The New OHADA Arbitration and Mediation Framework : A Glass Half Full?

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Founded 20 years ago, the Organization for the Harmonization of Business Law in Africa (OHADA) is a group of 17 African States who have joined efforts to enact unified legislation in all areas of business law in order to promote investments by fostering legal certainty across member States. The OHADA Treaty acknowledged the importance of arbitration as a modern business dispute resolution mechanism, and in 1999 a first Uniform Arbitration Act was enacted and the Common Court of Justice and Arbitration (CCJA) was created in Abidjan. Almost 18 years later, on 23-24 November 2017, the OHADA Council of Ministers adopted a Uniform Mediation Act (UMA) and a new Uniform Arbitration Act (UAA), along with new Arbitration Rules for the CCJA. These three texts were published in the OHADA Official Journal on 15 December 2017 and will become applicable on 15 March 2018 in all 17 OHADA States.

Together, the three documents offer a new framework for alternative dispute resolutions in OHADA countries. The avowed purpose is to further attract investors and foster confidence in OHADA-seated arbitrations and mediations (most notably by considerably streamlining court application schedules) to capitalize on the economic growth of the continent. The reform also tackles some criticism leveled at OHADA arbitration in the not-so-distant past.

The UMA fills a gap, as there was virtually no framework for mediation, *ad hoc* or institutional, in place prior to its enactment. For that reason alone, it is a most welcomed addition to the OHADA tool-box of uniform acts.

On the other hand, while the new UAA and revised CCJA rules do address certain issues that have cast a shadow on OHADA arbitration in recent years and reflect current trends in international arbitration (including promoting CCJA investment arbitration), one fails to be completely reassured that all is now well with OHADA arbitration.

This post will briefly examine the most welcomed features of the new ADR framework, before turning to some unanswered questions and, alas, new causes for concern.

First and foremost, the Uniform Mediation Act, which by virtue of the OHADA Treaty, becomes directly applicable in the 17 State Parties, will apply to all mediations commenced after 15 March 2018, irrespective of the date of signature of the applicable mediation clause. It applies to *ad hoc* and institutional mediations alike, be they initiated by the parties, a national court, an arbitral tribunal, or an administrative entity.

The UMA enshrines the hallmarks of modern mediation: confidentiality, timely court validation of settlements, and independence of the mediator from the parties. In addition, a mediator cannot act as expert or arbitrator in the same dispute absent an agreement of the parties to the contrary.

There is no real consensus between arbitrators on the question of whether provisions for mediation in multi-tiered dispute resolution clauses in particular, is one of jurisdiction or admissibility. Too often respondents use pre-litigation mandatory mediation requirements as delay tactics, even where it is obvious that the parties will not reach an amicable settlement through mediation, and the issue would be better treated as one of admissibility. The UMA and UAA seem to provide an adequate level of flexibility. The UMA starts with the bright-line rule that pre-litigation requirements must be fulfilled, and that a court or tribunal will have to give them effect. It does, however, also aptly reserve the possibility for courts and tribunals to issue interim and provisional measures, even as they direct the parties to comply with pre-litigation steps, therefore striking a welcomed balance. The UAA adds for its part, that if mandatory steps have been initiated (but not necessarily fully complied with), a tribunal may acknowledge their failure.

Turning specifically to arbitration, the new CCJA Rules do indeed address concerns raised in the (in)famous *Getma v. Guinea* case discussed elsewhere on this blog (here, here and here). The 2014 EUR 34 million *Getma* award was set aside by the CCJA in 2016 on the ground that the fee arrangement agreed upon between the tribunal and the parties was in breach of CCJA rules. The arbitrators then took the unusual step of writing an open letter questioning the CCJA's impartiality before seeing a D.C. court uphold the decision to set-aside the award. The D.C court found that there had been no evidence of bias at the CCJA and that the fee arrangement was in breach of CCJA Rules. In the wake of this unfortunate episode, the CCJA Rules now explicitly provide that any fixing of fees without the CCJA's approval is null and void, but that this is not a ground to set-aside an award.

Other welcomed features include a clarification of the scope of the competence-competence principle: national courts must now decline jurisdiction unless the arbitration agreement is not only manifestly invalid—as already provided for in the 1999 UAA—but also—going forward—manifestly inapplicable. The UAA also includes an innovative provision allowing the parties to waive their right to seek to set-aside an award. On both counts, the reform embraces the liberal philosophy which prevailed at the time of enactment of the OHADA Treaty and first UAA. Finally, the UAA now expressly enshrines the arbitral tribunal's power to issue interim or conservatory orders.

Perhaps the most disheartening feature of the new UAA, however, is that the language of Article 1 related to the territorial scope remains unchanged: it is limited to arbitrations with their seat in a OHADA State Party. The reality is that the vast majority of arbitrations with respect to disputes in OHADA countries, particularly those involving foreign investors, will be seated in third-party countries.

The drafters of the new UAA could at least have seized this opportunity to clarify the language of Article 34, which unfortunately also remains unchanged and still provides that "*arbitral awards rendered on the basis of rules other than those of the present Uniform Act shall be recognized in the States Parties in accordance with any international conventions that may be applicable and, failing any such conventions, in accordance with the provisions of this Uniform Act*." While this language has been read to include awards rendered in third-party countries, the clash with the territorial scope of Article 1 remains. Short of a rewriting of Article 1, a straight-forward, broad, reference in Article 34 to awards rendered in countries other than the OHADA country in which recognition or enforcement is sought would have made things considerably easier for arbitration practitioners.

Article 34 of the UAA could have benefitted from further clarification on two grounds. First, it provides a complex and unsatisfactory system where recognition of foreign awards will be granted, depending on the particulars of the case, on the basis of either applicable multilateral agreements (such as the

ICSID and New York Convention), bilateral agreements, or the UAA itself. Second, it addresses recognition only, and is silent on enforcement. An argument that it applies *mutatis mutandis* to enforcement, while highly plausible, is of course unsatisfactory. The fact that the New York Convention criteria for enforcement are more stringent than those of the UAA further leads to the paradoxical result that seeking enforcement of an award in a OHADA State party may be easier if that State is not a signatory to the New York Convention (5 out of 17 OHADA States are still not signatories of the New York Convention).

Finally, a number of timeframes have been aggressively streamlined. For instance, a national court now has fifteen days to rule on a request for exequatur. If the court does not issue a ruling within those fifteen days, exequatur is deemed to have been granted. The UAA expressly provides that a decision declining exequatur is subject to direct appeal to the CCJA, and that a decision granting exequatur cannot be appealed. What the UAA fails to provide for, unfortunately, is the situation in which a court fails to rule within fifteen days on an award for which, for whatever reason, a party has a legitimate argument that it should not be granted exequatur. This is all the more surprising as the UMA for its part expressly provides for direct appeal to the CCJA in cases where a party would contest a mediation settlement agreement on public policy grounds but automatic approval or exequatur is deemed granted because the court having jurisdiction failed to issue a decision within fifteen days. This discrepancy between mediation and arbitration is certainly troubling. While institutional arbitration offers parties the safeguard of award scrutiny by a reviewing body, this is not foolproof, and the occasional ICC award for instance, does warrant setting aside. The risk is even greater with *ad hoc* arbitration, where no such safeguard exists. This is a strong argument in favor of institutional arbitration if recognition or enforcement is expected to be sought in an OHADA State Party.

Overall, however, the reform provides a solid framework for ADR in OHADA countries. Experience will hopefully alleviate the limited concerns raised in this post.

The views expressed in this post are the authors' personal views, and do not reflect the opinions of Quinn Emanuel or Sciences Po Paris.