

**INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICA:
THE ORGANIZATION FOR HARMONIZATION OF BUSINESS
LAW IN AFRICA (OHADA) SETS THE TONE**

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CERTIFICATE

This thesis is submitted to Indiana University School of Law-Indianapolis in fulfilment of the requirements for the Degree of Master of Laws (LLM).

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at Indiana University School of Law-Indianapolis or any other institution, except where due acknowledgement is made.

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ABBREVIATIONS

AAA	American Arbitration Association
CCJA	Common Court of Justice and Arbitration
COMESA	Common Market for Eastern and Southern Africa
ECOWAS	Economic Organization of Western Africa States
ERSUMA	French for Ecole Régionale Supérieure de la Magistrature (Regional Training Center for Legal Officers)
IACAC	Inter-American Commercial Arbitration Commission
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
OAS	Organization of American States
OHADA	French for Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organization for the Harmonization of Business Law in Africa)
UAA	Uniform Act on Arbitration.
UNCITRAL	United Nations Commission on International Trade Law

INTRODUCTION

Africa offers immense natural resources and business opportunities for foreign direct investment, which are essential to the world economy.¹ Concurrently, “financial backers often complain about legal and judicial uncertainties in Africa.”² Foreign investors are traditionally suspicious about African national judicial systems, which have been plagued by corruption, long and costly procedures, and lack of efficient enforcement of the law.³ Therefore, in the early 1990s, facing a reduction in investment, West and Central African countries decided to combine their efforts to solve the reluctance of investors to come to Africa because of the disparity of and lack of cohesive business laws across borders. These countries established a “High Level Mission” (hereinafter “the Mission”), led by Mr Keba Mbaye (former Vice President of the International Court of Justice), in order to diagnose the problem and find an appropriate solution. The Mission concluded that a lack of judicial and legal security and lack of governance created an unattractive investment environment. To solve this problem, the Mission proposed the creation of a new business law intended to be “modern,” “harmonized,” and “interpreted by lawyers well trained in business law,” the application of which would be secured by a “unique supranational court.”⁴

This idea led to the signing of the Port-Louis Treaty in 1993, which created the Organization for the Harmonization of Business Law in Africa (OHADA, French

¹ See Barthelémy Cousin & Aude-Marie Cartron, OHADA: A common legal system providing a reliable legal and judicial environment in Africa for international investors, at 1 (www.ohada.com, Ohadata D-07-27).

² Id.

³ See Id., at 3

⁴ Keba Mbaye, L'Histoire et les objectifs de l'OHADA, Petites affiches, 4 (n°205, 13 October 2004) (hereinafter Mbaye, L'Histoire et les objectifs de l'OHADA).

acronym for Organisation pour l'Harmonisation en Afrique du Droit des Affaires).⁵ The Organization was aimed at harmonizing the business laws of different African countries by establishing common rules that would be simple, modern and adapted to each country's situation. This allowed them to be more competitive in the world economy.⁶

1. OHADA: Sources of law and main bodies

A. Sources of Law

The Uniform Acts are the main sources of OHADA Law and are created by Article 5, section 1, of the Treaty related to harmonization of business law in Africa. They are the main means used by OHADA members to accomplish their mission of harmonizing African business laws. They are the core of the organization, and every institution works either to create them or to implement them properly in every Member State.⁷

Uniform Acts are different from other kinds of laws regulating regional organizations, such as Regulations, Directives or Recommendations, because they are automatically and directly applicable and mandatory in every Member State as soon as they are enacted.⁸ They also replace national legislation on any matter they cover. They

⁵ Current Member States include: Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Union of Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

⁶ Mbaye, supra, at 4.

⁷ Id., at 6.

⁸ Article 10 of the Treaty provides that Uniform Acts are directly applicable and mandatory in every Member State. This establishes the primacy of Uniform Acts on any other national law and renders inapplicable any provision of national law contrary to Uniform Acts provisions. In its opinion of April 30th, 2001, the CCJA considers that article 10 of the Treaty establishes the direct and mandatory applicability of the Uniform Acts and their supremacy on any former or posterior provision of Member States national laws. This idea is explained in Joseph Issa-Sayegh, OHADA, Traite et Actes Uniformes commentes et annotes, at 32.

are therefore superior to and overrule any contrary national statute or law.⁹ Uniform Acts are only applicable to facts occurring after their enactment and are therefore non-retroactive.¹⁰ However, it is possible to delay their application in some cases, in order to give time to Member States to modify their laws and prepare to apply a new Uniform Act.

To pass, a Uniform Act requires that at least two thirds of the Council of Ministers be present and there must be a unanimous vote among them. Abstention is nevertheless accepted and does not prevent a Uniform Act from being enacted.¹¹

As of today, nine Uniform Acts have been adopted by the Council of Ministers:

- Uniform Act on General Commercial Law, enacted April 7, 1997, implemented January 1, 1998, and revised December 15, 2010;
- Uniform Act on Commercial Companies and Economic Interest Groups, enacted April 17, 1997 and implemented January 1, 1998;
- Uniform Act on Securities, enacted April 17, 1997, implemented January 1, 1998, and revised December 15, 2010;
- Uniform Act on Collective Proceedings for the Clearing of Debts, enacted April 10, 1998 and implemented January 1, 1999;
- Uniform Act on Simplified Recovery Procedures and Enforcement Measures enacted April 10, 1998 and implemented July 10, 1998;

⁹ Laurence Vanderstraete, The impact of the Democratic Republic of the Congo's future accession to the OHADA, Ghent University Law School, Ohadata D-07-26, <http://www.ohada.com/doctrine>, 8 (2006-2007).

¹⁰ Article 9 of the Treaty provides that a Uniform Act is implemented ninety days after its adoption, unless otherwise provided in the uniform act itself. Uniform Acts have effects thirty days after their publication in the OHADA official gazette and the Member States' official gazettes. This is the only provision on the effects of the Uniform Acts and no other article provides for any retroactive effect of the Uniform Acts.

¹¹ Article 8 of the Treaty provides for unanimity as the voting requirement for a Uniform Act to pass. Para 3 of the same article provides that abstention is nevertheless allowed and does not prevent a Uniform Act from being passed.

- Uniform Act on Accounting, enacted March 24, 2000 and implemented January 1, 2001 for companies' private account, and January 1, 2002 for combined and consolidated accounts;
- Uniform Act on Arbitration, enacted March 10, 1999 and implemented June 11, 1999;
- Uniform Act on Contracts for the Carriage of Goods by Road, enacted March 22, 2003 and implemented January 1, 2004;
- Uniform Act on Cooperatives, enacted December 15, 2010.¹²

B. Main bodies

1. Conference of Head of States:

The Conference of Head of States is composed of Head of States and Governments of OHADA Member States. The Conference is chaired by the Head of State of the Member State which is presiding the Council of Minister. The Conference meets whenever it is required, at its chair or any Member State's initiative, and deliberates all decisions related to the Treaty. The Conference holds meeting only if 2/3 of its members are present; its decisions are made by consensus or by absolute majority of Member States who are present.

2. Council of Ministers:

The Council of Ministers is the highest institution of OHADA. As a legislative body, it revises and adopts new laws to be applied in all Member States. The Council also makes general decisions concerning the organization, such as appointing new judges to the Common Court or the Permanent Secretary.

¹² Boris Martor et al., Business Law in Africa : OHADA and the harmonization process, 16(2nd ed., GMB Publishing Ltd., 2007) (hereinafter Martor et al., Business Law in Africa).

It is composed of the Member States' ministers of Justice and Finance. Every Member State, in alphabetical order, takes turns presiding over the Council for a year.¹³ The Council holds an annual meeting convened by its president (the minister of the Member State presiding) at his/her initiative or the initiative of one of the Member States. The president decides the topic of the meeting by proposition of the Permanent Secretariat, and the topic can be deliberated only if two thirds of the Member States are represented. The Council's decisions, other than those concerning Article 8 of the Treaty (related to Uniform Acts), are voted by absolute majority, each Member State having one vote.¹⁴

The Council can also pass Regulations that have the same nature as the Treaty and are directly applicable in every Member State as soon as they are adopted. Regulations cover specific domains not entirely covered by the Treaty. So far, five Regulations have been adopted and they cover the procedure in the Common Court of Justice and Arbitration, the arbitration procedure, the finances of the organization's institutions and the status of the organization's employees.

3. Permanent Secretariat:

The Permanent Secretariat, headquartered in Yaoundé (Cameroon), is executive body of the organization that has a streamlined composition headed by a Permanent Secretary. The Secretariat represents OHADA and assists the Council of Ministers. Pursuant to Article 40 of the Treaty, the Permanent Secretary is appointed for a four year-term, renewable once by the Council of Ministers. The Permanent Secretary appoints the

¹³ The composition of the Council of Ministers and its management procedure are provided in article 27 of the Treaty.

¹⁴ The rules for the Council of Ministers' meetings, subjects to be discussed and decisions are provided in articles 28, 29 and 30 of the Treaty.

other members of the Secretariat in accordance with recruitment criteria determined by the Council of Ministers.¹⁵

As an administrative body, it monitors the organization by:

- assisting the Council of Ministers during its annual meetings and proposing to its president the questions to be discussed;
- inviting the Member States to nominate judges and the court's employees to be appointed by the Council of Ministers;
- assisting the Council of Ministers in its legislative role by drafting Uniform Acts that it proposes to Member States for eventual modifications and, after requesting the Common Court of Justice and Arbitration's advice, submitting the draft to the Council for adoption.¹⁶

3. Regional Training Center for Legal Officers¹⁷ (ERSUMA, French for Ecole Regionale Supérieure de la Magistrature):

Headquartered in Porto Novo (Benin), ERSUMA was created in order to ensure harmonized decisions not only at the Common Court of Justice and Arbitration level, but also at the level of Member States' national courts. ERSUMA's role is to train and improve the Common Court and Member States' judges and court employees on OHADA legislation and structures, in order to have a harmonized justice administration in all Member States. ERSUMA is under control of the Permanent Secretariat but depends also on the Council of Ministers, which appoints its Director-General for a four

¹⁵ Boris Martor et al., *Business Law in Africa*, *supra*, at 7.

¹⁶ Joseph Issa-Sayegh, Quelques aspects techniques de l'intégration juridique : Exemple des Actes Uniformes de l'OHADA, cited by Urbain Babongeno, OHADA : Projet d'Harmonisation du droit des affaires en Afrique à l'épreuve de la consolidation et de l'élargissement, Ohadata D-05-25, <http://www.ohada.com/doctrine>,9 (5 May 2008). (hereinafter Issa-Sayegh, Quelques aspects juridiques de l'intégration juridique).

¹⁷ Martor et al., *Business Law in Africa*, *supra*, at 12.

year term renewable once, and determines its general policy. Its budget is provided by contributions from the Member States.

ERSUMA is also a documentation and research center on business law, with resources related not only to OHADA but also to other African integration organizations, such as the Common Market for Eastern and Southern Africa (COMESA) and the Economic Organization of Western Africa States (ECOWAS).¹⁸

4. Common Court of Justice and Arbitration (CCJA, French for Cour Commune de Justice et d'Arbitrage)

Apart from being a supranational institution and the highest court of the organization, the CCJA is also an original body promoting arbitration within OHADA. With its dual role, both in litigation and arbitration, it is an original institution and the heart of the OHADA system.¹⁹ Headquartered in Abidjan (Cote d'Ivoire), the CCJA can also hold hearings in a Member State whenever needed, without financially depending on the Member State.²⁰ Its functions and role are covered by Titles III and IV of the Port Louis Treaty that created OHADA.

Composition

It is composed of nine judges appointed through secret voting by the Council of Ministers for a seven-year term, non-renewable.²¹ A candidate to a CCJA judge's position can be a Member State judge, a law professor, or an attorney licensed to practice

¹⁸ Joseph Issa-Sayegh, *supra*, at 9.

¹⁹ Roger Masamba Makela, Modalités d'adhésion de la RDC au Traité de l'OHADA, Rapport Final, COPIREP, 30 (2005).

²⁰ See article 19 of the Regulation related to the CCJA procedure (hereinafter the CCJA Rules).

²¹ The 2008 revision of the Treaty has provided that the Council of Ministers can appoint more than 9 judges if necessary.

in a Member State and must have fifteen years of experience in his/her jurisdiction. Six of the positions are reserved for judges having past high court experience in their respective Member States, while the three remaining are reserved for law professors and attorneys.²² The Council of Ministers cannot appoint more than one judge from a specific Member State in order to assure the equitable distribution of positions within the Court.

Members of the Court elect a President and a Vice-President for a 3½ year non-renewable term.²³ The President appoints a Registrar-in-Chief of the Court who is nominated by the Member States and must have fifteen years of experience as Registrar-in-Chief in a Member State. The President, advised by the Registrar in Chief, appoints the other staff of the court.²⁴

Functions

As per the Treaty, the Court has two functions: judicial and arbitral.

As a judicial body, the Court is the highest court of the organization, aiming to assure a common and harmonized interpretation of the Uniform Acts in all the Member States' courts. It also aims to assure a unique interpretation of the Treaty and the Regulations that apply to it. The Court's opinion can be requested by the Permanent Secretariat concerning a new Uniform Act's draft before its adoption by the Council of Ministers. The Court may also be consulted by the Council of Ministers concerning an OHADA norm or legislation. Moreover, its advice can be requested by a Member State's court in a dispute settlement matter concerning the interpretation or application of an OHADA norm. The Court renders its decision as an opinion, which, even if not

²² Martor et al., *Business Law in Africa*, *supra*, at 8.

²³ The composition of the CCJA and its management are provided in articles 31 to 39 of the Treaty.

²⁴ See article 39 of the Treaty.

mandatory and binding in national courts, may become binding indirectly if a party uses its last appeal to the CCJA on the same matter.

Regarding litigation, the Court's jurisdiction is limited to matters covered by OHADA legislation²⁵ and every part of business law that is within the scope of the organization.²⁶ CCJA replaces the Member States' supreme courts in that it has jurisdiction for all last resort appeals. CCJA's jurisdiction depends, then, on the national courts' jurisdiction in that a dispute is brought in the first instance to a national court; if parties do not agree on the first court's decision, they can appeal to the national court having jurisdiction for the first appeal.²⁷ If the dispute is still not settled, parties can then appeal to the CCJA, which is the highest and last resort court concerning matters covered by OHADA legislation. If parties appeal to the national Supreme Courts, those courts have to declare themselves incompetent and refer the matter to the CCJA, which is the only institution having jurisdiction regarding those matters.²⁸ The CCJA, which is the court of last resort for all matters arising under OHADA laws, is therefore a supranational body free of any national bias and able to review and monitor national courts' decisions. This structure was established to lead to more effective litigation and justice within the OHADA area.

²⁵ The functions of the CCJA are provided in article 14 of the Treaty. The article gives details on the litigation role of the Court as well as on its role as an advisory body.

²⁶ Article 2 of the Treaty lists all areas of law that fall within the scope of business law as construed by OHADA. These areas are: company law, clearing of debts, securities, enforcement measures, rules on bankruptcy, arbitration, labor law, accounting, sales, transportation and any matter that the Council of Ministers may decide to add later on. The CCJA's jurisdiction is therefore limited to matters falling within those areas of law.

²⁷ Martor et al., *Business Law in Africa*, *supra*, at 10.

²⁸ Claire Moore Dickerson, *Unified Business Laws for Africa: Common Law perspectives on OHADA*, 28 (GMB Publishing Ltd, 2007).

2. Importance of arbitration

Parties, when entering into a contract of significant value, generally want to ensure that any dispute that might arise under the contracts in the future will be dealt with efficiently, rapidly, and confidentially.²⁹ Especially if the parties are from different countries, each of them may prefer disputes to be handled by a neutral body rather than by the national courts of the other party. This is the case especially in Africa where foreign investors, going through bribe and corruption, do not trust national courts and judicial systems. Usually, when states (or state entities) are involved, they can often only be sued before their national courts. Arbitration offers a neutral forum which can disregard states' sovereignty immunity and possible arguments concerning their capacity to be a party to an arbitration agreement or arbitration proceedings.³⁰ These are the considerations that have led to the popularity of arbitration in general and arbitration clauses in contracts in particular, especially in international contracts.³¹

In the past, foreign investors deplored the lack of a reliable arbitration reference in Sub-Saharan Africa and the lack of international arbitration institutions capable of monitoring complex arbitration proceedings with competence, confidentiality and impartiality.³² They were using European or American arbitration forums, or the World Bank (ICSID³³), because they could not rely on African arbitration. However, those arbitration forums were not always adapted to African reality and issues.³⁴ That is why

²⁹ See Martor et al., *Business Law in Africa*, supra, at 259.

³⁰ See article 177 of the Switzerland's Code of Private International Law also article 2, para 2 of the OHADA Uniform Act on Arbitration.

³¹ See Martor et al., supra.

³² Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1 (ACOMEX, Janvier-Fevrier 2011, n°37).

³³ International Centre for Settlement of Investment Disputes.

³⁴ See Richard Boivin and Pierre Pic, L'arbitrage international en Afrique: quelques observations sur

OHADA has created a new international commercial arbitration forum in Africa, which is comparable to other major international arbitration forums in the world. OHADA created two kinds of arbitration: ad hoc and institutional. The OHADA Common Court of Justice and Arbitration (CCJA) is a new international arbitration institution which, being inter-governmental, provides certain advantages that other international arbitration institutions do not.

OHADA adopted a Uniform Act on Arbitration, enacted March 10, 1999 and implemented June 11, 1999, which is applicable to every Member State and has become their national law on arbitration. Through title IV of the Treaty and the CCJA rules on arbitration, OHADA has also created an original regional arbitration institution, which is closer to investors in the OHADA area, cheaper in administrative cost and both after and more efficient regarding enforcement.³⁵

3. Definition and advantages of arbitration

Arbitration is an alternative to conventional litigation (alternative dispute resolution), used primarily for disputes of a commercial nature.³⁶ It is a private mechanism for settlement of disputes, which depends on parties' agreement. Arbitration is preferred in international commercial transactions because it is seen as a fair option, cost efficient, free of unnecessary publicity, neutral, impartial, providing to the parties the expertise of the judges (arbitrators) in a specific field and giving them a certain control

l'OHADA, at 2 (Revue Generale de Droit, 2002) (hereinafter Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA).

³⁵ See Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 10 (Revue camerounaise d'arbitrage, Numero special, October 2001) (hereinafter Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA).

³⁶ Thomas E Carbonneau, Arbitration in a nutshell, 2nd edition, (West, 2009) (hereinafter Thomas E. Carbonneau, Arbitration in a nutshell) *see also* Emilia Onyema, The doctrine of separability under Nigerian Law, SOAS School of Law Legal Studies Research Paper Series, (Research Paper No 3, 2010) (hereinafter Emilia Onyema, The doctrine of separability under Nigerian Law)

over the procedure, which is not the case in national courts. It permits parties involved in international commercial transactions to avoid the potential bias in local courts.³⁷ There are two sorts of arbitration:

- Institutional arbitration is monitored by organizations having their own sets of arbitration rules. In this type of arbitration, parties choose to submit their dispute to a specific institution, which usually has its own set of rules that parties choose to follow.³⁸ For example: the International Chamber of Commerce (France), the American Arbitration Association (United States), the London Court of International Arbitration (United Kingdom), the International Center for Settlement of Investment Disputes (World Bank).
- Ad hoc arbitration: which is a process in which parties create their own procedures or apply the United Nations Commission on International Trade Law arbitration Model Law (hereinafter UNCITRAL Model Law). This arbitration is reputed to be flexible, cheap, and fast.³⁹

4. Sources of relevant norms

The sources of arbitration are party's autonomy, institutional rules, municipal law, and international treaties. OHADA has created in Africa both institutional and ad hoc arbitration. Ad hoc arbitration is governed by the OHADA Uniform Act on Arbitration, whereas the Treaty and the CCJA rules apply to the CCJA, the OHADA regional arbitration institution.

³⁷ Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1.

³⁸ See Ralph H. Folsom et al., International Business Transactions in a nutshell, at 327 (West, 2009) (hereinafter Ralph H. Folsom et al., International Business Transactions in a nutshell).

³⁹ Thomas E. Carbonneau, Arbitration in a nutshell, at 10.

In this thesis, I will analyze both the OHADA Uniform Act on Arbitration, which is used as the municipal law, and the arbitration rules of the Common Court of Justice and Arbitration, used as the institutional rules and created by the Port Louis Treaty (an international treaty). As OHADA arbitration has the particularity to be created by an international treaty and is applicable to an international organization, in the first chapter I will comparatively analyze the OHADA and the Inter-American arbitration forums. The Inter-American Convention on International Commercial Arbitration (hereinafter Panama Convention) was signed at Panama January 30, 1975 by the Member States of the Organization of American States (hereinafter OAS). It created rules on International Commercial Arbitration that are applicable in every Member State that has ratified the Convention. The Panama Convention will be a good study case, as it is an international treaty, which is applicable to Member States of an international organization (OAS) in the same way the Port-Louis Treaty applies to OHADA Member States.

I will also analyze the OHADA institutional arbitration, monitored by the OHADA Common Court of Justice and Arbitration (CCJA). I will focus on the CCJA rules and compare them to the rules of the Inter-American Commercial Arbitration Commission (hereinafter IACAC), body of the Organization of American States. As the CCJA is an inter-governmental institution and has the particularity of being both a supranational court and arbitral institution, I will focus on any particularity that the CCJA might have compared to other major international commercial arbitration institutions and identify any advantages and weaknesses it might have compared to the IACAC.

After studying how each of the treaties created an arbitration forum in the two organizations, in the second chapter I will study the OHADA Uniform Act on Arbitration

and compare it to the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention) in order to see if it meets the standards of international arbitration. The UNCITRAL Model Law, prepared and adopted by the United Nations Commission on International Trade Law June 21, 1985⁴⁰, and the New York Convention, adopted by diplomatic conference June 10, 1958, are widely recognized as foundational instruments of international arbitration.⁴¹ They will be good models to determine if the OHADA arbitration provides standard international arbitration rules.

In the conclusion, I will summarize my findings on the OHADA arbitration forum and determine whether the Organization for Harmonization of Business Law in Africa has created an arbitration forum that meets other international arbitration forum standards. I will emphasize any advantages that it might have compared to other arbitration forums and also focus on any weaknesses that might be fixed by other models of international commercial arbitration.

⁴⁰ http://en.wikipedia.org/wiki/UNCITRAL_Model_Law_on_International_Commercial_Arbitration visited on November 2nd, 2010

⁴¹ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, visited on November 2nd, 2010

CHAPTER I:

THE OHADA COMMON COURT OF JUSTICE AND ARBITRATION

The Common Court of Justice and Arbitration is a regional arbitration institution that was created by the OHADA Treaty.⁴² It has jurisdiction over all OHADA Member States and is governed by its own independent arbitration rules, adopted March 11, 1999.

Because of their similarities, in this chapter I will comparatively analyze the OHADA Common Court of Justice and Arbitration (hereinafter CCJA) and the Inter-American Commercial Arbitration Commission (hereinafter IACAC) and find the advantages and weaknesses of the CCJA reference compared to the IACAC reference. Particular attention will be given to the American Arbitration Association (hereinafter AAA), US National Section of the IACAC, which is a major arbitration institution in the world.⁴³

A. Historical background on the Inter-American international commercial arbitration forum

Latin American countries have been traditionally considered hostile towards arbitration.⁴⁴ Several reasons could justify that hostility:

- Latin-American countries were reluctant because historically they always lost arbitration proceedings involving foreigners;⁴⁵

⁴² Provisions on the arbitration provided by the CCJA are found in Title IV (articles 21 to 26) of the OHADA Treaty.

⁴³ See Thomas E. Carboneau, *Arbitration in a nutshell*, at 318-319

⁴⁴ See Fernando Cantuarias, *Problematic of International arbitration in Latin-America*, at 3 (Florida Journal of International Law, 2008) (hereinafter Fernando Cantuarias, *Problematic of International arbitration in Latin-America*)

⁴⁵ Joseph Jackson Jr., *The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems*, at 93 (Kluwer Law International, 2007) (hereinafter Joseph Jackson Jr., *The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application*)

- The existence of different internal legal systems may have been a cause for the non-functionality of international arbitration in the area, making it unlikely to reconcile all the legislations and agree on a uniform arbitration forum;⁴⁶
- Because of the bias against arbitration, Latin-American countries wanted to keep arbitration under national courts' auspices;⁴⁷
- Parties were usually reluctant to arbitrate when the dispute had already arisen and preferred the national courts' forum.⁴⁸
- In Latin-American countries, acceptance of universal arbitration treaties was almost nonexistent.⁴⁹

Several solutions were proposed to solve this problem:

- The unification arbitration legislation bodies;
- The adoption of international agreements enabling the correction of this problem;⁵⁰
- The creation of a system or special forum which would have competence to harmonize different arbitration laws in the area. Decisions issued by this forum must be binding on the Member States.⁵¹

Those are the reasons which led to the adoption, at the Seventh International Conference of American States, of a resolution on an Inter-American arbitration forum, which was approved and turned into a Convention in Panama on January 30th, 1975.

and Problems)

⁴⁶ Fernando Cantuarias, Problematic of International arbitration in Latin-America, at 6

⁴⁷ Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 92

⁴⁸ Id., at 93.

⁴⁹ Fernando Cantuarias, Problematic of International arbitration in Latin-America, at 4.

⁵⁰ Id., at 7.

⁵¹ Id., at 5.

The legal framework of the Inter-American arbitration forum, which culminated in the Panama Convention, was composed of three prior fundamental conventions:

- The Treaty of International Procedural Law of Montevideo (1889)–Recognition and enforcement of foreign judgments;
- Convention on Private International Law, Bustamante Code (Havana, 1928)–Enforcement of arbitral awards;
- The Treaty of International Procedural Law of Montevideo (1940)–Only ratified by 3 countries;

We can add to that list the New York Convention (1958) ratified by several countries.⁵²

The Panama Convention was aimed at reaching two goals:

- Encourage Latin-American States which were not parties to any convention on arbitration to become more friendly to arbitration;
- Stimulate trade and economic development in Latin America.⁵³

The political goal of the Convention was to create a greater solidarity between the United States and Latin-American countries,⁵⁴ as the United States trades extensively in that area. Arbitration was presented as a dispute settlement option which was faster, cheaper, confidential and neutral.⁵⁵ The Panama Convention was a good idea, as Latin-American countries preferred a regional arbitration process under the Organization of

⁵² Countries, parties to the Panama Convention, which had already ratified the New York Convention: El Salvador, Mexico. Ecuador, US, and Trinidad made reservations: they would apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State and would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under their own law.

⁵³ Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 91

⁵⁴ Id., at 92

⁵⁵ Id., at 94

American States (OAS), because it would preserve their needs and legal traditions. That is why it was adopted within the framework of the OAS and is open to signature to all countries of the OAS.⁵⁶

The Panama Convention, which is a regional convention, overrides the New York Convention and promotes a greater uniformity in the area.⁵⁷ It provides a regional mechanism for dispute settlement and preserves important regional prerogatives while promoting trade relations between the United States and Latin-American countries.

The Panama Convention replicates the New York Convention in general, but also provides a mechanism to administer International Commercial Arbitration and rules of procedure.⁵⁸

Article 3 of the Panama Convention recognizes the application of the rules of the IACAC, which is an international arbitration institution located in the OAS building in Washington DC. It has several National Sections in most countries which are parties to the Panama Convention.⁵⁹ National Sections are independent arbitration agencies which can issue their own domestic rules. The National Section in the United States is the American Arbitration Association⁶⁰, a private enterprise located in New York.

Duties of the IACAC:

- Support establishment of National Sections of conciliation and cooperate with

⁵⁶ Article 7 of the Inter-American Convention on International Commercial Arbitration.

⁵⁷ Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 99

⁵⁸ Charles Robert Norberg, Recent Developments in Inter-American Commercial Arbitration, at 89 (Northwestern Journal of International Law and Business, 1991-1992) (hereinafter Charles Robert Norberg, Recent Developments in Inter-American Commercial Arbitration).

⁵⁹ Id.

⁶⁰ Rafael Eyzaguirre, Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission, at 289 (International Tax & Business Lawyer, 1986) (hereinafter Rafael Eyzaguirre, Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission).

- them;
- Issue rules and standards for international commercial arbitration;
 - Establish a list of arbitrators proposed by National Sections;
 - Recommend new texts to OAS;
 - Hold conferences on commercial arbitration;
 - Cooperate with domestic institutions to develop educational programs on commercial arbitration;
 - Maintain relations with other institutions and organizations interested in international commercial arbitration;
 - Administer conciliation;
 - Adopt all appropriate measures to improve the Inter-American system for commercial conciliation and arbitration.⁶¹

B. Arbitration under the CCJA rules

CCJA arbitration is governed by provisions of the OHADA Treaty and the CCJA arbitration rules (hereinafter CCJA rules). Title IV of the Treaty is the framework for CCJA arbitration whereas details are given in the CCJA rules.⁶²

1. Scope of application

Arbitration under the CCJA rules is applicable under three conditions:

- The dispute has to be contractual;
- One of the parties must have its domicile or usual residence in an OHADA

⁶¹ Id.

⁶² Emilia Onyema, Arbitration under the OHADA Regime, at 10 (International Arbitration Law Review, 2008) (hereinafter Emilia Onyema, Arbitration under the OHADA regime).

Member State;

- The contract must have been executed or is to be fully or partially performed in an OHADA Member State.⁶³

Those conditions make the CCJA a regional arbitration institution, as the parties or the contract have to be linked to the OHADA area for the CCJA to have jurisdiction over a dispute submitted to its arbitration reference.

These provisions do not differentiate whether the arbitration is international or national. The only detail referring to the dispute is that it has to be *contractual*.

The IACAC has adopted a different approach. Article 1 of the IACAC rules provides that these rules apply where parties have agreed to submit their disputes to arbitration under the IACAC Rules of Procedure. This makes the IACAC an international arbitration institution rather than a simple regional institution, as parties from anywhere in the world can choose to be governed by these rules, regardless of their nationality, their domicile or the place where the contract will be performed.⁶⁴ The AAA, National Section of the IACAC, has adopted the same approach.⁶⁵

The AAA goes further and makes an original distinction in the application of its rules. Unless otherwise agreed by parties, cases in which no disclosed claim or

⁶³ This is the rule set by article 21 of the OHADA Treaty, which is repeated in article 2.1 of the CCJA rules

⁶⁴ The scope of application of the IACAC rules is found at article 1 of the IACAC rules. The article provides “where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the IACAC Rules of Procedure, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing and the IACAC may approve.” These provisions do not limit the application of the IACAC rules to disputes between parties from OAS Member States or disputes linked to transactions taking place in an OAS Member State.

⁶⁵ Similar provisions are found in the AAA rules, section r-1 (a) “The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association...”

counterclaim exceeds \$75,000 are administered by the Expedited Procedures⁶⁶; cases where the amount of the disclosed claim or counterclaim is at least \$500, 000 shall be administered by the Procedures for Large, Complex Commercial Disputes⁶⁷; all other cases are administered in accordance with Sections R-1 to R-54 of the AAA rules.⁶⁸ This distinction is important because it provides appropriate time frames for different kind of disputes: shorter for cases with a small amount and longer for cases which are more complex.

2. CCJA arbitration framework

When parties opt for CCJA arbitration rules, different texts are automatically applicable to their arbitration:

- Title IV (articles 21-26) of the OHADA Treaty;
- CCJA rules;
- CCJA internal rules and appendices;
- Arbitration costs and rates in force at the moment the arbitration process starts.

The fundamental text on this matter is decision 004/CCJA of February 3rd, 1999 governing arbitration costs, approved by the decision of the Council of Ministers March 12th, 1999.⁶⁹

⁶⁶ These rules are found in Sections E-1 through E-10 of the AAA rules.

⁶⁷ These rules are found in Section L-1 through L-4 of the AAA rules.

⁶⁸ This distinction is found in Section R-1 points (b) and (c) of the AAA rules.

⁶⁹ See Joseph Issa-Sayegh et al, OHADA, Traités et actes uniformes commentés et annotés, at 46 (Juriscope, 2008) (hereinafter Joseph Issa-Sayegh et al., OHADA, Traités et Actes uniformes commentés et annotés). In an introduction to their comments on the CCJA rules of arbitration, authors list all documents that are applicable to arbitration under the CCJA rules. See also Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 1.

3. Function of the Court

The first role of the CCJA is to act like any other arbitration institution. The Court does not arbitrate itself, but administers the arbitration proceedings and appoints or confirms arbitrators who will judge the case.⁷⁰ The originality of the CCJA is that it also acts like a jurisdiction. In this regard, the CCJA reviews the award drafts before the arbitral tribunal makes its decision⁷¹, and is also competent for recognition and enforcement of the same awards.⁷²

4. Arbitration agreement

Parties choose to submit their dispute to arbitration in an arbitration agreement. The arbitration agreement is consensual, and parties may decide on the arbitration process, the scope of the arbitration, which law to apply to their dispute, which procedure to follow, etc.⁷³ Arbitration depends therefore on parties' autonomy and is not mandatory, but the arbitral award is binding on them. There are two forms of arbitration agreement:

- *Clause compromissoire* or arbitration clause, which is an agreement included in the main contract between parties. Here parties agree to submit future disputes to arbitration before they have arisen;

⁷⁰ This role is similar to the one of the IACAC and the AAA. Section R-2 of the AAA rules provides that when parties choose to be governed by these rules, they thereby authorize the AAA to administer the arbitration. Although it is not provided in any specific article, the same approach is adopted by the IACAC when it provides for example for the composition of the arbitral tribunal and appointment of arbitrators by the IACAC in article 5.

⁷¹ This role is inspired from article 27 of the International Chamber of Commerce arbitration rules. This provision gives the ICC Court the same role to review draft awards before they are rendered by the arbitral tribunal.

⁷² See article 2 of the CCJA rules on the mission of the Court. This provision is original before it gives the CCJA the right to monitor a regional recognition of the arbitral awards.

⁷³ See Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 5.

- *Compromis d'arbitrage* or submission, in which parties agree to submit a dispute to arbitration after it has arisen.⁷⁴

The CCJA rules have provided both forms of arbitration agreement.⁷⁵ However, they do not give enough details on the form of this agreement and the way to prove its existence.

The IACAC rules provide that the agreement to refer the dispute to arbitration shall be in writing.⁷⁶

5. Kompetenz-Kompetenz

If one party challenges the existence, validity or scope of an arbitration agreement, the Court, after confirming existence of the agreement and if one party requests it, must decide to send the parties to arbitration. This procedure is valid even when the arbitral tribunal has not yet been constituted. Arbitrators are therefore competent to decide on their own jurisdiction.⁷⁷ This is called the *Kompetenz-Kompetenz* doctrine. Widely recognized in international arbitration, this principle gives priority to the

⁷⁴ See Boris Martor et al., *Le droit uniforme africain issue de l'OHADA*, at 253. See also Thomas E. Carboneau, *Arbitration in a nutshell*, at 11

⁷⁵ The two forms of arbitration agreement are found in article 2 of the CCJA rules. This provision only mentions that the CCJA can arbitrate a dispute when parties have provided in an arbitration clause or a submission agreement that the CCJA rules will apply. The provision does not give any detail on the form of the arbitration agreement.

⁷⁶ Article 1 of the IACAC rules.

⁷⁷ The *Kompetenz-Kompetenz* doctrine is found in article 10, para 10.3 of the CCJA rules. However, despite the existence of an arbitration agreement, if none of the parties requests the judge to send them to arbitration, the judge can decide on these matters. This idea is developed in Richard Boivin and Pierre Pic, *L'arbitrage international en Afrique: quelques observations sur l'OHADA*, at 4. The *Kompetenz-Kompetenz* doctrine is found in article 18, para 1 of the IACAC rules. This provision gives the power to the arbitral tribunal to “rule on objections that it has no jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.” The same doctrine is found in section R-7 (a) of the AAA rules, which duplicates the IACAC provision, and adds that the arbitral tribunal can also rule on the scope of the arbitration agreement.

arbitral tribunal to decide on any matter covered by the arbitration agreement, or on its own competence.⁷⁸

6. Separability

Linked to the doctrine of *Kompetenz-Kompetenz*, the doctrine of separability refers to the existence of an arbitration clause independent within the underlying contract. The arbitral tribunal has the right to decide whether a factor affecting the existence or validity of the main contract also affects the arbitration clause.⁷⁹ Unless otherwise provided, if the arbitrator considers the arbitration clause valid but deems the main contract null or does not exist, he is allowed to decide on each party's rights and claims.⁸⁰

7. Arbitrators

7.1 Appointment

The CCJA rules provide that either one or three arbitrators can be appointed.

If parties decide to have one arbitrator, they agree on the appointment, which is subject to confirmation by the Court. If parties fail to agree within thirty days after notification of the request for arbitration by the other party, the Court appoints the arbitrator.

If they decide to have three arbitrators, each party appoints one arbitrator, either in the request for arbitration or in the answering statement. If one party fails to do so, the Court appoints the other arbitrator. The third arbitrator, deemed to be the president of the arbitral tribunal, is appointed by the Court, unless parties have provided that the

⁷⁸ See Thomas E. Carbonneau, *Arbitration in a nutshell*, at 13.

⁷⁹ See Emilia Onyema, *The doctrine of separability under Nigerian Law*, at 69

⁸⁰ The doctrine of separability is found in article 10, para 10.4 of the CCJA rules. This doctrine is found in article 18, para 2 and 3 of the IACAC rules and section 7 (b) of the AAA rules.

appointment would be made by the other arbitrators already appointed. In this case, the Court will have to confirm the third arbitrator.⁸¹

If parties did not provide the number of arbitrators, the Court appoints one arbitrator, unless it determines the dispute to require three arbitrators. In this case parties have fifteen days to appoint the arbitrators.

In a multi-party case, with multiple claimants and respondents, if parties cannot agree on the appointment of arbitrators, the Court can appoint the entire arbitration panel.⁸²

Arbitrators can be chosen from the roster established by the Court and renewed annually.⁸³

In appointing arbitrators, the Court takes into account the parties' nationality, their locations and the location of both their counsels and the arbitrators, the parties' language, the nature of the subject matter and, eventually, the choice by the parties of the law to govern their relationship.⁸⁴

The IACAC and the AAA have not limited the number of arbitrators and have left it to the parties to decide the number of arbitrators. Where parties have not provided for the number of arbitrators, the IACAC has provided that three arbitrators shall be appointed, and the AAA has provided that one arbitrator will be appointed, unless the AAA, in its discretion, directs that three arbitrators be appointed.⁸⁵ This right of parties to

⁸¹ A similar appointment procedure is provided in article 5 para 2 to 5 of the IACAC rules and sections R-11 and R-12 of the AAA rules. Like for the CCJA rules, both provisions give the IACAC and the AAA the power to appoint arbitrators where the parties have not provided for a specific procedure.

⁸² The appointment procedure is provided at article 3, para 3.1 of the CCJA rules.

⁸³ Section R-11 of the AAA rules also gives the AAA the right to appoint arbitrators from a National Roster.

⁸⁴ See article 3, para 3.3 of the CCJA rules. Similar considerations are provided in article 5 para 6 of the IACAC rules and section R-14 of the AAA rules.

⁸⁵ See article 5 para 1 of the IACAC rules and section R-15 of the AAA rules.

appoint more than three arbitrators is important in multi-party cases, as it allows seeing all parties having their rights guaranteed.

7.2 Immunity and privileges of CCJA arbitrators

In the scope of their work, arbitrators designated by the Court and those designated by parties but confirmed by the Court enjoy diplomatic immunity and privileges.⁸⁶ The immunity given to those arbitrators is questionable, especially in cases where they make some mistakes on purpose without being held accountable.⁸⁷

Neither the IACAC nor the AAA have provided for such privileges to their arbitrators. This provision of the CCJA rules may have been adapted to the context of OHADA Member States in order to guarantee the arbitrators' independence and freedom while accomplishing their mission.

7.3 Independence

An arbitrator who is considered for appointment, before his/her nomination or confirmation by the Court, informs the parties of any fact or circumstance which can, according to them, call into question the arbitrator's independence vis-a-vis the parties. He has the same obligation throughout arbitration proceedings, from his/her nomination or confirmation by the court to notification of the award.⁸⁸

⁸⁶ See article 49 of the Treaty, which was revised by the Conference of Head of States and Governments on October 17th, 2008. The revision extended these privileges and immunity to arbitrators designated by parties but confirmed by the Court. The previous version of the article provided such privileges only for arbitrators designated by the Court.

⁸⁷ See Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 10. Authors discuss CCJA arbitrators' immunity and find it inappropriate in case arbitrators make a serious mistake intentionally. The same concern is expressed in Boris Martor et al., Le droit uniforme africain issu de l'OHADA, at 265.

⁸⁸ See article 4.1 of the CCJA rules. Similar rule is provided in article 6 of the IACAC rules and section R-16 of the AAA rules. The AAA gives more details on these circumstances by mentioning “any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.”

7.4 Challenge

An arbitrator can be challenged for lack of independence or any other reason. The party challenging the arbitrator must submit its challenge within thirty days after notification of nomination or confirmation by the Court, or within thirty days after it becomes aware of the alleged facts or circumstances.⁸⁹ Under the CCJA rules, parties do not need to go to national courts to challenge an arbitrator and submit their requests to the CCJA, which decides the matter.⁹⁰

However, the AAA allows arbitrators to be non-neutral if agreed by parties, in which case such arbitrators need not to be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.⁹¹

7.5 Replacement

An arbitrator can be replaced due to death, when the Court has confirmed his/her challenge or when his/her resignation has been accepted by the Court. He can also be replaced when the Court determines that the arbitrator is prevented *de jure* or *de facto* from fulfilling his/her mission, or that he failed to fulfil his/her mission according to Title IV of the Treaty and the CCJA rules.

When an arbitrator's resignation is denied by the Court, and the arbitrator refuses to continue his/her work, the Court may replace him/her if he/she is the sole arbitrator or the president of the arbitral tribunal. In any other case, the Court considers the evolution

⁸⁹ See article 4, para 4.2 of the CCJA rules

⁹⁰ Eric Teynier et al., Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 3. See articles 6, 7, 8 and 9 of the IACAC rules and section r-17 of the AAA rules on the challenge of arbitrators.

⁹¹ See section R-17 (iii) of the AAA rules.

of the process and the opinion of the other two arbitrators, and can decide to proceed with the arbitration.⁹²

8. Commencement of arbitration

Under the CCJA rules, arbitration proceedings start when a party submits its request for arbitration to the CCJA. The interested party submits its request to the Secretary General of the CCJA.⁹³ The request must contain:

- Names, titles, designation and addresses of parties. Indication of the amount claimed and election of domicile for the rest of proceedings must also be specified;
- Arbitration agreement between parties and contractual documents giving details on circumstances of the dispute;
- General elements of claim and arguments to be used;
- Any useful indication and proposition on number and choice of arbitrators;
- If any, agreement on the seat of arbitration, the language to be used, and the law applicable to the arbitration agreement, to arbitration proceedings, to the subject matter. If there is no agreement, the claimant indicates his/her proposition on these different subjects.⁹⁴

The request must be submitted with the fees for an arbitration request to the Court. Once he receives the request and the answering statement of the respondent, the Secretary-General of the Court seizes the Court and requests it to decide on the

⁹² See article 4, para 4.3 and 4.4 of the CCJA rules. Similar rules are found in article 10 of the IACAC rules and section R-19 of the AAA rules.

⁹³ Under the IACAC rules, the arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent. This is provided in article 3 para 2 of the IACAC rules.

⁹⁴ Similar elements are provided in article 3 of the IACAC rules.

administrative cost, the commencement of arbitration proceedings and the seat of arbitration if that was not provided in the arbitration agreement.⁹⁵

If the Court notes the non-existence of any arbitration agreement providing application of the CCJA rules, or if the respondent declines the arbitration or does not submit its answering statement within forty five days, the Secretary-General of the Court informs the claimant of his/her request to have the Court decide that arbitration cannot take place.⁹⁶

9. Arbitration proceedings

9.1 Seat

The seat of arbitration⁹⁷ is decided by the arbitration agreement or by a subsequent agreement of the parties. If the parties failed to choose the seat of arbitration, the Court, as the administrative body monitoring the arbitration process, may choose the seat before assigning the case to arbitrators. During proceedings, arbitrators may decide to relocate, after consultation with the parties. If parties do not agree to change the seat, the Court decides. If, given certain circumstances, it becomes impossible or difficult to keep the same seat, the Court may, at the request of the parties, decide to relocate.⁹⁸

⁹⁵ Rules on the request for arbitration are found in article 5 of the CCJA rules

⁹⁶ This rule is provided in article 9 of the CCJA rules. This scenario is only possible where there is no arbitration agreement referring to the CCJA rules. However, where there is a valid arbitration agreement referring to the CCJA rules, the arbitration process will continue nevertheless. This is provided in article 10, para 10.2 of the CCJA rules. The idea is explained in Joseph Issa-Sayegh at al., OHADA: Traite et Actes uniformes commentes et annotes, at 171 and in Eric Teynier et al., Un nouveau centre d'arbitrage en Afrique sub-saharienne, at 4

⁹⁷ "Seat of arbitration" is to be construed as the location of the arbitration proceedings.

⁹⁸ See article 13 of the CCJA rules on the seat of arbitration. Similar rules are found in article 13 of the IACAC rules and section R-10 of the AAA rules on the fixing of the Locale where arbitration is to be held.

9.2 Confidentiality

According to article 14 of the CCJA rules, arbitration proceedings are confidential. Arbitrators, experts, counsels, any person involved in the arbitration process, and all the work of the Court pertaining to arbitration proceedings are also subject to confidentiality. However, this provision might conflict with article 49 of the Treaty on immunity and privileges. As arbitrators designated by the Court enjoy diplomatic immunity, they would not be punished if they did not respect their obligation of confidentiality.⁹⁹

9.3 Initial meeting

Within sixty days after receiving the case, arbitrators have to organize an initial meeting with parties or their representatives with their counsels. Several points are discussed during this meeting:

- Referral of the case to the arbitral tribunal and list of different claims;
- Any agreement between parties on the seat of arbitration; the language to be used; the law applicable to the arbitration agreement, to the arbitration proceedings and to the dispute matter; confirmation on the existence of an arbitration agreement referring the dispute to the CCJA arbitration; answering statement from the respondent. Parties may also grant arbitrators the right to decide on *amiable compositeur* or equity;
- Rules to apply to the arbitration procedure;
- A tentative schedule of the hearings;¹⁰⁰

⁹⁹ See Joseph Issa-Sayegh et al., *OHADA, Traités et Actes uniformes commentés et annotés*, at 176

¹⁰⁰ A similar provision is found in section R-20 of the AAA rules on a preliminary hearing. This option is however not mandatory and can be organized at the request of any party or at the discretion of the arbitrator or the AAA. The AAA does not provide for the taking of any minutes.

Arbitrators take minutes of the meeting, which have to be signed by either the parties or their representative and the arbitrators.¹⁰¹ Parties have to make sure the minutes are correctly recorded because arbitral hearings will be based on dispute matters contained in these minutes and the arbitrators mission's conformity will be appreciated based on the same minutes.¹⁰²

9.4 Rules of procedure

Rules of procedure to be followed are the ones provided by the CCJA rules. If these rules are not provided, parties or the arbitrator may decide on the rules to apply and may refer to any national law.¹⁰³

9.5 Applicable law

Parties are free to choose the law they want the arbitrator to apply to their dispute. If parties fail to indicate the applicable law, the arbitrator may apply the law indicated by the appropriate rules of private international law. In doing so, the arbitrator has to take into account the provisions of the contract and commerce usages.¹⁰⁴ If agreed upon by the parties in the arbitration agreement or subsequently, the arbitrator can also use equity or *amiable compositeur* to decide their dispute.¹⁰⁵

9.6 Hearings

After examining documents parties have submitted to support their claims and arguments, the arbitrator hears the parties or their representatives in an adversarial procedure, at one party's request or at the arbitrator's discretion. The arbitrator can decide

¹⁰¹ Details on the initial meeting are provided by article 15 of the CCJA rules.

¹⁰² See Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 7.

¹⁰³ Article 1 of the IACAC rules and section R-1 (a) provide for similar provisions on their application to disputes referred to the IACAC and the AAA.

¹⁰⁴ The arbitration procedure is found in article 16 of the CCJA rules.

¹⁰⁵ This is provided by article 17 para 3 of the CCJA rules. Similar provisions are found in article 30 of the IACAC rules.

to hear the parties separately, if he considers it appropriate. He sets the date and location of the hearings.

If one of the parties does not show up although regularly convoked, the arbitrator may, after making sure that the party did receive the convocation and unless the party has good justification, may continue proceedings. The procedure will be deemed adversarial.

The minutes of every hearing are submitted to the Secretary-General of the Court.

The arbitrator may appoint one or several experts, determine their role, receive their report and hear them in front of the parties or their representatives. The arbitrator monitors those hearings, which must be adversarial.

Unless otherwise agreed by parties, hearings are not open to third-parties.¹⁰⁶

9.7 New claims

Parties can submit new claims during proceedings, unless the new claims are not in the scope of the arbitration agreement and the arbitrator determines that he should not authorize such an extension of his/her mission, in particular because of the delay with which it is submitted which can affect the other party's right to contradictory proceedings.¹⁰⁷

9.7 Award upon settlement

During proceedings, parties can agree to settle the case. They may request the arbitrator to acknowledge the settlement in a *consent* award.¹⁰⁸ Although this is not a

¹⁰⁶ For provisions on arbitral hearings, see article 19 of the CCJA rules. Similar rules are provided in article 21 to 26 of the IACAC rules and sections R-22 to R-35 of the AAA rules.

¹⁰⁷ New claims are treated in article 18 of the CCJA rules. Provisions on new claims are provided in article 17 of the IACAC rules and section R-6 of the AAA rules.

¹⁰⁸ See article 20 of the CCJA rules on consent award. Provisions on consent awards are found in article 31 para 1 of the IACAC rules and section R-44 of the AAA rules.

formal award, parties may want to have their agreement enacted in an award in order to benefit from the rules governing recognition and enforcement of awards.¹⁰⁹

10. Arbitral award

10.1 Draft awards

Draft awards on the arbitral tribunal's jurisdiction and partial and final awards are reviewed by the Court before arbitrators can render them. The Court verifies that the awards comply with the arbitration rules and may suggest technical modifications of the awards.¹¹⁰

10.2 Signature and motivation

Unless otherwise agreed upon by parties and only if that agreement is allowed by the applicable law, awards must be motivated and signed by arbitrators to be valid. If the award is rendered by three arbitrators, it is signed by the majority, otherwise the president of the arbitral tribunal is the only one who renders the award and signs it. If the award is rendered by the majority, the minority arbitrator's failure to sign the award does not affect the validity of the award.¹¹¹ Awards are reputed rendered at the seat of arbitration, on the date of their signature after the Court's review.¹¹²

¹⁰⁹ See Joseph Issa-Sayegh et al., *OHADA, Traités et Actes uniformes commentés et annotés*, at 181.

¹¹⁰ Court's review of the awards is provided in article 23 of the CCJA rules. This provision is inspired from article 27 of the ICC rules.

¹¹¹ See article 22, para 22.1 and 22.3. Article 29 of the IACAC rules provides that the arbitral award shall be made in writing and shall be final and binding on the parties and subject to no appeal. The award shall be motivated, unless otherwise agreed by parties. The AAA rules have similar provisions in section R-42, but provide that the award will be motivated only if requested by parties prior to appointment of the arbitrator.

¹¹² See article 22, para 22.2.

10.3 Decision on the fees

In addition to deciding the dispute, the award also provides a decision about the arbitration fees. Arbitrators decide which party should pay the fees, or the way the fees should be divided among parties.

10.4 Res judicata

Arbitral awards made based on the CCJA rules are binding and are reputed *res judicata*, like any judicial decision (judgment) rendered by a court in a Member State, allowing awards to be enforced in any Member State without further procedure.¹¹³ Awards do not have this quality under the IACAC rules and the AAA rules and need to be given *res judicata* in the national court where recognition is sought.

10.5 Notification

The Secretary-General of the CCJA notifies the parties when an arbitral award has been made, after payment by them of all the arbitration fees.¹¹⁴

10.6 Rectification and interpretation

Parties can request rectification of any technical error or interpretation of the award. They may also request a supplemental award regarding a claim that was submitted to the arbitrator.¹¹⁵ The request should be made within forty-five days of the notification of the award to parties. If, for any reason, the Secretary-General cannot submit the request to the same arbitrator, the Court can transfer the request to a new arbitrator.¹¹⁶

¹¹³ See article 27 of the CCJA rules.

¹¹⁴ Article 25 of the CCJA rules discusses notification of the arbitral award. It also provides that certified copies of the award can be delivered to parties if requested.

¹¹⁵ Similar provisions are provided in articles 32, 33 and 34 of the IACAC rules and sections R-46 and R-53 of the AAA rules.

¹¹⁶ This is provided in article 26 of the CCJA rules. However, these rules do not apply to an award based on the CCJA rules which is to be enforced outside an OHADA Member State. In this case, national law or any international convention on recognition and enforcement of foreign arbitral awards will be applied. This idea is developed in Joseph Issa-Sayegh et al., OHADA, Traite et Actes uniformes commentes et

11. Recourse against the award

Three recourses are provided against an award based on the CCJA rules: action for nullity, revision, and tierce-opposition.

11.1 Action for nullity

A party opposing enforcement of an award and its binding character may submit a request to the Court to declare the award null. The requesting party notifies the other party. The request has to be submitted within two months of the notification of the award. This recourse is only valid if in the arbitration agreement parties did not waive their right to use it.¹¹⁷ Grounds for this recourse are the same provided for denial of *exequatur*.¹¹⁸ If the Court denies recognition and *res judicata*, it nullifies the award and can decide on the dispute if requested by parties. Otherwise the arbitration process is resumed by the most diligent party.¹¹⁹

11.2 Revision

Revision may be requested against an arbitral award or a Court's decision deciding on the dispute as provided in article 29 of the CCJA rules.¹²⁰ Revision can only be requested by a party when there is a new fact which was unknown before the award was rendered but which is decisive to the decision.¹²¹ A party can only request revision

annotes, at 189.

¹¹⁷ This recourse is provided by article 29 of the CCJA rules.

¹¹⁸ These grounds for denial of recognition are found at article 30, para 30.6.

¹¹⁹ Article 29, para 29.5. This recourse is similar to the action for nullity found in article 25 of the Uniform Act on Arbitration, as the Court *nullifies* the award if it does not recognize its validity. This idea is developed in Joseph Issa-Sayegh, OHADA, Traite et Actes uniformes commentes et annotes, at 187.

¹²⁰ Article 29, para 29.5 provides that the Court, after denying recognition of an arbitral award, may decide on the dispute if requested by the parties.

¹²¹ Boris Martor et al., Le Droit uniforme des affaires issu de l'OHADA, at 272 (Editions du Juris-classeur, 2004) (hereinafter Martor et al., Le Droit uniforme des affaires issu de l'OHADA).

within three months of the knowledge of the fact. Revision is not accepted more than ten years after the award was made.¹²²

11.3 Tierce-opposition

Tierce-opposition is a recourse used by a third-party that was not invited to arbitration proceedings, but whose rights are affected by the award.¹²³ Like revision, *tierce-opposition* can be requested against arbitral awards and Court's decisions when it has decided on the dispute according to article 29, para 29.5.¹²⁴ In its request for *tierce-opposition* the third-party must:

- Specify which arbitral award or the Court's decision it is attacking;
- Determine how the party has been affected by the decision;
- Indicate the reasons why the party did not participate in the arbitration proceedings.¹²⁵

If the Court grants *tierce-opposition* to a third-party, the arbitral award or Court's decision is modified by the Court.¹²⁶

12. Recognition and enforcement

12.1 Recognition

Request for recognition or *exequatur* of the award can only be submitted to the Court and granted by the President of the Court or any other judge who has been assigned that role. The CCJA is the only one to have jurisdiction on recognition of awards

¹²² Rules on revision are found in article 49 of the rules of procedure of the CCJA.

¹²³ Joseph Issa-Sayegh et al., OHADA, Traite et Actes uniformes commentes et annotes, at 191.

¹²⁴ Article 33 of the CCJA rules.

¹²⁵ Article 47 of the rules of procedure of CCJA, para 2.

¹²⁶ See article 47 of the rules of procedure of CCJA, para 3. There is no delay for *tierce-opposition* as it is for revision.

rendered under its rules.¹²⁷ The award is given a certification for enforcement. This procedure is not contradictory.¹²⁸ Recognition can only be denied on the following grounds:¹²⁹

- There was no arbitration agreement or it was null or expired;
- In making the award, the arbitrator went beyond the powers conferred to him/her¹³⁰;
- The adversarial principle was not respected¹³¹;
- The award is against international public policy.¹³²

Once recognition is granted for an award, it is valid in every OHADA Member State. It is therefore not required of a party seeking enforcement of the award in any of the Member States to obtain its recognition in that Member State. It does not matter where the seat of arbitration was, as long as the award was made based on the CCJA rules. This is an original procedure created by OHADA. By instituting *res judicata* of arbitral awards under the CCJA rules in every Member State, OHADA has established a

¹²⁷ See Decision n°741 of the Cour d'appel d'Abidjan (Court of appeals of Abidjan) July 2nd, 2004. In its decision, the Court of appeals cancels a judgment rendered by the Court of Abidjan granting recognition of an arbitral award rendered under the CCJA rules and refers to article 25 of the OHADA Treaty which provides that the CCJA is the only court to have jurisdiction regarding recognition of awards rendered under its rules.

¹²⁸ Article 30, para 30.1 and 30.2.

¹²⁹ These grounds are found in article 30, para 30.6 of the CCJA rules.

¹³⁰ The arbitrator went beyond the powers that were conferred to him/her by parties in the arbitration agreement or decided on matters that were not covered by the arbitration agreement.

¹³¹ One of the parties was not given the chance to challenge the other party's arguments.

¹³² As explained in Winnie Ma (2005) *Public Policy in the judicial enforcement of arbitral awards: lessons for and from Australia*, SJD, ePublications@bond, Faculty of Law, international public policy comprises the fundamental rules of natural law, the principles of universal justice, *jus cogens* (or peremptory norms) in public international law, and the general principles of morality accepted by civilized nations. In this particular case, international public policy may refer to general principles of morality accepted by OHADA Member States.

regional recognition of awards.¹³³ This is a great advantage for the party seeking enforcement of the award, in case the other party has assets in more than one OHADA Member State.¹³⁴

12.2 Enforcement

The Secretary-General of the Court delivers to the party that requests it a certified copy of the award with a certification attesting that it has been recognized by the Court. The certification also attests that the award has become final, given that no opposition was filed against the award within fifteen days of its notification to parties, or the Court denied a request for denial of recognition.¹³⁵ Competent national courts in any Member State in which enforcement is sought, given the certification attesting recognition of the award by the Court, shall add a certification for enforcement on the award.¹³⁶

The IACAC rules and the AAA rules do not provide provisions on recognition and enforcement of arbitral awards. This matter has not been yet subject to harmonization under the inter-American reference and depends on national laws on recognition and enforcement of arbitral awards. Countries that are parties to the New York Convention follow the rules provided by this document.

¹³³ See Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 8.

¹³⁴ See Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 11.

¹³⁵ The procedure to obtain recognition of an award is found at article 31, para 31.1.

¹³⁶ Article 31, para 31.2. This provision establishes a uniform recognition mechanism for all OHADA Member States, which is monitored by the CCJA.

CHAPTER II:

THE OHADA UNIFORM ACT ON ARBITRATION

The OHADA Uniform Act on Arbitration (hereinafter UAA) was adopted March 11, 1999. As provided in Article 10 of the OHADA Treaty, the UAA is directly applicable and mandatory in all OHADA Member States. In every Member State which joins OHADA, every piece of legislation on arbitration which is contrary to the provisions of the UAA is automatically replaced and overruled by it. The UAA is therefore the municipal law on arbitration which is applicable in all OHADA Member States and governs ad hoc arbitration.¹³⁷

The UNCITRAL Model Law on International Commercial Arbitration was adopted June 21, 1985, by the United Nations Commission on International Trade Law. The Model Law is aimed at assisting States around the world in reforming and modernizing their legislation on arbitral procedure, based on particular features and needs specific to international commercial arbitration. The Model Law covers the different stages of the arbitral process: the arbitration agreement, the appointment of the arbitrators, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention during the process and the recognition and enforcement of the arbitral award. The Model Law reflects widely recognized key aspects of international arbitration practice, which have been accepted in the different regions and in different legal or economic systems of the world.¹³⁸

¹³⁷ See article 10 of the Treaty which establishes the direct applicability of the Uniform Acts. See also the CCJA opinion of April 30th, 2001, in which the Court considers that article 10 of the Treaty establishes the direct and mandatory applicability of the Uniform Acts and their supremacy on any former or posterior provision of Member States national laws. See also article 35 of the UAA which provides that the UAA is the arbitration law for all OHADA Member States.

¹³⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention) was adopted by a diplomatic conference June 10, 1958. The Convention is widely recognized as a foundation instrument of international arbitration.¹³⁹ It is also widely recognized as a “model of modern arbitration legislation...because of its codification of international consensus on arbitration.” It focuses on two important and “vital elements of the arbitral procedure: the validity of arbitration agreements and the enforcement of arbitral awards.”¹⁴⁰

In this chapter, I will comparatively analyze the OHADA Uniform Act on Arbitration with these two fundamental international arbitration documents because of their widely recognized authority and their common use as references in international arbitration. This exercise will determine if the UAA is based on the standards of international arbitration and identify any particularities that it may provide.

1. Scope of application

The applicability of the UAA is determined by the seat of the arbitration. Pursuant to article 1 of the UAA, the UAA rules shall apply to arbitration when the seat is in an OHADA Member State.¹⁴¹

The UAA applies to natural persons, legal persons, states and state entities or public (administrative) bodies.¹⁴² There is no distinction between international and local arbitration in the UAA.¹⁴³ Based on these elements, both institutional arbitration and ad

¹³⁹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

¹⁴⁰ See Thomas E Carbonneau, *Arbitration law in a nutshell*, at 287 where the author gives a brief description of the UNCITRAL Model Law.

¹⁴¹ Provisions on the scope of application of the UAA are found in article 1 of the UAA. These provisions are similar to article 1 (2) of the UNCITRAL Model Law.

¹⁴² Article 2 para 2 of the UAA lists all persons to which it is applicable.

¹⁴³ Emilia Onyema, *Arbitration under the OHADA reference*, at 5.

hoc arbitration are therefore subject to the UAA when the seat of arbitration is in a Member State.¹⁴⁴

Even when parties choose to apply a law other than the UAA to their dispute but have the seat of arbitration in an OHADA Member State, the UAA applies every time an arbitration rule is missing in the legislation chosen by the parties.¹⁴⁵

To help coordinate legislation on the subject, the UNICTRAL Model Law has provided for a definition of international commercial arbitration. Pursuant to article 1 (3) of the UNCITRAL Model Law, arbitration is international if the following conditions apply:

- the parties to the dispute have their places of business in different States;
- one of the following places is outside the State in which the parties have their place of business: 1) the place of arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed or 2) the place with which the subject-matter of the dispute is most closely connected;
- parties have expressly agreed that the subject-matter of the arbitration is related to more than one country.¹⁴⁶

Based on this definition, the UAA is assumed to apply over international commercial arbitration anytime the seat of arbitration is located in the OHADA area. It can, therefore, be construed from the second point of this article that the UAA is applicable to a dispute between two parties who have no connection with the OHADA area but whose seat of arbitration is in an OHADA Member State. This opens the UAA

¹⁴⁴ *Id.*, at 4.

¹⁴⁵ Boris Martor, Nanette Pilkington, David Sellers and Sebastien Thouvenot, Business Law in Africa: OHADA and the harmonization process, at 262 (GMB Publishing, 2002) (hereinafter Martor et al., Business Law in Africa).

¹⁴⁶ *See* article 1 (3) of the UNCITRAL Model Law.

reference to any parties willing to be governed by its arbitration provisions, whereas the CCJA's arbitration is limited to disputes with a connection with the OHADA area.¹⁴⁷

2. Character of the arbitration agreement

The arbitration agreement, in which the parties agree to submit their dispute to arbitration, shall be in writing or any other means able to show evidence of the parties' agreement.¹⁴⁸

There are three effects of the arbitration agreement:

- It is as binding on parties as the main contract;
- It denies national courts' jurisdiction over the dispute;
- It gives arbitrators the same power to decide the dispute as national courts.¹⁴⁹

Even when parties are already in court proceedings, they can agree to leave the court's proceedings and move to arbitration.¹⁵⁰ This provision reflects the preference of arbitration as a dispute resolution option within the OHADA area.¹⁵¹

The UNCITRAL Model Law gives helpful details to understand the “agreement in writing” and “other means able to show evidence of the parties' agreement” provided by the UAA. Pursuant to article 7 of the UNCITRAL Model Law:

- An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letter, telex, telegrams or other means of telecommunication

¹⁴⁷ The CCJA's scope of application is limited to either contracts performed or to be performed in the OHADA area, or parties having their domicile or usual residence in a OHADA Member State.

¹⁴⁸ Article 3 UAA. This provision shows the importance of the arbitration agreement.

¹⁴⁹ Sadjo Ousmanou, Comment prévoir le recours à l'arbitrage dans un contrat?, at 1 (Revue camerounaise de l'Arbitrage n°35, Décembre 2006).

¹⁵⁰ Article 4 para 3 of the UAA.

¹⁵¹ Emilia Onyema, Arbitration under the OHADA reference, at 4. The author discusses the independence of the arbitration clause and the possibility for parties already litigating before a national court to mutually agree to discontinue the proceedings, agree an arbitration agreement and commence arbitration. The assumption is that arbitration is the preferred dispute settlement option, as it can be chosen by parties even after litigation proceedings have begun.

- which provide a record of the agreement, or in an exchange of claim and defense in which existence of an agreement is alleged by one party and not denied by another.
- The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.¹⁵²

3. Separability

The arbitration clause is independent from the underlying contract. Nullity of the underlying contract does not affect the existence of the arbitration clause, which is determined based on parties' will and not on national law.¹⁵³

4. Kompetenz-Kompetenz

The arbitrators decide their own competence and the validity and existence of an arbitral agreement.¹⁵⁴

If both an arbitral tribunal and a national court are seized, the national court must declare itself incompetent at the request of one of the parties, unless it finds that the arbitration agreement is manifestly null. A national court cannot automatically declare itself incompetent.¹⁵⁵ A national court shall declare itself incompetent even if the arbitral tribunal has not been seized yet.¹⁵⁶

¹⁵² Those provisions are found in article 7 (2) of the UNCITRAL Model Law. The New York Convention only gives a few details on the arbitration agreement in its article II para 2. That provision provides that an arbitration agreement can be either an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

¹⁵³ The separability doctrine is found in article 4 para 1 and 2 of the UAA. Similar provisions are found in article 16 (1), second and third sentence.

¹⁵⁴ The Kompetenz-Kompetenz doctrine is found in article 11 of the UAA. The same provisions are found in article 16 (1) of the UNCITRAL Model Law.

¹⁵⁵ Pursuant to article 13 of the UAA, a national court can only declare itself non-competent if one of the

Although it has similar provisions regarding the effects of the kompetenz-kompetenz doctrine, the New York Convention goes beyond the provisions found in article 13 of the UAA. The New York Convention provides that “the Court of a Contracting State...shall refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”¹⁵⁷

5. Arbitrator

The UAA provides that an arbitrator must be an individual who must possess full enjoyment of his/her civil rights and be and remain independent and impartial towards the parties.¹⁵⁸

5.1 Appointment

Parties' choice on arbitral tribunal constitution is more flexible in the UAA than it is in the CCJA rules where parties might have to choose an arbitrator from the roster provided by the CCJA.¹⁵⁹

The arbitral tribunal can be composed of either one or three arbitrators.¹⁶⁰ Article 5 of the UAA gives two scenarios for the appointment of arbitrators:

- If the arbitral tribunal is composed of three arbitrators, each party appoints

parties requests it or if the arbitration agreement is null. The assumption is that although there may be a valid arbitration clause, the court can still have jurisdiction over the dispute if nobody denies it and nobody requests to be referred to arbitration.

¹⁵⁶ Pursuant to article 13 para 2 of the UAA, the national court is required to refer the parties to arbitration, when requested, even if the arbitral tribunal has not been established and cannot decide on its own competence yet. This provision has been applied by the supreme court of Ivory Coast in its decision n°230 of April 12th, 2001 MACACI c/MAY Jean-Pierre. The court annulled a decision by the court of appeals confirming the jurisdiction of an Ivorian court where an arbitration clause was included in the parties' contract and one of the parties requested to be referred to arbitration.

¹⁵⁷ Article II 3 of the New York Convention.

¹⁵⁸ Provisions found in article 6 of the UAA. An arbitrator that can “freely use his rights” should be construed as rights which do not need the intervention of a public authority to be exercised. This idea is found in Martor et al., *Business Law in Africa*, at 262.

¹⁵⁹ Mayatta Mbaye, *L'arbitrage OHADA: réflexions critiques*, at 18 (www.ohada.com, July 2001).

¹⁶⁰ Article 8 of the UAA provides that the arbitral tribunal can only be composed of either one or three arbitrators.

one arbitrator and the two appointed arbitrators appoint the third arbitrator. If one of the parties fails to appoint an arbitrator thirty days after the other party's request to do so, or if the two appointed arbitrators fail to agree on the appointment of the third arbitrator within thirty days since their appointment, the appointment is done by a competent national judge at the request of one of the parties.

- In case of a sole arbitrator, if parties fail to agree on the appointment of the arbitrator, the competent national judge appoints the arbitrator.¹⁶¹

The limitation made by the UAA to a maximum of three arbitrators can be an issue in a multi-party situation with multiple claimants and defendants, and it can affect parties' right to equality in appointing arbitrators who can guarantee their rights.¹⁶²

The UNCITRAL Model Law does not limit the number of arbitrators and leaves the choice to the parties.¹⁶³ This provision is more advantageous than the limitation found in the UAA in case of multi-party situations.

UAA provisions on the arbitral tribunal composition are applicable only if parties did not stipulate any provisions in their arbitration agreement.¹⁶⁴

Parties have the right to determine the panel and procedure of their arbitration.¹⁶⁵

Creation of the arbitral tribunal is monitored by the competent national judge who intervenes in the nomination, the challenge and the replacement of the arbitrators.¹⁶⁶

¹⁶¹ Rules for the appointment of arbitrators are found in article 5 a) and b) of the UAA.

¹⁶² Emilia Onyema, Arbitration under the OHADA reference, at 5.

¹⁶³ See article 10 1). This article leaves to parties the freedom to choose the number of arbitrators to be appointed. In case parties fail to agree on the number of arbitrators, the number of arbitrators shall be three.

¹⁶⁴ Mayatta Mbaye, supra, at 18.

¹⁶⁵ Article 14 of the UAA provides that parties can decide the procedure or choose existing arbitration rules to govern their dispute. If parties fail to choose a procedure, the arbitrator decides which procedure to follow.

A decision made by a national judge to disqualify an arbitrator cannot be appealed.¹⁶⁷ The UAA addresses only a provision concerning a decision of disqualification by a national court; however, there is no similar provision for a decision on nomination or replacement of the arbitrators made by a national judge. Can these other judge's decisions be appealed as well? This loophole may allow the parties to abuse the use of this kind of appeal in order to delay the arbitration procedure.¹⁶⁸

The appointment procedure is decided by the parties. The UAA provisions are applied only when parties have failed to provide a procedure. Parties can also choose to delegate their appointment right to an authority which will appoint the arbitrators.¹⁶⁹

To complete the appointment process the appointed arbitrator must agree to and accept the appointment and notify the parties of his/her acceptance in writing or any other means that can prove his/her acceptance.¹⁷⁰

The mission of an arbitrator cannot be accepted if there is any circumstance that may cause a challenge by the parties. Any prospective arbitrator who thinks that such circumstances exist must disclose them to the parties.¹⁷¹ This rule may be problematic because it gives too much freedom to the arbitrator to determine whether such circumstances may be a cause for challenge.¹⁷² Although article 10 para 2 states “any

¹⁶⁶ See articles 5, 7 and 8 of the UAA. Article 5 provides that if parties fail to nominate the arbitrators the competent national judge can nominate them at the request of one party. Article 7 provides that the national judge decide the disqualification of an arbitrator if parties did not provide a procedure. Article 8 provides for the nomination of the third arbitrator by the national judge when parties have only nominated two arbitrators and fail to agree on the nomination of the third arbitrator.

¹⁶⁷ Article 7 c) of the UAA.

¹⁶⁸ Mayatta Mbaye, *supra*, at 18.

¹⁶⁹ This is possible pursuant to article 5 of the UAA provides that arbitrators are appointed, challenged and replaced according to the parties' agreement. Parties are therefore free to choose an appointing authority to monitor this procedure. This appointing authority can be an arbitration institution or a national judge.

¹⁷⁰ Article 7 of the UAA.

¹⁷¹ This rule is provided in article 7 of the UAA. After disclosing such circumstances the appointed may be accepted by the arbitrator only if parties agree unanimously to the appointment.

¹⁷² This is due to the language of article 7 para 2 of the UAA which provides that such circumstances must

circumstance in his person which may cause a challenge by the parties,” this provision must be given a wide interpretation to include circumstances that the parties themselves can consider as affecting the arbitrator's impartiality.¹⁷³

The UNCITRAL Model Law provides for a stricter language regarding this matter. The Model Law provides that the arbitrator “shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”¹⁷⁴ This provision gives less freedom to the arbitrator and obligates him/her to consider circumstances that both he and any other person may consider as affecting his/her impartiality.

The UNCITRAL Model Law goes beyond the UAA provision and provides that the arbitrator has the obligation to reveal such circumstances throughout the arbitration proceedings.¹⁷⁵

5.2 Challenge

Under the UAA, parties are allowed to challenge an arbitrator's independence or impartiality only for facts which are revealed or known after the arbitrator's appointment. This provision means that parties' agreement to appoint an arbitrator despite such information already revealed cannot be used to challenge an arbitrator after appointment. However, this waiver for revealed information only covers what was already revealed by the arbitrator. Any new information or any information which was not known or revealed yet may be used as grounds for challenge.¹⁷⁶

be disclosed *IF* the arbitrator *thinks* that it may affect the mission to arbitrate the dispute.

¹⁷³ See Emilia Onyema, *supra*, at 6. Parties can, for example, consider nationality as a circumstance affecting the impartiality of an arbitrator, whereas the arbitrator does not.

¹⁷⁴ Article 12 (1) of the UNCITRAL Model Law.

¹⁷⁵ *Id.* A similar provision is found in article 4.1 of the CCJA rules.

¹⁷⁶ This rule derives from articles 7 para 5 which provides that an arbitrator can only be challenged for circumstances affecting his/her independence and impartiality known after the appointment. Article 7

A party which asserts a reason to challenge an arbitrator shall disclose it as soon as he/she becomes aware of it.¹⁷⁷ The UNCITRAL Model Law provides for fifteen days after the party becomes aware of such information.¹⁷⁸

Parties are free to choose the procedure to be followed for the challenge of the arbitrators. Otherwise, the competent national judge decides the challenge.¹⁷⁹ The UNCITRAL Model Law has another solution and has provided that the arbitral tribunal, and not the competent national judge, is to decide on the challenge, unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge. This procedure is followed if parties have not provided for a challenge procedure.¹⁸⁰ In this scenario, a party will request a competent national judge to decide on the challenge only when the first challenge is not successful.¹⁸¹

5.3 Replacement

Although the UAA does not stipulate a specific provision on the replacement of arbitrators, the procedure of replacement is decided by the parties; if parties did not agree upon this procedure, it is governed by the provisions of article 5 of the UAA and article 8 para 3.¹⁸²

para 2 also provides that an arbitrator can still be appointed after revealing such circumstances only if parties agree unanimously to the appointment. Agreeing to his appointment prevents parties from challenging the arbitrator later on for the same circumstances. This idea is also discussed in Emilia Onyema, *supra*, at 6.

¹⁷⁷ Article 7 para 4 of the UAA.

¹⁷⁸ Article 13 (2) of the UNCITRAL Model Law.

¹⁷⁹ *Id.*, para 3. The UNCITRAL Model Law has similar provisions in its article 13.

¹⁸⁰ Article 13 (2) of the UNCITRAL Model Law.

¹⁸¹ *Id.*, (3).

¹⁸² Article 5 of the UAA provides that arbitrators are nominated, challenged and replaced according to parties' agreement. If parties did not provide for such a procedure, article 5 provides for the intervention of the competent national judge. Article 8 provides that replacement should follow the same procedure for the appointment of the third arbitrator when parties have not provided for it.

6. Instituting the arbitration

No provision in the UAA provides for the exact moment when the arbitration process begins. Article 10 para 2 provides that the arbitration process is deemed to have started as soon as one of the parties submits the dispute to the arbitral tribunal according to the arbitration agreement; and where the arbitrators have not yet been appointed, when one of the parties launches the appointment process. A provision in the UAA determining the exact moment when the arbitration process begins could be useful.¹⁸³

The UNCITRAL Model Law provides that “unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”¹⁸⁴

7. Arbitration proceedings

7.1 Procedural law

Under the UAA, parties are free to choose the procedural rules to be applied to their dispute. They may choose the rules of an arbitral institution or any other procedural law to govern their dispute.¹⁸⁵ If they choose an arbitral institution, they must follow all the rules of that institution, unless they have excluded some of these rules.¹⁸⁶ If the

¹⁸³ Article 10 para 2 is the only provision that mentions the moment when the arbitration proceedings begin. However, this provision is not clear regarding the exact moment when the arbitration proceedings are considered to have begun. This idea is also discussed in Issa-Sayegh et al., OHADA: Traite et actes uniformes commentes et annotes, at 131.

¹⁸⁴ Article 21 of the UNCITRAL Model Law.

¹⁸⁵ The choice of the rules of procedure to be followed is provided in article 14 of the UAA.

¹⁸⁶ This rule is provided in article 10 of the UAA.

parties have not established the procedure to be followed, the arbitrators may proceed as they deem appropriate.¹⁸⁷

7.2 Applicable law

Parties choose the law which will be applicable to their dispute. Where parties have not provided for the applicable law, arbitrators choose the most appropriate rules, based on international trade usages. Arbitrators may also apply *amiable compositeur* (equity) in deciding the case, if it was agreed upon by the parties.¹⁸⁸

7.3 Equality of treatment and equal opportunity

In conducting the arbitration proceedings, arbitrators must treat the parties equally and give them the same opportunity to present their case.¹⁸⁹ Violation of this principle is grounds for setting aside an award.¹⁹⁰

7.4 Statement of claims and defense

During hearings, parties present their cases and are responsible for the submission of the appropriate arguments to sustain their claims. The arbitrators may request the parties to submit, through the appropriate legal procedure, any elements of fact or any

¹⁸⁷ Article 14 of the UAA. Similar provisions are found in article 19 (2) of the UNCITRAL Model Law.

¹⁸⁸ The choice of applicable law is provided in article 15 of the UAA. Pursuant to this article, the applicable law may be provided either by parties, or by the arbitration institution of their choice, or by the arbitrators. Similar provisions are found in article 28 of the UNCITRAL Model Law. However, in case the parties have not provided for the applicable law, the UNCITRAL Model Law has provided that the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. In addition to providing that the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of international trade applicable to the transaction, the same article provides that the arbitral tribunal may also decide *ex aequo et bono* or *amiable compositeur*, if parties have expressly authorized it to do so.

¹⁸⁹ Equality of treatment and equal opportunity of parties to present their case are provided in article 9 of the UAA. During proceedings, this principle gives to both parties the chance to present their case and challenge the other party's arguments. The same principle is provided in article 18 of the UNCITRAL Model Law.

¹⁹⁰ Violation of the principle of contradictory is listed as one of the ground for setting aside an award in article 26 of the UAA.

evidence which they consider necessary to decide the case. The arbitrators can only accept such evidence when parties had the opportunity to debate.¹⁹¹

7.5 Experts

The UNCITRAL Model Law also provides that, unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may also require a party to give the expert any relevant information and to produce or provide access to any relevant documents, goods or other property for inspection.¹⁹² Such provision is not found in the UAA.

7.6 Expiration of the hearings

The arbitration hearings end at the expiration of the arbitration time-frame, unless prorogation has been agreed upon by the parties or ordered by the competent national judge at the request of one party. Hearings can also end by settlement, withdrawal, agreement or arbitral award.¹⁹³ The arbitral tribunal decides when the case will be deliberated and when parties are no longer allowed to add new information.¹⁹⁴ The deliberations of the arbitral tribunal are secret.¹⁹⁵

¹⁹¹ These provisions are found in article 14 of the UAA. Similar provisions are found in article 23 (1) of the UNCITRAL Model Law.

¹⁹² Article 26 (1) of the UNCITRAL Model Law.

¹⁹³ This derives from the provisions of article 16 of the UAA. Parties can agree to extend the arbitration hearings; prorogation may also be ordered by the competent national judge if requested by a party. Nevertheless, the hearings may end earlier than agreed upon by parties. The end of the arbitration hearings is governed by the procedural law chosen by the parties. This idea is discussed in Issa-Sayegh et al., *OHADA: Traite et actes uniformes commentes et annotes*, at 138. To this list, article 32 of the UNCITRAL Model Law adds that the proceedings can be terminated when the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

¹⁹⁴ Article 17 of the UAA. This article provides, however, that new elements may be received if requested by the arbitral tribunal in writing.

¹⁹⁵ Article 18 of the UAA.

7.7 Duration

The arbitration hearings last six months, from the arbitrators' acceptance of their mission to the arbitral award. The prorogation of the arbitration proceedings can be agreed upon by the parties or ordered by the competent national judge.¹⁹⁶

8. Arbitral award

8.1 Award upon settlement

The UNCITRAL Model Law provides that “if during arbitral proceedings, the parties settle the dispute the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.”¹⁹⁷

8.2 Award

The arbitral tribunal renders its decision, the arbitral award, according to the procedure agreed upon by parties. Otherwise, the decision is made by majority, if the tribunal is composed of a panel of three arbitrators.¹⁹⁸

The following elements must be included in the award:

- The names of the arbitrators who decided the case;
- The date of the arbitral award;
- The seat of arbitration;

¹⁹⁶ Martor et al., *Le droit uniforme africain issue de l'OHADA*, 11

¹⁹⁷ Awards upon settlement are provided in article 30 of the UNCITRAL Model Law.

¹⁹⁸ Article 19 of the UAA provides that the procedure in which the arbitral award is to be rendered is decided by the parties. Otherwise, the arbitrators render their decision by majority, if the arbitral tribunal is composed of three arbitrators. However, the award may be rendered unanimously if the parties have provided for it, as majority is only applicable if parties did not provide for any procedure. This idea is found in Issa-Sayegh et al., *OHADA: Traite et actes uniformes commentes et annotes*, at 139. The same majority procedure is provided in article 29 of the UNCITRAL Model Law, unless otherwise agreed by the parties. The Model Law provides also that the presiding arbitrator, if authorized by the parties or all members of the arbitral tribunal, may decide questions of procedures.

- The names of the parties and their domicile or head office address;
- If applicable, the names of persons who represented or assisted the parties;
- The arguments presented by the parties and the evidence submitted to support those arguments;¹⁹⁹

The arbitral award must be motivated.²⁰⁰ It must also be signed by the arbitrators.²⁰¹

The award releases the arbitrators from their duties. However, even when the award has been rendered, the arbitrators still have power to interpret the award and correct technical or typographical errors or omissions.

The arbitrators can make additional awards when they fail to decide a matter of the dispute. Parties must submit their requests for additional awards within thirty days from the notification of the award. The arbitral tribunal has forty-five days to render its decision. If the arbitral tribunal is not able to meet again, the additional matters of the dispute will be decided by the competent national judge.²⁰²

The arbitrators may grant provisional enforcement of the award. If the losing party has to be compelled to perform, a national judge might be more appropriate.²⁰³

Awards have the *res judicata* effect.²⁰⁴ This effect means that the same dispute cannot be submitted anymore to any national judge or any arbitral tribunal. Awards are also final and binding.²⁰⁵

¹⁹⁹ These elements are listed in article 20 of the UAA. Similar requirements are found in article 31 of the UNCITRAL Model Law.

²⁰⁰ *Id.* This means that the arbitrators must give the reasons of their decision, the elements on which they based their opinion. A similar provision is found in article 31 (2) of the UNCITRAL Model Law.

²⁰¹ Article 21 of the UAA. The arbitral award is signed by the majority of arbitrators. If a minority refuses to sign the award, it must be mentioned in the award; the award will nevertheless have the same effect as if it was signed by the majority. Same as article 31 (4) of the UNCITRAL Model Law.

²⁰² These rules are provided in article 22 of the UAA. Similar rules are provided in article 33 of the UNCITRAL Model Law This article provides for the correction and interpretation of awards and for addition awards.

²⁰³ Provisional measures are provided in article 24 of the UAA.

9. Recourse against the award

9.1 Action for nullity

The first available recourse is the challenge of the award or action for nullity (setting aside). The request is submitted to the competent national judge. The national judge's decision can only be appealed to the CCJA.²⁰⁶

Grounds for the challenge of the award are as follows:

- absence, nullity or expiration of arbitration agreement;
- irregularity of constitution;
- violation of the arbitrators' mission;
- violation of the contradictory principle;
- violation of the international public policy;
- insufficiency or absence of motivation.²⁰⁷

The UNCITRAL Model Law provides for more grounds for an application for setting aside an arbitral award. Pursuant to article 34 of the UNCITRAL Model Law, an arbitral award may be set aside by a court only if the following conditions are found:

- The party making the application furnishes proof that: a party to the arbitration agreement was under some incapacity; the agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise

²⁰⁴ Res judicata of the arbitral awards is provided in article 23 of the UAA. Res judicata applies to any dispute which has been resolved by the award.

²⁰⁵ Articles 35 (1) of the UNCITRAL Model Law also provides that arbitral awards shall be recognized as binding.

²⁰⁶ Provisions on the action for nullity are found in article 25 para 2 and para 3.

²⁰⁷ Grounds for the challenge of an arbitral award are listed in article 26 of the UAA.

- unable to present his/her case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- The court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or the award is in conflict with the public policy of this State.²⁰⁸

Revision and tierce-opposition are other available recourses. They are submitted to the arbitral tribunal which rendered the award. The arbitral tribunal is therefore required to decide the same case for a second time.²⁰⁹ These options are not provided in the UNCITRAL Model Law.

9.2 Revision

Revision can be requested in case there is a new fact which may influence the award and which was unknown by the arbitral tribunal and by the party requesting revision at the moment the award was made.

9.3 Tierce-opposition

Tierce-opposition may be submitted by any physical or legal person which was not convoked to the arbitral proceedings but whose rights are affected by the award.²¹⁰

10. Recognition and enforcement

Recognition and enforcement are important because arbitrators do not have judges' imperium to enforce the award and arbitral awards do not automatically have a

²⁰⁸ These provisions are found in article 34 (2) of the UNCITRAL Model Law.

²⁰⁹ Richard Boivin et al., *supra*, at 6.

²¹⁰ Revision and tierce-opposition are provided in article 25 para 4 and 5 of the UAA.

certification showing that it is enforceable.²¹¹ Although arbitration is consensual and depends on parties' choice, States still have control and monopoly for recognition and enforcement of decisions.²¹²

Under the UAA rules, an award becomes enforceable through a recognition procedure. A request for the recognition of the arbitral award is submitted to the competent national judge.²¹³ Unlike the CCJA which has a two-tier procedure for the recognition of arbitral awards, here the parties only have to submit their request for recognition (*exequatur*) to the competent national judge. As soon as the award has been recognized it becomes enforceable.²¹⁴

To request recognition, parties must prove the existence of the award, by submitting:

- The original award; and
- The arbitration agreement; or the authenticated copy of both documents.²¹⁵

The decision granting recognition is final and binding. The decision denying recognition can be appealed to the CCJA.²¹⁶

²¹¹ Lucien Mathieu N'Gouin Claih, L'exécution des sentences arbitrales et les voies de recours, at 5 (www.ohada.com, Ohadata D-07-11) (hereinafter Lucien Mathieu N'Gouin Claih, L'exécution des sentences arbitrales)

²¹² Id., at 6.

²¹³ This two-tier procedure for the enforcement of arbitral awards is found in article 30 of the UAA.

²¹⁴ This derives from the language of article 30 of the UAA which provides that an award becomes enforceable as soon as recognition has been granted by the competent national judge. The CCJA rules, however, have provided for the recognition of the arbitral awards by the CCJA (article 30 CCJA rules) and the enforcement by a competent national judge (article 31 CCJA rules). The CCJA procedure is nonetheless advantageous, as the recognition granted by the CCJA is valid in all OHADA Member States, which is not the case for the UAA recognition by a national judge.

²¹⁵ Article 31 of the UAA provides that the party requesting recognition of an arbitral award must submit those documents to the judge. If the documents are not in French, the party must also provide for a translated copy done by a certified translator recognized by the national court. Similar provisions are found in article 35 (2) of the UNCITRAL Model Law and in article IV of the New York Convention.

²¹⁶ Article 32 UAA. The same provision provides that although the *exequatur* decision is final and binding, the submission of an action for nullity of an arbitral award can be construed as an appeal against the *exequatur* decision.

The rejection of a request to set an award aside has the same effect as the recognition of an arbitral award and the confirmation of an *exequatur* decision.²¹⁷

If the award was rendered based on rules other the UAA rules, recognition of that kind of award will be governed by the applicable international convention on recognition of arbitral awards. Otherwise, the UAA provisions on recognition will be applied.²¹⁸

Recognition of the award can be denied if the award is manifestly contrary to international public policy.²¹⁹

The decision granting recognition cannot be appealed. However, the action for nullity can be construed as an appeal against a decision granting recognition.²²⁰ Action

²¹⁷ Article 33 of the UAA.

²¹⁸ The UAA, as the municipal law of all OHADA Member States, has provided for situations where parties may choose other arbitration rules to be applied to their dispute. Article 34 of the UAA rules has provided that that appropriate international conventions should be applied to the recognition and enforcement of arbitral awards rendered under other arbitration rules. The UAA rules on recognition and enforcement of arbitral awards will apply in case there is no applicable international convention. The same idea is developed by Richard Boivin and Pierre Pic in L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 7 (Revue Generale de Droit de l'Universite d'Ottawa, 2002) (hereinafter Richard Boivin et al., L'arbitrage international en Afrique). The authors discuss the application of other international conventions to arbitral awards rendered under other arbitration rules. The authors also point out a problem that might arise as article 34 of the UAA rules only provides for the recognition but no provision on the enforcement of such awards. Enforcement is however also covered as the provisions of article 34 have to be read with the provisions of article 30 which provides that an award is enforceable as soon as it has been granted recognition by the competent national judge. Enforcement of such awards is therefore implied in the provisions of article 34.

²¹⁹ Article 31 para 4. By providing for international public policy, it should be assumed that it is the case of an international arbitration and not a local arbitration, as the public policy of the concerned State would be applicable for local arbitration. In the case of international arbitration, two meanings can be given to international public policy: for matters governed by the UAA, a regional public policy can be applied as the UAA is common to all Member States. In case the matter is not governed by the UAA, the international public policy to be applied is the one provided by the private international law rules of the State in which recognition is sought. This idea is developed in Joseph Issa-Sayegh et al., OHADA: Traite et actes uniformes commentes et annotes, at 145. For the denial of the recognition of an arbitral award, the UNCITRAL Model Law has provided for the same requirements as the ones for an application to set aside an arbitral award. The only requirement that is added is when “the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.” The same requirements are found in article V of the New York Convention.

²²⁰ This idea is developed in article 32 para 2 of the UAA.

for nullity can be reviewed as soon as recognition has been granted and within one month of the recognition decision.²²¹

In case a State is both an OHADA Member State and a Contracting party to the New York Convention, a question might arise on which of the two documents will be applicable. Article VII of the New York Convention give a solution by providing that the provisions of the Convention “shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into the Contracting State.” This provision establishes that the UAA will be applicable, as it might be considered as a multilateral agreement between the OHADA Member States and it provides for the recognition and enforcement of arbitral awards.²²² The New York Convention will nevertheless be applicable everytime parties choose other arbitration rules than the UAA to be applicable to their dispute.

²²¹ Article 27 of the UAA.

²²² This idea derives from the provisions of article VII para 1 of the New York Convention.

CONCLUSION

In the past, foreign investors deplored the absence of a reliable arbitration forum in Sub-Saharan Africa and the lack of international arbitration institutions capable of monitoring complex arbitration proceedings with competence, confidentiality and impartiality. The Organization for Harmonization of Business law in Africa has filled the gap by creating a new international commercial arbitration reference in Africa which provides both ad hoc and institutional arbitration. The Common Court of Justice and Arbitration has been assigned the role of a regional arbitration arbitration, which provides for modern and original arbitration rules within the OHADA area. The OHADA Uniform Act on Arbitration was adopted as the municipal law replacing OHADA Member States' national laws on arbitration and provides with arbitration rules that meet the standard of international commercial arbitration in the world. Both CCJA rules and Uniform Act on Arbitration compose the new arbitration framework created by OHADA in Africa, which provides with rules and procedures for foreign and local investors who are interested in investing in the OHADA area.

This thesis provided with a double comparative analysis which goal was to find out if OHADA's arbitration reference is similar to other major references in the world and identify any advantages provided by either references, which could help improve OHADA's arbitration in particular or international commercial arbitration in general. In the first chapter, I comparatively analyzed the OHADA Common Court of Justice and Arbitration with the Inter-American Commercial Arbitration Commission because of their similarities – both being institutions monitoring commercial arbitration within an

international organization – and also because of the IACAC's particularities which can benefit the CCJA. In the second chapter I did a comparative analysis between the OHADA Uniform Act on Arbitration and the UNCITRAL Model Law and the New York Convention. The UNCITRAL Model Law and the New York Convention, which are foundational instruments of international arbitration, were used to show that the OHADA Uniform Act on Arbitration meets the standards of international arbitration and therefore secures a reliable ad hoc arbitration for foreign investors used to other major commercial arbitration references.

This conclusion will focus on the findings of the two chapters and highlight any advantages that could benefit OHADA and help improve international commercial arbitration in Africa. This exercise will also emphasize specific advantages provided by OHADA which can be used to improve other commercial arbitration forums.

THE OHADA Common Court of Justice and Arbitration and the Inter-American Commercial Arbitration Commission

A. International vs regional arbitration institution

The scope of application of the CCJA rules is limited to matters connected to the OHADA area and therefore prevents parties located in different parts of the world with no connection with OHADA to benefit from the CCJA rules. This is understandable, as the primary goal of the drafters of the OHADA legislation was to provide investors and business entities with modern and competitive norms within the area. However, after improving its rules and gaining the necessary experience, it will be beneficial for the CCJA to open its arbitration forum to parties from all parts of the world and provide its expertise as an international commercial arbitration institution.

B. The different set of arbitration rules provided by the AAA

The AAA provides with an original distinction between its rules of arbitration. Different sets of rules are provided based on the amount of money claimed by parties. This interesting distinction allows the AAA to provide faster procedures for small amounts and more adjusted procedures for bigger amounts. This distinction could be applied to the CCJA rules as it would accelerate the procedures and provide for shorter time frames for smaller cases.

C. Dual role of the CCJA

Under the CCJA rules the Court has a dual role: it operates as an administrative institution monitoring the arbitration process and also acts as a Court in some instances. As a jurisdiction it may *inter alia* review the award drafts before the arbitral tribunal renders its decision and verify that the awards comply with the CCJA rules; after the awards are rendered, the Court is also competent for recognition and enforcement of the same awards in OHADA Member States. By conferring this role to the CCJA, OHADA has therefore created a regional recognition of arbitral awards in the area, as parties are not required to seek recognition and enforcement of the awards in each Member State. This is an original procedure instituted by OHADA, which eases the enforcement of foreign arbitral awards.

D. Immunity and privileges of CCJA arbitrators

The immunity and privileges of CCJA arbitrators, although it seems inappropriate as it may cause arbitrators to make mistakes on purpose knowing that they are protected by their immunity, may be a very important provision. It may be appropriate given the

particular situation of a region where arbitrators may face local and national pressures and need these immunity and privileges to ensure their independence and impartiality.

E. Number of arbitrators

Whereas the CCJA rules have provided that either one or three arbitrators only can be appointed, the IACAC and the AAA have not limited the number of arbitrators and have left it to parties to decide the number of arbitrators. The latter institution have provided for either one or three arbitrators only in case parties did not provide for the number of arbitrators to be appointed. The IACAC and AAA approaches may be useful in cases with multiple claimants and defendants which require more than three arbitrators, which is the limit for the CCJA.

II. The OHADA Uniform Act on Arbitration, the UNCITRAL Model Law and the New York Convention

A. One arbitration law for all OHADA Member States

Having the same Uniform Act on Arbitration as arbitration law in all OHADA Member States allows OHADA these sixteen states to have common and modern arbitration legislation and share best practices in arbitration. Having a common legislation also ease business in the region for investors operating in more than one country in the area, as the rules are the same in the sixteen Member States. As the scope of application of the Uniform is determined by the seat of arbitration being in a Member States, this approach is also useful for parties from one Member States which prefer to establish their seat of arbitration in a different Member State for logistical and financial reasons. The UAA gives them the opportunity to apply rules they are already familiar with in a different Member State.

B. Number of arbitrators

The UAA provides for the same rules for the appointment of arbitrators as the CCJA rules and limits the number of arbitrators that can be appointed to either one or three. The UNCITRAL Model Law, however, leaves the choice to parties. As already stated, the UNCITRAL Model Law provision may be more advantageous than the limitation found in the UAA in case of multi-party situations.

C. Institution of the arbitration

No provision provides for the exact and clear moment when the arbitration process begins, whereas the UNCITRAL Model Law has provided that the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. A provision in the UAA determining the exact moment when the arbitration process begins could be useful.

D. Experts

The UNCITRAL Model Law has provided that unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. Such provision is not found in the UAA, but it may be useful to have such provision added.

E. Revision and tierce-opposition

Revision and tierce-opposition are recourses against arbitral awards provided by the UAA. They are submitted to the arbitral tribunal that rendered the award and are a request to the arbitral tribunal to decide the same case for a second time, whether it is to correct an error in the award or to address the issues of a party which did not participate in the proceedings. These options are not provided in the UNCITRAL Model Law.

F. International public policy

The UAA provides that the recognition of an award can be denied if the award is manifestly contrary to international public policy. International public policy may be defined here as a regional public policy, the UAA being the common legislation on arbitration for all Member States, and can therefore be construed as general principles of morality accepted by OHADA Member States.

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APPENDIX

LATIN AMERICA STATES PARTIES TO THE PANAMA CONVENTION

SIGNATORY COUNTRIES	SIGNATURE	RATIFICATION	DEPOSIT	PARTIES TO THE NY CONVENTION (*)
Argentina	03/15/91	11/03/94	01/05/95	03/14/1989
Bolivia	08/02/83	10/08/98	04/29/99	04/28/1995
Brazil	01/30/75	08/31/95	11/27/95	06/07/2002
Chile	01/30/75	04/08/76	05/17/76	09/04/1975
Colombia	01/30/75	11/18/86	12/29/86	09/25/1979
Costa Rica	01/30/75	01/02/78	01/20/78	10/26/1987
Dominican Republic	04/18/77	/ /	/ /	04/11/2002
Ecuador	01/30/75	08/06/91	10/23/91	01/03/1962
El Salvador	01/30/75	06/27/80	08/11/80	02/26/1998
Guatemala	01/30/75	07/07/86	08/20/86	03/21/1984
Honduras	01/30/75	01/08/76	03/22/79	10/03/2000
Mexico	10/27/77	02/15/78	03/27/78	04/14/1971
Nicaragua	01/30/75	/ /	/ /	09/24/2003
Panama	01/30/75	11/11/75	12/17/75	10/10/1984
Paraguay	08/26/75	12/02/76	12/15/76	10/08/1997
Peru	04/21/88	05/02/89	05/22/89	07/07/1988
United States	06/09/78	11/10/86	09/27/90	09/30/1970
Uruguay	01/30/75	03/29/77	04/25/77	03/30/1983
Venezuela	01/30/75	03/22/85	05/16/85	02/08/1995

(*): Date of ratification

OHADA MEMBER STATES

SIGNATORY COUNTRIES	RATIFICATION	DEPOSIT	PARTIES TO THE NY CONVENTION (*)
Bénin	038/1995	03/10/1995	05/16/1974
Burkina Faso	03/06/1995	04/16/1995	03/23/1987
Bissau-Guinea	01/15/1994	12/26/1995	//
Cameroon	10/20/1995	10/04/1996	02/19/1988
Central African Republic	01/13/1995	01/13/1995	10/15/1962
Chad	04/13/1996	05/03/1996	//
Comoros	02/20/1995	04/10/1995	//
Congo	05/28/1997	05/18/1999	//
Côte d'Ivoire	09/29/1995	12/13/1995	02/01/1991
Equatorial-Guinea	04/16/1999	06/15/1999	//
Gabon	02/02/1998	02/04/1998	12/15/2006
Guinea	05/05/2000	09/22/2000	01/23/1991
Mali	02/07/1995	03/23/1995	09/08/1994
Niger	06/05/1995	07/18/1995	10/14/1964
Sénégal	06/14/1994	06/14/1994	10/17/1994
Togo	10/27/1995	11/20/1995	//

(*): Date of ratification