longer can, once they become parties to an arbitration agreement, invoke their own law to contest the arbitrability of the dispute, their capacity to sign an arbitration agreement or the validity of the arbitration agreement. As written by some authors, this provision aims not only to strengthen the efficiency of the arbitration agreement contained in the contracts where States or other public entities are parties, but also to give some guarantee to private parties(foreigner or local investors) which could be contracting with some African states or other public bodies, for many OHADA Member State were strongly influenced by French administrative law where the disputes involving public entities were not likely to be submitted to arbitration[10].

THE ARBITRATION AGREEMENT

The regime and the validity of the arbitration agreement

The arbitration agreement is the cornerstone of the arbitration, for it is the expression of the will of parties to submit the settlement of their dispute, future or present, to that mechanism of dispute resolution. The UA contains provisions addressing the arbitration agreement but with some particularities. Indeed, the UA does not neither make difference between the arbitration clause and the submission agreement nor defines what the arbitration agreement is; instead it use the general term of arbitration agreement and consequently unifies its legal regime[11]. The UA contains a particular provision relating to the arbitration agreement its article 4; paragraph 2 that stipulate that the parties always have the option to enter into an arbitration agreement, by common agreement, even when they have already initiated an instance before a court of law.

[9] Inasmuch as most of member states of OHADA had taken back in their majority after their independence, with slight difference of redaction in their domestic code of civil procedure, the article 2060 of French civil code, the following matters related to the state and capacity of person, marriage, divorce or matters requesting the intervention of the public authority are not arbitrable; see article 577 of Cameroon code of civil procedure from the law of 1975, article 370 of Chad code of civil procedure from the order of July 28th, 1967

[10] Boris Martor and al " Business law in Africa", p. 275

[11] In France, following the reform of arbitration law of 2011, the legal regime of arbitration clause and the submission agreement, in domestic arbitration, has been grouped in one provision devoted to arbitration agreement, see article 1442 of French new code of civil procedure (les cahiers de l'arbitrage Français, 2011)

As for the arbitration agreement, like in most arbitration laws worldwide, the UA stipulates that it is must be made in writing; however the writing form is not required for its validity but instead as an evidence of its existence. Indeed, article 3 of the UA states that

> "*the arbitration agreement shall be made in writing or by any others means that permitting it to be evidenced, notably by reference made to a document stipulating it*".

Thus, it may be understood from the above provision that under the OHADA UAA law, the arbitration agreement does not need to be materialized for it to be valid, it may be in writing or oral[12], express or implicit, direct or by reference, for its writing form is not a condition of its validity but just an element that permit to prove its existence, unlike under French domestic arbitration, Swiss law or Chinese arbitration law in which the writing form of arbitration agreement is the condition of its validity[13]. The rule laid down by article 3 of U.A is a substantive rule under OHADA arbitration law, which applies to both, domestic and international arbitration agreements and has the advantage to avoid the rule of conflict and will validate an arbitration agreement in a country where the writing form is required either to valid it or to evidence it.

The independence of the arbitration agreement

The principle of the independence of the arbitration agreement means that the fate of the main contract does not affect the existence of the arbitration agreement seen as a clause separated from it. The alleged invalidity of the main contract does not affect that clause, what is an exception to the common rule according which the accessory follows the principal. The principle of the independence of the arbitration clause, consecrated by French case law through Gosset case[14], Hecht's case[15] and the famous Dalico[16] case, is now expressly recognized in most of modern legislations on arbitration, and the OHADA UAA law is in this trend. Indeed, article 4 of the UA stipulates that:

> "*the arbitration agreement is independent of the main contract. Its validity is not affected by the nullity of the contract and it is appreciated by the common intention of the parties, without reference to a State law".*

So, as many laws on arbitration, the OHADA UA also has expressly established the principle of the independence of the arbitration agreement from the main contract that contain it, and do not necessarily submitted its validity by reference to a given state law but to the common will of the parties to arbitrate.

THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

The appointment of arbitrators

Among the advantages that arbitration has over the lawsuit before the courts of law there is the right recognized to parties in the arbitration to choose their judge, i.e. the person in the hand of who they will give the power to determine on the dispute between them. Arbitration being firstly the matter of the parties, the UA recognizes that the appointment of the arbitrators belongs first to the parties' freedom. That's why its article 5, paragraph 1 stipulates that

> "*the arbitrators are appointed, dismissed or replaced in accordance with parties agreement*".

It is therefore up to parties through the arbitration agreement to designate the arbitrators or at least to set up the terms of their appointment. When the parties have failed to do so, the paragraph of the same provision goes on and states *that*

[12] An oral arbitration agreement could rise some problem during the stage of the exequatur because the award must be accompanied the arbitration agreement(article 32)

[13] Under Chinese arbitration law, in addition to be in writing, the arbitration agreement must also contain the parties expression to arbitrate, the matter subject to arbitration and the arbitration commission chosen, according to article 16 of Chinese arbitration law of 1994. by contrast, the Uniform Act is silent on the content of the arbitration agreement.

[14] 7 may, 1963. Ets Gosset c/ Caparelli, Rev. Crit. DIP 1963, 615, note Motulsky

[15] 4 July, 1972. Hecht c/ Ste Buismans, JDI 1972. 843. Note B.Oppetit

[16] 20 déc. 1993. Municipalite de Khoms El Mergeb c/ Ste Dalico, JDI 1994. 432. Note E. Gaillard

> *"failing to do so, or if the arbitration agreement is insufficient, in the case where the arbitral tribunal is composed of three arbitrators, each party shall appoint one arbitrator and the two so appointed arbitrators shall choose the third one, the presiding arbitrator*."

When one party has not appointed an arbitrator within a period of time, 30 days, from the receipt of a request in this regard from the other party, or if the two appointed arbitrators do not agreed on the choice of the third arbitrator within 30 days of their appointment, the appointment is made, on the request of one party, by the competent judge in the Member State. Similarly, in the case of arbitration by a sole arbitrator, if the parties cannot agree on the choice of the arbitrator, the latter is appointed, on the request of one party, by the competent judge in the Member state[17]. The intervention of the competent judge at this stage of the arbitration is intended to mitigate the difficulties that could likely occur about the constitution of the arbitral tribunal when one of the parties is reluctant to collaborate for the good functioning of arbitration proceedings.

Number of arbitrator

The OHADA UAA law sets up the rule of odd number in the composition of the arbitral tribunal. Thus, depending on the importance of the case, the arbitral tribunal would be consisted either of sole arbitrator or of three arbitrators. That rule is provided in article 8 of the Uniform Act:

> "*the arbitral tribunal is constituted either of a sole arbitrator or of three arbitrators*".

The paragraph 2 of the same provision added that

> "*in the case where an arbitral tribunal is composed in even number, the tribunal will be supplemented by an additional arbitrator appointed by the parties by agreement, by the appointed arbitrators or, failing to, by the competent judge in the State party*".

From that provision, we can say that, under the Uniform Act, an arbitral tribunal constituted in even number would be seen as improperly constituted, for the rule set up by the OHADA legislator is the odd number for the arbitral tribunal, this rule is a compulsory rule of the UA related to the number of the arbitral tribunal. Compared with article 10 of UNCITRAL Model Law, in which the parties have the freedom to determine the number of arbitrators, and that only when the parties failed to make such determination that the tribunal is composed of three arbitrators, the UA seems to limit the parties' freedom on this point.

The required qualifications to be chosen as arbitrator

Under the Uniform Act, the mission of arbitrator may be entrusted only to a natural person.[18]They must enjoy the full exercise of their civil rights and remain impartial and independent towards the disputing parties.[19]Thus, being a natural person, enjoying the full exercise of the civil rights and remaining impartial and independent towards the disputing parties are the only conditions to meet in order to be appointed as an arbitrator under the OHADA UAA law. Besides, the UA does not contain any provisions related to the nationality of the arbitrator[20] or if he or she must have a particular legal knowledge[21]. The arbitration being the matter of the parties it is therefore reasonable to say that they will choose as arbitrator someone who has the wanted skills in the field of the disputes for which parties intend to submit to arbitration. Consequently, in the spirit of the provision of article 6, the legal person may not exercise the function of arbitrator. If such a person is chosen by parties, they will only have the power of administering and organizing the arbitration proceedings.

[17] That competent judge is the competent judge within the territory of the member state in which the arbitral tribunal has its seat.

[18] The new article 1450 of the French code of civil procedure, following the reform of French arbitration law of 2011 also provides that" the mission of arbitration can be entrusted only to a physic person".

[19] Uniform Act, article 6

[20] Because the Uniform Act does not make any difference between domestic and international arbitration, a foreigner, i.e. someone who is not the national of one of State party of Ohada may be appointed as an arbitrator.

[21] Compared with the Chinese arbitration law, in domestic arbitration, only the Chinese national who meet the requirement set forth in article 13 of Chinese Arbitration Law (CAL, 1994) can be appointed as an arbitrator. However those requirements do not apply to foreign arbitration administrated by the Arbitration Commissions as CEITAC, in the cases having the foreign element.

Challenging of arbitrators

The UAA recognizes to parties the rights of challenging the arbitrators; nevertheless, it does not enumerate the grounds under which such challenging may be undertaken.[22] The article 7, which is dealing with the matter of the challenging of arbitrator only stipulate that the challenging of an arbitrator will be admitted only for the grounds revealed after the arbitrator has been appointed(paragraph 5).Thus, it may be understood through this provision that the challenging of arbitrator will be exercised only when the appointment procedure has been carried out, whereas before such procedure, parties or one of them still has the freedom to go against the appointment of an arbitrator[23]. In the event that the parties failed to provide the procedure of arbitrators challenging in their arbitration agreement, in case of dispute, then the competent judge of the State party where the arbitral tribunal has its seat shall decide in this regard and his ruling is not open to any appeal. In addition, still under the provision of article 7, paragraph 2, the arbitrator is under the legal obligation of disclosure if he or she is aware of any circumstances for challenge against his person, he must inform the parties about it and he can accept his mission only with the unanimous written agreement of the parties. To the extent that the arbitrator must meet the requirements of impartiality and independence, it is believed that the obligation of disclosure must bear on all facts or circumstances likely to cause in the mind of the parties or one of them a serious doubt on the existence of those required qualities[24]. Besides, as for the time within which any ground of challenge should be raised, the UA does not mention it but merely stipulate that any grounds of challenging should be raised without delay by the party who intends to rely on it (paragraph 4 of article 7).[25]

[22] Compared with article 34 of Chinese Arbitration Law of 1994 that contains the grounds for the challenging of arbitrators

[23]G. Kenfack Douajni and al: Acte uniforme sur le droit d'arbitrage dans le cadre du traité OHADA, Penant Avril-Juin 1999, p. 6

[24] See the decision of the Paris court of Appeal, 17 Feb. 2005, Rev. Arb. 2005, p. 709, Stating that" the obligation of disclosure hangs over the arbitrator from his appointment to the end of the arbitral procedure"

[25] In France, since the reform of 2011, in domestic arbitration, the time limit for challenging arbitrator is of one month, from the month following the reveal or the discovery of the fact in issue. (article 1456, paragraph 3 French code of civil procedure)

THE ORGANIZING OF THE ARBITRATION PROCEEDINGS

The rules applicable to the arbitral procedure

Among the well-known advantages of the use of arbitration, there is the flexibility of its procedure, for the parties have the freedom to organize it the way that is suitable for them, unlike the procedure before the courts of states. The arbitration being mainly the matter of parties, it is widely recognized by most of modern arbitration laws that the arbitration proceedings is firstly governed by the will of parties through the rules they choose, failing to provides such a choose, then the arbitrators will decide. The UA is following this trend. Indeed, article 14, paragraph 1, stipulates that

> "*parties may, directly or by reference to arbitration rules, determine the arbitration procedure; they may also subject this procedure to a procedural law of their choice*".

According to this paragraph, the rules of law applicable to arbitral proceedings are first those chosen by the parties themselves directly or by reference to an arbitration rules (*of one arbitration body*), unless they wish to submit it to the procedure law of their own choice. In the case the parties do not make such a choice, the paragraph 4 of the same article state (article 14),

> "*the arbitral tribunal may conduct the arbitration as it considers appropriate*"[26].

Article 10 paragraph 2 for its part stipulates that the arbitral proceedings commences as soon as one of the parties seizes one or all the arbitrators in accordance with the arbitration agreement or, failing such appointment, as soon as one of the parties initiates the procedure of the constitution of the arbitral tribunal. On this point, it should be noted that the Uniform Act, although inspired by the UNCITRAL Model law, did not follow the latter whose article 21 stipulates that the arbitral procedure begin when the request of arbitration is notify to the defender party.

[26] They must nevertheless respect the principles of due process, article 9 of Uniform Act.

The powers of arbitral tribunal

If the disputing parties through a valid arbitration agreement submit to arbitration their disputes, the arbitral tribunal has the power to rule on any questions raised by one of the parties related either to the said arbitration agreement or to the challenging of the arbitral tribunal's jurisdiction on the matter submitted to arbitration. This power is generally known as the principle of competence-competence and it is recognized as well as by international instruments[27] on arbitration and national laws[28]. The UA also fully recognizes such principle. Indeed, the provision of article 11, paragraph 1 and 3 stipulate that

> "*the arbitral tribunal shall decide on its own jurisdiction, including all issues relating to the existence or the validity of the arbitration agreement. The arbitral tribunal may rule on its own jurisdiction either in the final award on the merits or in a partial award subject to an action for annulment"*.

The party who challenge the arbitral tribunal jurisdiction must raise such challenge before any defense on the merits, unless the facts on which it is based have been discovered later, paragraph 2 of article 11 said.

The state courts attitude before a matter submitted to arbitration

Generally speaking, the state courts have no power to rule on the matter submitted to arbitration through an arbitration agreement; they are incompetent to hear the case covered by the arbitration agreement. This principle, as the competence-competence principle, is also universally recognized both by international[29] conventions and national laws[30]. The Uniform Act, similar to the others laws, expressly recognizes the lack of state court's jurisdiction to hear the case covered by a valid arbitration agreement. Indeed, article 13 paragraph 1 and 2 of the UA stipulates

> "*when a dispute for which the arbitral tribunal is seized by virtue of an arbitration agreement is brought before a state court, the said court must, if one the party so request, declare that it has lack of jurisdiction. If the arbitral tribunal has not yet been seized, the state court must declare equally its lack of jurisdiction, unless the arbitral agreement is manifestly void*. *In any case, the state court cannot in its own motion declare its incompetence*".

In the above mentioned provisions, the OHADA approach highlights two circumstances. First, if the arbitral tribunal is already seized, the state court seized for the dispute covered by the arbitration agreement must declare its incompetence, provided that one of the parties raises this lack of jurisdiction of the state court to hear the case, for the state court may not raise by its own motion its incompetence. The lack of such request from one of the parties may be considered as the evidence that the parties have abandoned the arbitration[31]. Secondly, if the arbitral tribunal has not yet been seized, the court must also declare its incompetence, unless the arbitration agreement is manifestly void. This means, in the case where the arbitration agreement is void, the state court may have the jurisdiction to hear the case. But by using the terms *manifestly void,* we may understand that the drafters of the UA wanted that the nullity of the arbitration agreement must be obvious and unquestionable , otherwise if the state court deems, prima facie, the existence, validity and effectiveness of the arbitration agreement, it should refer parties to arbitration.

The ordering of interim measures

During an arbitral proceedings interim measures may become necessary, pending the solution on the merits of the case, either in order to preserve a situation of fact or to maintain a legal relationship, to gather or preserve the evidence or the other situations. If French arbitration law and Swiss

[27] J.F. Poudret and S.Besson: Droit Comparé de l'Arbitrage, 2002, n. 459 et s.

[28] In Chinese arbitration practice, this principle knows particular application, see Prof. Wei Xia Gu: arbitration in China, Intl. commercial arbitration in Asia 2013, p.101-104

[29] New York Convention of 1958 article II(3); Geneva convention of 1961 article VI(3), UNCITRAL Model Law art.8

[30] French code of civil procedure art. 1448; Swiss law on International private Law art 7; CAL, art 5

[31] According to paragraph 8 of article 14 of the Uniform Act

arbitration law[32]acknowledge expressly to the arbitral tribunal the power to grant interim measures, the UA as for it does not contain any express provision stipulating that the arbitral tribunal has the power to grant by itself interim measures. In effect, article 13, paragraph 4 simply stipulates that

> "*the existence of an arbitration agreement shall not be an obstacle to the fact that on the application of one party, a state court, in case of recognized and motivated emergency or when the measure shall have to be enforced in a non-member state of OHADA, order interim measures as long as the measures do not imply an examination of the claim in the merits, for which only the arbitral tribunal is competent*."

From the above provision it could be understood, at the first glance, under the Uniform Act, the power to grant interim measures is established only in favor of the state court, under the twofold conditions that these measures are ordered only for an recognized and motivated emergency and that the measures will be enforced outside of OHADA territory and the measure will not imply the examination of the claim in the merits. The question that comes right away in mind is the following: does the UA deny to arbitral tribunal the power to order interim measures? On this point, Cassius J.S. has written that

> "*even if no express provision exist in the body of the Uniform Act for arbitral tribunal to order such measures nevertheless from the above paragraph 4 it's understandable to say that the powers of the arbitral tribunal to order such measures do not prevent the state court from ordering them. The parties have the option, in spite of the existence of the arbitration agreement, to seize directly the court of support without to resort first to the arbitral tribunal, for the jurisdiction of the arbitrators on this point is concurrent with the jurisdiction of state judge".*[33]

Furthermore, as said by Kenfack G. Douajni (2000), (a famous expert of OHADA) goes in the same direction,

> "*it would be hardly acceptable to deny the arbitral tribunal the power to take interim measures, unless otherwise agreed by the parties, since the arbitral tribunal is competent to judge the merits of the case, it is also able to order such measures, including protective measures that intended to maintain the balance of the relationship between the parties, these measures aimed to preserve a factual or law situation, or are related to the administration or the preservation of evidence".*

Thus, it's reasonable to draw the conclusion that the UA recognizes at the same time the powers to state judge and arbitrators to order interim measures and do not deprive the parties the right of resorting to the court, in case of emergency, when the protection that the arbitral tribunal gives is no efficient, given the fact that, unlike to the state judge, the arbitrators have not the imperium[34].

The choice of the substantive law

The principle of the parties choice as to the law applicable to the merits of their case is firmly recognizes and stressed by article 15 of the Uniform Act. That provision stipulated that

> "*the arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties or, in absence of such a choice, according to those chosen by them as the most appropriate, taking into account where necessary the international trade usages. They may also decide as amiable compositeur when the parties have authorized them to do so*".

According to the above provision it belongs first to the parties to choose the rules of law applicable to their disputes and the arbitrators should respect the

[32] The two laws have inspired the drafters the Uniform Act

[33] J.S. Cassius : étude comparée de la règlementation de l'arbitrage OHADA et Suisse.

[34] The power to give orders, to use forces of law and order, make seizures and to pronounce fines, power for which the state judge alone is generally entitled to use

choice made by the parties and be assured that those rules of law cover the entire case, for the arbitrators have no power to substitute their own choice to that of the parties when there is an express and clear choice, otherwise their award will be open to challenge in the ground that the arbitral tribunal has acted without complying with its mission. However, when the parties did not make such a choice, article 15 invites then the arbitrators to decide the case according to the rules of law chosen by them as the most appropriate. This provision gives to the arbitrators a lot of freedom, in absence of the parties' choice, to determine the rules of law applicable to the merits of the case; and to carry out that task, they can also take into account the international trade usages when necessary. The arbitrators may use the method of conflict of law to determine which rules of law will be applicable to the case or they can decide directly the material law applicable to the matter. In addition, under the Uniform Act, the arbitrators may decide the case ex aequo et bono, generally known as amiable compositeur, provided that the parties have expressly given to them the power to act so.

The question of evidence in the Uniform Act

Strongly inspired by its origin of an area influenced by the civil law tradition, the UA leaves the burden of proof on the parties. The parties must cooperate in good faith in the administration of the evidence throughout of the arbitration proceedings so that the arbitral tribunal will decide on the rights and obligations of the both disputing parties. The adversarial principle requires that the parties make known their claims in fact and in law and answer back those of their opponents, so that nothing that has served to the decision of the arbitral tribunal has breached the contradictory procedure. It's what is stipulated in article 14 (paragraph 3 and 4) to support their claims, the parties shall have to allege and adduce evidence to establish their claims. The arbitrators may invite the parties to furnish them with factual explanations, and to present to them by any means legally admissible evidence which they believe will provide a solution to the claim. Any explanations or documents invoked or produced by the parties and retained as evidence must have been the subject of an adversary procedure. They (i.e. the arbitrators) cannot base their ruling on evidence they established on their own without having invited the parties to present their remarks". In addition, aware of the fact that the arbitrator does not the "imperium", the UA permits to the tribunal arbitral, when necessary, to resort to the assistance of the state courts for the administrating of the evidence, as stipulated in paragraph 7 of article 14

> "*if the assistance of judicial authorities is necessary for the production of evidence, the arbitral tribunal may ex officio or on application, request the assistance of the competent judge in the State party*"[35].

Besides, something special regarding the administrating of evidence by the arbitral tribunal that should be noted is that the UA empowers the arbitrators to decide on all point of law concerning the verification of writing and fraud, according to the paragraph 9 of article 14.

The time of the arbitration proceedings

Concerning the time under which the arbitration proceedings must be conducted and the award rendered, the Uniform Act, taking in consideration the need of celerity which is among the generally recognized advantages of the use of arbitration, stipulates in its article 12 that the mission of the arbitrators, if the arbitration agreement does not determine the time limit, may not exceed six months, and that time run from the date where the last of the arbitrators has accepted his mission. This time is similar with French domestic arbitration[36] but since the 2011 reform, that period no longer runs from the acceptance by the last arbitrator of his mission, but rather from the time where the tribunal arbitration was seized. The paragraph 2 of article 12 of the UA adds that the time limit may be extended either by agreement of the parties or at the request of one of them or of the arbitral tribunal, by the competent judge in the State party. Article 16 as for its part mentions the others events that could make an end to the arbitration proceedings. The articles 17 and 18 are dealing with the conditions of the deliberation of the arbitral tribunal and confirm the confidential nature of these deliberations.

[35] The UNCITRAL Model Law of 1985 also recognizes this assistance of the judge of support, in its article 27.
[36] Article 1463 NCPC

THE ARBITRAL AWARD

The form of the sentence award under the Uniform Act

Although containing the whole title dealing with the arbitration award, the UA does not define what the arbitration award is; instead it merely stipulates that the arbitration award, once it is rendered, has the authority of res judicata relatively to the settled dispute (article24). As to the form of the arbitration award, the UA does not require a specific form for it. Indeed, under its article 19 it is stipulated that:

> "*the arbitration award is made following the procedure and form agreed upon by the parties. When there is no such agreement, the award shall be made by majority vote when the arbitral tribunal is composed of three arbitrators*."

The article 20 is dealing with the content of the arbitration award, with an important element that is stressed out, notably the reasons of the award that the absence may open the award to challenge.[37] The award is signed by the arbitrator or arbitrators. When a minority of them refuses to sign the award, mention of such refusal shall be made and the award will have the same effect as if it had been signed by all the arbitrators (article 21 of Uniform Act). This provision aims to enforce the award as if it had been render by all member of the arbitral tribunal and therefore avoid that the refusal of an arbitrator to sign the award paralyzes its validity and effectiveness.

The effects of the arbitration award

The arbitration award is final and binding upon the parties, this is why article 23 stipulates that the arbitration award has, once it is rendered, the authority of res judicata in relation to the dispute settled. In this regard, the article 24 adds that the arbitrators may grant the provisional enforcement of the award when it has been requested, or may rejected such request by an motivated decision. If the parties are bound by the rendered award, the arbitrators once they accomplished their assignment, they are also discharged of the dispute. They are no longer competent to hear again the same case between the same parties. However, the UA still recognizes to the arbitrator the power to act under some circumstances as stipulates in article 22:

> "*the arbitrator has nevertheless the power to interpret the award or to correct the errors and clerical omissions affecting it. When he has omitted to rule on part of the claim, he may do it by an additional award. In either case mentioned above, the request must be made within 30 days from the notification of the award. The arbitral tribunal has 45 days to decide. If the arbitral tribunal can no longer be gathered together, this power belongs to the competent judge in the State party".*

But, the res judicata of the arbitral award do not prevent one of the parties from challenging it, for the law provides some remedies against it.

The remedies against the awards

The matter of remedies against the arbitral awards varies from one country to another and the merit of the UA was to unify and simplify these remedies in its 17 member States. Indeed, the UA only recognizes the action for annulment as the main remedy against the arbitral awards along with two others extraordinary remedies, namely the revision and the third party opposition. Article 25, paragraph 1, 2 and 3 stipulates that:

> "*the award is not subject to any opposition, appeal or judgment setting aside. It may be subject to a petition for nullity, which must be lodged with the competent judge in the member state. The decision of the competent judge in the member state can only be set aside by the common court of justice e and arbitration*"[38].

[37] The uniform act is silent concerning the fact whether the parties may waive or not the reasons of the award, contrary to the UNCITRAL Model Law of 1985 which recognize to the parties this ability (article 31, paragraph 2)

[38] The CCJA is acting as a supreme court of Member States regarding to the harmonized legislation

As to the revision and the third opposition, they are both submitted before the arbitral tribunal but on the basis of different grounds. The paragraph 4 provides that the opposition of the award is made by any third party, natural person or corporate body, who had not been called (in the arbitration proceedings) when the award is damaging to his rights. The application for revision, as provided in the paragraph 5 of article 25, is open on the basis of the discovery of a fact capable of having a decisive influence and which, before the making of the award, was unknown to both the arbitral tribunal and the party applying for revision. The particularity of the UA on this point is that these two extraordinary remedies apply regardless of the nature of arbitration, for the difference between domestic and international arbitration does not exist in the OHADA Law on Arbitration law. Besides, the UA does not provide any provision on what would happen to these remedies when the arbitral tribunal cannot be constituted again. Presumably in this point the provisions of article 22 paragraph 5 could be applicable, i.e. the competent judge in the State party in the territory of which the seat of the arbitral tribunal was located will be seized.

The grounds to challenge the award.

In article 25, paragraph 2, the UA provides that the arbitral award may be subject of an action for annulment before the competent judge in the state party. It is open only for 6 grounds listed in article 26 of the Uniform. These grounds are the following:

(i) If the arbitral tribunal has ruled without an arbitration agreement or an agreement is void has expired;

(ii) If the arbitral tribunal was irregularly composed or the sole arbitrator was irregularly appointed

(iii) If the arbitral tribunal has settled without conforming to the assignment it has been conferred;

(iv) If the principle of adversary procedure has not been observed;

(v) If the arbitral tribunal has violated an international public policy rule of the States, signatories of the treaty

(vi) If no reasons are given for the award

These limited grounds meant that national courts in OHADA Member States, seized through an action for annulment of an award rendered under the provisions of Uniform Act, will not put forward others grounds than the aforementioned grounds to set aside the award. The action for annulment is admissible as soon as the award is issued and ceases to be so if it has not been exercised within one month from the notification of the award furnished with an exequatur.[39]

Article 28 of the UA stipulates, however, that except when the provisional enforcement of the award has been granted by the arbitral tribunal, the exercise of the recourse of annulment suspends the enforcement of the arbitral award until the competent judge in the State party has ruled on this point.[40]

When an action for annulment has succeeded, and the award is set aside on the basis of one of the grounds listed in article 26, the state judge having no power to rule in the merits of the case, the UA recognizes therefore to the parties or one of them the right to restart the arbitration proceedings, if they so wish.[41]

It should be noted here that, if under the UA the arbitral award is not submitted to the appeal, however the decision of the competent judge in the Member State where the seat of the arbitral tribunal was located, ruling about an application for annulment of the award, either the decision has dismissed the recourse or has set aside the award, is likely to an appeal before the CCJA acting as the cassation court in OHADA territory with regard to the application of the harmonized legislation[42].

The recognition and the enforcement of award

When the losing party in the arbitration proceedings does not voluntarily comply with the award, the other

[39] Article 27 of Uniform Act

[40] Under French arbitration law, following the 2011 reform, the suspensive effect of the enforcement of the award because of an action for annulment was removed in international arbitration but maintained in domestic arbitration

[41] Article 28 of Uniform Act

[42] Arrêt de la CCJA, 10/06/ 2003, RDAI 2004. P. 566, note P. Agboyibor

party, the creditor of the award, may seek its enforcement by the state courts. On this point, the UA provides in its articles 30 and 31 the requirements that the winning party must meet in order to see its award being recognized and then enforced. Indeed, under the Uniform Act, the arbitration award is enforceable only by virtue of an exequatur decision awarded by the competent judge in the state party, according to article 30. However the UA says nothing as to know whether the competent judge who grants the exequatur decision is the competent judge in the Member States where the award was made or the competent judge in the state party where the enforcement of the award is sought. On this question, the OHADA doctrine believes that the exequatur decision should be awarded by the competent judge in the Member State where the enforcement is sought inasmuch as the decision of a court of one country cannot have the extraterritorial effects in the territory of another country.[43]

As for the recognition of the arbitration award, the provision of article 31 dealing with this matter, stipulate that the Recognition and the exequatur of the arbitral award presupposes that the party wishing to rely on it shall establish the existence of the award. *The existence of the award is established by the production of the original of the award accompanied by the arbitration agreement or copies of these documents satisfying the conditions required for their authenticity*. The paragraph 3 of article 31 adds that *when the documents are not written in French, the party shall have to produce a translation certified by a translator registered on the list of experts established by competent courts*[44].

When the competent judge in one state party is seized for the purpose of recognition and the exequatur, he just has to verify the material existence of the award and the arbitration agreement from which the power of the arbitral tribunal was based, because the award has, as soon as it is rendered, the authority of the res judicata in relation to the dispute settled, and this authority prevent the case from being brought again before the State court in order for the latter to rule again in the merits of the case. The only ground on which the competent judge in the Member state may rely on and refuse the recognition and the exequatur of the arbitral award is the ground contained in the paragraph 4 of article 31 that stipulates that

> "*the recognition and the exequatur shall be refused when the award is manifestly contrary to the international public policy rule of the member States*".

It should be noted on this point that the UA has established a very favorable regime for the reconnaissance and the enforcement of the arbitral awards in the member States because it retains only one cause on which the competent judge could refuse the recognition and the exequatur.

Articles 32 and 33 are dealing with the effects of the decision of the competent judge in the Member state when he is ruling on the matter of recognition and exequatur. The ruling of the competent judge refusing the exequatur of the award can be set aside only by the common court of Justice and Arbitration[45], however the ruling granting the exequatur is no subject to any recourse, subject to the recourse of annulment if successful, will mean the recourse against the decision of the competent judge that had granted the exequatur. But when the recourse for annulment has been rejected, this rejection will automatically validate the decision of the competent judge that had granted the exequatur.

The case of the arbitral award rendered outside of OHADA territory.

Article 34 of the UA is the main provision dealing with the case of the arbitral awards rendered outside of OHADA and according to other rules than those of the Uniform Act. Indeed, article 34 stipulate that

> *"awards made on the basis of rules different from those provided by the Uniform Act shall be recognized as binding the member States under the conditions provided by international agreements possibly applicable and failing which, under the same condition as those provided in this Uniform Act".*

[43] Business law in Africa, p. 270

[44] Because all member states of OHADA are not francophone, it is logical to say that, if the award has to be recognized and enforced in these no French speaking countries, the documents must be translated into the language of that country instead of French.

[45] Because the CCJA is the court of cassation for the OHADA member State regarding the application and the interpretation of the harmonized legislation

Thus, as far as the recognition and the enforcement of foreign arbitral awards are concerned, the most important and widely used international convention in the practice of international commercial arbitration remains to date the 1958 New York Convention. Therefore, the arbitral awards rendered outside of the OHADA region and on the basis of rules different from those provided by the UA can be recognized and enforced in one or several of Member States of OHADA according to the 1958 New York Convention when that State of these States are also member State of the 1958 New York convention or member[46] of others international agreements. But if the OHADA member state in which the recognition and enforcement are sought is not the Member State of such international conventions, in this case the rules provided by the UA shall apply, notably the provisions of article 26[47].

The benefits of the Uniform Act on Arbitration for Member States

Before the establishment of OHADA and the adoption of the UAA, most of OHADA current Member States did not have a legal text on Arbitration, the first advantage that the UA brings to them is that they now have a modern legal framework governing any arbitration that may be taking place on their territory. In that way, the UA has provided and improved the legal framework of the Member States. Second, with the legal framework provided by the Uniform Act, the arbitration practice in Member States is being increasingly encouraged and promoted, for it was very modest, even nonexistent in some Member States before the coming of OHADA and its harmonized legislation. Another beneficial aspect of the UA is that parties involved in arbitration may choose as arbitration seat the territory of one of the Member States. Indeed, before the elaboration of the OHADA legal framework, and because of the lack of a good legal framework on arbitration, most arbitration involving Africans parties were always taking place abroad, seat of arbitration tribunal were also always fixed abroad, that is, in Europe or North America countries. But with the adoption of OHADA instruments, with the Uniform Act, the situation has changed because Member State now possess a modern legislation which takes into account the main principles of the arbitration and ensure a fair and just outcome of a given arbitration proceedings. To that end, we could say that the provisions of UAA contributed to the establishment of a confidence environment between OHADA Member States and foreign investors and helped to promote investment in the community area, for we should bear in mind that the main aim of the modernization of business law that led to the inception of OHADA is to attract foreign investors. The UAA is therefore a genuine tool for Member States for the settlement of cross- border disputes relating to economic and commercial activities in their territories.

CONCLUSION

The arbitration is became nowadays one of the legal element of the world of business and motivated by the desire to encourage and promote its use in the OHADA zone, the OHADA lawmaker has enacted the UAA law in order to regulate the practice of this mechanism of the settlement of the disputes related to the world of business. The UA has established a friendly arbitration regime, which follows the trends and the principles of the modern practice of arbitration. Thus, although making no difference between domestic and international arbitration, it expressly affirms the legal independence and the effectiveness of the arbitration agreement, corner stone of the arbitration, with regard to the main contract and do submit its validity only to the parties intention without necessary reference to the law of a particular state. Besides, the parties' autonomy is fully recognized in relation with the constitution of the arbitral tribunal, the choice and the challenge of arbitrators, the choice of the rules of law applicable to the arbitration proceedings, the merits of the dispute, and finally it established a very favorable regime for the recognition and enforcement of the arbitral awards. On the point of its benefits towards Member States, we can affirm that the UAA brings to them a modern legislation governing the arbitration conductive to the development of the arbitration practice in the community area and above all likely to attract investors. It is possible now to say that to

[46] The states party of OHADA, also member States of the 1958 New York convention are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Cote d'Ivoire, Gabon, Guinea Conakry, Mali, Niger, Senegal and the Democratic Republic of Congo

[47] The following States of OHADA are not member States of the 1958 New York Convention: Comoros, the Republic of Congo, Equatorial Guinea, Guinea- Bissau, Chad and Togo

arbitrate in OHADA zone should not no longer be the subject of concern like it was years ago.

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