Arbitrating in West and Central Africa: An Introduction to OHADA

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Over the past decade, Africa has emerged as a leading center of economic growth. From mining and manufacturing, to banking and telecoms, nearly every industry is witnessing rapid expansion in Africa, driven by both African enterprises and businesses from around the world. Naturally, an increase in international commerce has resulted in an attendant increase in international arbitration, renewing the interest of arbitrators and practitioners in the region.

Parties seeking to arbitrate in Africa have the choice among several well-known regional African arbitration centers, including the Cairo Arbitration Center (CIRICA) in the north, the Arbitration Foundation of Southern Africa (AFSA) in the south, and more recently the London Court of International Arbitration in Mauritius (LCIA-MIAC) in the east. In Western and Central Africa, which is largely francophone, the leading arbitral institution is the Common Court of Justice and Arbitration (CCJA) based in Abidjan, Côte d'Ivoire, which was established by the Organization for the Harmonization of Business Law in Africa ("OHADA," with its French acronym). (For a comprehensive and detailed analysis of the organization, *see* Benoit Le Bars, *Droit des sociétés et de l'arbitrage international: Pratique en droit de l'Ohada*, Joly Éditions 2011 (in French, forthcoming in English this year).)

OHADA's origins lie in a series of meetings among francophone African leaders in Ouagadougou, Burkina Faso, and Paris, France, in 1991. These meetings resulted in a proposal from Senegalese legal scholar Kéba M'Baye for what would ultimately become OHADA: a supranational organization aimed at harmonizing commercial law among its members and increasing both foreign and domestic investment in the West and Central African economic zone. Following M'Baye's proposal, seven African Ministers of Finance, along with M'Baye and French jurists Martin Kirsch of the *Cour de cassation* and Michel Gentot of the *Conseil d'état*, drafted the treaty establishing OHADA. The final treaty was signed by seven francophone African countries on October 17, 1993, in Port Louis, Mauritius, and came into force upon its ratification in 1995. (See Alhousseini Mouloul, *Understanding OHADA*, 2d ed. June 2009.)

The OHADA community, membership in which is available to all African nations, now comprises seventeen countries, not all of which are francophone (languages include French, Spanish, English and Portuguese). Still, as one would expect from its intellectual origins, OHADA owes much to French civil law.

French law is by no means the only influence on francophone African law, and much legal diversity exists among these nations. This diversity, many have argued, has resulted in a level of legal

unpredictability—particularly in the context of business law—that, coupled with the negative foreign perception of certain of Sub-Saharan Africa's domestic court systems, has inhibited foreign investment and economic growth in the area. (See Jonathan Bashi Rudahindwa, *From Port Louis to Panama and Washington DC*, 2012.) Accordingly, OHADA aims not only to harmonize commercial law but also to increase confidence in international arbitration as a means for the resolution of commercial disputes across the OHADA zone.

To this end, OHADA Member States have adopted a variety of Uniform Acts pertaining to various aspects of business law, including securities regulation, bankruptcy procedures, and company law. OHADA has also created a unique, hybrid judicial body: the CCJA, a supranational court of seven judges that administers not only appeals of a commercial nature from national courts of OHADA Member States, but also dispute resolution proceedings under OHADA's own rules of arbitration.

Arbitration under the CCJA is available for contractual disputes where any contractual party is domiciled or habitually resides in an OHADA Member State, or where the contract is to be executed at least partially in the OHADA zone. Naturally, then, parties seeking to arbitrate under OHADA need not be registered in OHADA Member States nor even in Africa, as is demonstrated by the diversity of nationalities present in CCJA case law. Arbitral awards rendered under OHADA also have the effect of *res judicata* among all Member States, giving them the same legal force as national court judgments across the OHADA zone.

CCJA arbitration may be engaged either by contractual clause or by subsequent agreement—even if a concurrent legal action in another court is taking place. The CCJA, which is comprised of seven OHADA nationals elected to renewable seven-year terms, does not arbitrate disputes itself. It does, however, have the power to confirm and, if necessary, appoint arbitrators, as well as to supervise the proceedings and ensure impartiality. The CCJA also reviews all awards before they are rendered, though the Court may only amend the form of an award and not its substance, as is the case under the ICC Rules.

In fact, parties and practitioners familiar with the ICC procedure will recognize many points of similarity. Both the CCJA and ICC provide, for example, for a similar system of provisional and conservatory measures, as well as terms of reference to be agreed upon by the parties at the outset of the proceedings.

In addition to institutional arbitration under the CCJA, however, OHADA also provides for *ad hoc* arbitration under the Uniform Act on Arbitration (UAA), as adopted in 1999. Consistent with other *ad hoc* practices, the *ad hoc* provisions of the UAA, which apply to any arbitration whose seat is in an OHADA Member State, are generally non-imperative and the parties are free to contract around them. Still, certain fundamental rules must be respected, including requirements of formalism in the arbitration agreement, requirements as to the number and impartiality of the arbitrators, and requirements for the drafting of awards.

Thus, parties seeking to arbitrate under OHADA have the choice between the predictability and structure of institutional arbitration, on the one hand, and the flexibility and freedom of *ad hoc* arbitration, on the other—all under the aegis of the supranational OHADA system. This presents parties with an important opportunity for arbitration in West and Central Africa (and soon, as seems likely, other African regions as well), which is certain to play an ever-increasing role in global dispute resolution as foreign investment in Africa continues to accelerate. Despite OHADA's relative youth, a marked increase in foreign investment has already been witnessed in West and Central Africa, particularly from Chinese investors. (*See* Zhu, *OHADA: As a Base for Further Chinese Investment in Africa*, and Dickerson, *Harmonizing Business Law in Africa: OHADA Calls the Tune*.) Considering the region's substantial capacity for additional growth and investor confidence engendered by the CCJA,

this trend is likely to continue.

This post, which is the first of a series, will be followed by additional posts that will develop, in further detail, OHADA procedure concerning institutional and *ad hoc* arbitrations, the role of OHADA in the execution of awards in member States, as well as the dual role of the CCJA in this *sui generis* system.

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