CHAZAI+PARTNERS

An Independent Law Firm based in Cameroon

FOCUS ON THE OHADA REFORM OF ARBITRATION LAW

—

March 5, 2018

FOCUS ON THE OHADA REFORM
OF ARBITRATION LAW

March 5, 2018

The Council of Ministers of the Organization for the Harmonization of Business law in Africa (the "**OHADA**") adopted, on 23-24 November 2017, two new texts of importance for the practice of arbitration in the OHADA zone, namely, the Uniform Arbitration Act (the "**UAA**") and the Arbitration Rules of the Common Court of Justice and Arbitration (the "**RCCJA**"). The Council has also adopted a new Uniform Act on Mediation, to which we will devote special focus in an article to be published soon on our website.

We will present below the main reforms of the UAA and the RCCJA, which will be enforceable on 15 March 2018.

1. THE UAA REFORM

It can be assessed in six points: scope of application (1.1), composition of the arbitral tribunal (1.2), arbitral proceedings (1.3), arbitral award (1.4), appeals against the arbitral award (1.5), and recognition and enforcement of awards arbitration (1.6).

1.1. Scope of application

The purpose of the reform is to encourage and secure the investments made in the OHADA zone. To this end, two main developments were introduced by the OHADA legislator.

1.1.1.
The introduction of new basis for OHADA arbitration

Henceforth, arbitration in the OHADA zone can be based on an investment instrument[1]. This instrument may be a Code of investment in force in a State party or a bilateral or multilateral investment treaty.

Previously, OHADA arbitration was established on the basis of an arbitration clause or an arbitration agreement; being specified that the new UAA defines these two concepts without however specifying the mandatory terms, thus devoting the free writing of the arbitration agreement[2].

In addition, the UAA reinforces the requirement of formalism for any arbitration agreement and also allows the use of the "convention by reference" mechanism[3].

[1] Section 3 of the UAA.

[2] Section 3-1 of the UAA.

[3] This mechanism consist in indicating in a contract, a reference to another document containing the arbitration agreement.

1.1.2.
The parties to the arbitration

Any public legal entity may now resort to OHADA arbitration[4] *i.e.* the state and all its public dismemberments.

This change is a small revolution because, previously, in international matters, the UAA limited this possibility only to local authorities and public institutions.

In addition, the UAA is intended to apply to any arbitration where the seat of the tribunal is in one of the States parties[5].

Through this measure, we hope that the States parties will be in alignment with the international standards in this area. Indeed, the United Nations Convention on transparency in arbitration based on treaties between investors and States[6] has only been signed by four[7] of the OHADA State parties and none has so far ratified it.

1.2. Composition of the arbitral tribunal

The new UAA establishes strict deadlines for the composition without forgetting to reaffirm the principles of independence and impartiality that must be respected by any arbitrator.

1.2.1.
Appointment of Arbitrators

From now on, in the event of disagreement by the parties on the appointment of the arbitrator, the competent judge in the State Party shall have a period of 15 days to appoint an arbitrator, unless a shorter period is established. This decision is free of appeal.

It should be noted that with the exception of the time limit for appointment, this system of recourse to the judge in case of difficulty in the appointment of arbitrators is not new and was already in place in the former UAA.

In our view, the OHADA legislator should have taken advantage of this reform to clarify the concept of "competent judge in the State party" so as to facilitate the updating of laws and codes of judicial organization in the various States parties.

1.2.2.
The arbitrator's obligation of independence and impartiality

The arbitrator is now required to inform the parties of any circumstances that would create a legitimate doubt in their mind throughout the arbitral proceedings. The party that intends to avail itself of its right to challenge the arbitrator shall have a 30-day delay to do so following that information. In the event of a challenge, the judge called upon to decide, must do so within a maximum period of 30 days. If the request for challenge is rejected, the most diligent party may refer to the Common Court of Justice and Arbitration (the "**CCJA**")[8].

[4] Section 2 of the UAA.

[5] The UAA applies both to civil and commercial disputes and primarily to *ad hoc* arbitrations *i.e.* outside any arbitration center.

[6] The Convention on Transparency was adopted on December 10, 2014 and entered into force on October 18, 2017 (the "**Transparency Convention**"). It applies to any arbitration between an investor and a State on the basis of an investment treaty.

[7] Benin, Cameroon, Congo, Gabon.

[8] Section 8 of the AUA.

Through this mechanism, the OHADA legislator adopts an objective approach[9] to the obligation of revelation that weighs on the arbitrator. In the absence of a definition of what may be a "circumstance likely to create in its mind a legitimate doubt", the arbitrator must disclose "all circumstances" without distinction. It is up to the parties to assess facts disclosed by the arbitrator and to exercise, where appropriate, their right to challenge.

1.3. Arbitral Proceedings

1.3.1.
Respect for the pre-arbitration phase: the multi-third clause

The UAA requires the application of the provisions of a so-called multi-third clause which would be contained in an arbitration agreement[10]. This clause provides for the respect of an amicable resolution step between the parties prior to the arbitration. It should be noted that the arbitral tribunal of its own cannot rule on this matter, one of the parties having to apply for it.

In our view, this measure is not of great interest because the judge cannot raises it of his own and there is no sanction on the parties in the event of non-compliance with this clause.

The parties may therefore stand for a multi-third clause in the convention and choose not to respect it and move directly to arbitration without the risk of any procedural defect.

1.3.2.
The jurisdiction of the court

Under the aegis of the old text, the arbitral tribunal ruled on its own jurisdiction and, if applicable, on any matters relating to the execution or validity of the arbitration agreement according to the competence-competence principle.

Henceforth, the competent judge in a State party may decide on the jurisdiction of the arbitral tribunal prior to the referral of that court or if no request for arbitration has been made, in the event that the arbitration agreement is clearly inapplicable. Previously, that agreement also had to be clearly null.

The competent judge in the State party is required to rule within 15 days[11] and his decision may only be appealed to the CCJA in cassation.

1.3.3.
The obligations of the parties

The parties are held in the conduct of the arbitral proceedings, of an obligation of speed and loyalty; they must also refrain from any dilatory tactics.

From now on, if one of the parties fails to appear at the hearing or produce documents without a legitimate ground, the arbitral tribunal may continue the proceedings and decide on the basis of the evidence at its disposal[12].

[9] It opposes the subjective approach which assumes that the arbitrator must be able to assess the desirability of a particular circumstance without the failure of revelation being able to cause its revocation.

[10] Section 8-1 of the UAA.

[11] Section 13 of the UAA.

[12] Section 14 of the UAA.

While the need for this measure should be welcomed, it is unfortunate that the UAA remains silent on the question of the exchange of scripture between the parties, and that the notion of legitimate motive has not been clarified by the OHADA legislator who missed the opportunity to reinforce the contradictory nature of the arbitral award.

1.4. Arbitral award

1.4.1.
The final award marks the end of the arbitral proceedings

Previously, the principle was that of early termination of the arbitral proceedings[13]. The final award was the exception in the same way as the acquiescence to the request for discontinuance or transaction.

Henceforth, the arbitral proceedings are concluded either by a final sentence, namely the complete sentence which extinguishes the entire dispute, or by a closing order; given that the concept of a closing order did not exist in the former UAA[14].

Through this mechanism, the OHADA legislator states that the arbitrator is no longer bound by the time limits contained in the arbitration agreement. The arbitrator may therefore choose not to give a definitive sentence before the expiration of the time limit and request that the time limit be extended. This is a genuine reservation to one of the major advantages of the arbitral proceedings, the speed of the procedure that can now in theory last indefinitely.

1.5. Appeals against the arbitral award

1.5.1.
The possibility of waiving any recourse

Henceforth, the parties may waive the action for annulment provided that this is not contrary to international public policy. In our view, this measure is not necessary. Indeed, the notion of international public order does not refer to the same reality in the 17 Member States of the OHADA[15].

Since the former UAA, it is common ground that the arbitral award is subject to three remedies: (i) the action for annulment, which consists in requesting, in certain cases, exhaustively enumerated, the annulment of the entire arbitral proceedings, (ii) the appeal in review of the award as a result of the occurrence of a new fact, and (iii) the third party opposition that is open to any third party who would be adversely affected by the arbitral award except for the third party who would have been called to intervene in the proceedings and who refused to do so.

---

[13] Former section 16 of the UAA had the arbitral proceedings terminated by the expiration of the arbitration period.

[14] The court shall make a closing order when:
- → the applicant withdraws his application, unless the defendant opposes it and the arbitral tribunal acknowledges that it has a legitimate interest in the final settlement of the dispute;
- → the parties agree to terminate the proceeding;
- → the arbitral tribunal finds that the continuation of the proceedings is, for any other reason, superfluous or impossible;
- → the initial or extended arbitration period has expired;
- → there is acquiescence in the application, discontinuance or transaction.

[15] For example, we can cite the above-mentioned Transparency Convention, but also the New York Convention, to which 12 of the OHADA States parties have acceded, without being ratified by any of them yet.

In case of third-party opposition, only the judge of a State party is validly competent to know of this remedy. Concerning the appeal in review of the award, the judge is competent only if the arbitral tribunal can no longer be convened.

1.6. Recognition and enforcement of awards Arbitration

1.6.1.
The deadlines for *exequatur*

Even if the UAA does not specify in what time limit the application requesting the *exequatur* must be introduced[16], it specifies, however, and, it is a novelty, that the State court seized shall decide within a time limit which cannot exceed 15 days from its seisin. If, at the expiration of that period, the court has not issued its order, the enforcement shall be deemed to have been granted[17].

An action is foreseen before the CCJA against decisions on refusal of *exequatur*. The decision granting *exequatur* is free of appeal.

Thus, the OHADA legislator chose not to follow the recommendation of a certain doctrine[18] which called for the establishment of a uniform *exequatur* procedure in the sense that it would have facilitated the circulation of arbitral awards.

2. THE REFORM OF THE RCCJA

The CCJA is for States parties, at the same time a Supreme Court and an arbitration Center. This double attribution makes it a single institution in the current state of international law.

The reform incorporated innovations in the arbitration procedure (2.1.), but also in the recognition and enforcement of CCJA arbitral awards (2.2.).

2.1. The arbitration procedure of the CCJA

Like the International Court of Arbitration of the International Chamber of Commerce (the "**ICC**"), the CCJA, does not itself judge the disputes. It sets up courts and ensures that the procedure is conducted in accordance with its rules.

2.1.1.
The appointment of arbitrators

Henceforth, the Secretary General (the "**SG**") of the CCJA is responsible for transmitting the lists of arbitrators to the parties. Within a time limit it fixes, the parties are required to return their lists to him with the indication of the arbitrators they have chosen. If, for any reason whatsoever, this procedure cannot be observed, the CCJA may appoint the arbitrators under its sole discretion.

[16] The OHADA legislator prefers to leave this question to national courts. In Cameroon, for example, the law of December 26, 2006 on the judicial organization establishes no time limit for the application for enforcement.

[17] Section 31 of the UAA.

[18] See also MEYER. P., *Commentary on the Uniform Act on the Law of Arbitration of 11 June 1999*, OHADA Treaties and uniform acts commented and annotated, Juriscope, 2016, pp. 184.

Under the auspices of the former text, even if it were established that the court could appoint the entire arbitral tribunal, there was no reference to a discretionary power, and instead it had to require the advice of practitioners with jurisdiction recognized in international arbitration.

This measure has the merit of putting the SG of the CCJA at the heart of the process of designating arbitrators. This is justified, in our view, by the duty of dispatch which must characterize the arbitral proceedings at the time of appointment of arbitrators. By way of comparison, the arbitration rules of the Mediation and Arbitration Centre of Paris make the parties responsible for designating the arbitrators within the allotted time limit. In the event of a failure, the designation is made by the *ad hoc* arbitration commission.

2.1.2.
Impartiality of arbitrators and CCJA

Previously, the nationality of a member of the tribunal or the CCJA was not a hindrance in itself to his participation in an arbitral proceeding. The court was just required to take into account the nationality of the parties to appoint the arbitrators.

Henceforth, the members of the Court having the nationality of a State directly involved in an arbitral proceedings must depart from the formation of the court in the case in question and the president of the court is obliged to proceed to their replacement.

This measure raises a number of questions: what about the arbitrator himself who would have the nationality of a State directly involved in an arbitral proceeding? What also happens if the implication of the State in the arbitral proceedings is carried out in an indirect way? The new RCCJA did not answer these two questions making the reform incomplete. Indeed, if the OHADA legislator's wish was to prevent conflicts of interest, the nationality of the arbitrator should have constituted a cause of challenge *per se*.

By way of comparison, the ICC rules of arbitration establish that the sole arbitrator or the president of the arbitral tribunal must be of a different nationality from that of the parties.

2.1.3.
Intervention and the plurality of parties

The RCCJA now admits the intervention procedure, which can be either forced or voluntary.

As a reminder, the forced intervention is the wish of one of the parties to involve a third party bound by the arbitration agreement, but who is foreign to the arbitration procedure. This intervention must be done before the constitution of the arbitral tribunal unless the parties agree otherwise. Voluntary intervention, even if it has not been defined by the RCCJA, implies that a third party seeks to intervene in the arbitral proceedings because it may prejudice its rights. No voluntary intervention is admissible before the constitution of the arbitral tribunal.

It should be noted that the RCCJA has adopted the same mechanism as the one includes in the ICC arbitration regulation since its revision in March 2017. However, the RCCJA innovates by introducing the voluntary intervention.

Moreover, the new RCCJA admits the plurality of parties and the joining of contracts. This is the hypothesis in which applications arising from several contracts involving or in connection with several parties may be joined in the context of a single arbitration[19]. This measure is also present in the ICC rules of arbitration.

[19] Section 8-2 of the RCCJA

2.2. Recognition of CCJA arbitral awards

2.2.1.
The imposition of strict deadlines

The former UAA accepted the possibility of a preliminary examination of the draft award by the CCJA, and the application for annulment of the sentence without clarification on the procedural deadlines. The new UAA establishes deadlines that raise some questions.

Indeed from now on the court now has a maximum period of one month after receiving the draft award for consideration. The action for annulment[20] must be brought before the court within two months of the notice of the sentence being inadmissible. From its referral, the court has six months to make its decision.

It should be noted that these new provisions of the RCCJA are in contradiction with the court's so far constant jurisprudence on the question of time limits[21]. In fact, so far, the court admitted that the timetable of proceedings was of provisional nature and that failure to comply with it could not constitute a cause of annulment of the sentence. By instituting strict deadlines, we can ask whether the OHADA legislator does not come to end this case law, especially since the RCCJA does not specify the fate of the sentence if the court fails to comply with the time limits of one month and six months above mentioned.

Although the revision of the UAA and the RCCJA has simplified a large number of measures, it has also left a sense of unfinishedness with regard to certain provisions, including:

- → the concept of "competent judge in the state-party";
- → the concept of "international public order" which is not equally appreciated in the 17 Member States;
- → the relativity of time limits;
- → the responsibilities of arbitrators.

It will be appropriate to be attentive to the forthcoming jurisprudence which may allow a clear interpretation of the OHADA legislator's will on the above-mentioned provisions.

Authors:

Aurélie Chazai, Lawyer admitted to the Cameroon and Paris Bars, managing partner of Chazai & Partners law firm.

Freddy Lionel Mooh Edinguele, trainee lawyer at Chazai & Partners law firm.

[20] Section 29.2 of the RCCJA states that this is an appeal against an award made in the course of arbitration by an arbitral tribunal and is admissible only in the following cases:
- → if the court has ruled without an arbitration agreement or on a void or expired agreement;
- → whether the tribunal has been irregularly composed or the single arbitrator improperly appointed;
- → if the court has ruled without complying with the mission entrusted to it;
- → if the adversarial principle has not been met;
- → if the arbitral award is contrary to international public policy.

[21] See also Judgment CCJA No. 102/2015 of 15 October 2015.

CHAZAI+PARTNERS

An Independent Law Firm based in Cameroon

1149, Bld. de la République – SUNU Assurance Building (next SOMATEL Hotel), Bali
PO Box 4937 Douala, Cameroon

T: +237 233 432 617 | M: +237 6 66 97 14 88 | M: +33 6 13 15 85 26

contact@chazai-partners.com

www.**chazai-partners**.com