Kluwer Arbitration Blog

New OHADA Arbitration Text Enters Into Force

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The revised OHADA Uniform Act on Arbitration (the Arbitration Act) and revised Rules on Arbitration of the Joint Court of Justice and Arbitration (the CCJA) (the Rules), as well as the new Uniform Act on Mediation, entered into force on 15 March 2018. The fruit of nearly two years of consultations among the 17 Member States of the Organisation for the Harmonization of Corporate Law in Africa (OHADA), these new acts will apply to all proceedings initiated as of such effective date. These acts had all been approved on 23 November 2017 by the OHADA Council of Ministers.

The revised Arbitration Act and the Rules, which replace previous versions dated 1999 and 1996 respectively, are in line with the rules and regulations of key arbitration-friendly jurisdictions and leading arbitral institutions. The most significant changes include: (i) provisions for arbitration arising under investment treaties or investment laws; (ii) the binding effect of multi-tiered dispute resolution clauses requiring the parties to undertake negotiation, mediation and/or conciliation prior to commencing arbitration; (iii) various measures to improve the efficiency of the proceedings, including permitting the parties to agree to the waiver of setting aside proceedings and very tight time limits to rule on requests for recognition and enforcement of arbitral awards and on requests for setting aside of awards; and (iv) measures to increase transparency in arbitration, notably by allowing the publication of excerpts of arbitral awards.

While all these new acts are without doubt a positive step towards offering investors a predictable and efficient arbitration framework within the OHADA region, it remains to be seen whether, in practice, the local state courts and the CCJA will succeed in implementing the new rules.

Modernisation of the OHADA arbitration mechanisms

Arbitration of investment disputes. *Both the Arbitration Act and the Rules recognise the importance of offering users a reliable framework to resolve their investment disputes in the region. They now expressly allow foreign investors to start an arbitration based on any instrument related to the protection of investments, including bilateral investment treaties and local investment laws.(Art. 3 of the Arbitration Act and Art. 2.1, Art. 5.1(b) of the Rules) To ensure consistency in the investors' access to*

arbitration, the Arbitration Act further confirms the ability of public entities to consent to arbitration.(Art. 2 of the Arbitration Act)

Powers of the arbitral tribunal reflecting modern arbitration practices

Pre-arbitration dispute resolution. In an effort to conform with the present-day practice in relation to multi-tiered dispute resolution clauses, the Arbitration Act and the Rules give the arbitrators the power to suspend the proceedings and instruct the parties to fulfil any preliminary steps (such as mediation, negotiation or conciliation) called for in the dispute resolution clause of their agreement, at the request of a party.(Art. 8-1 of the Arbitration Act and Art. 21-1 of the Rules)

Complex arbitrations. In response to the increasing use of arbitration to resolve disputes arising out of multiparty and multi-contract business transactions, the Rules now address the issue of arbitration with multiple parties and parallel arbitration proceedings. Articles 8.1 and 8.2, which are entirely new, offer the possibility, subject to the various conditions set forth therein, of joinder of additional parties.(Art. 8.1 and 8.2) Other new provisions of the Rules allow the arbitral tribunal to consolidate several related proceedings initiated under separate arbitration agreements (Art. 8.4) and/or involving the same parties.(Art. 8.3)

More efficiency and increased transparency

Parties' duty of loyalty and efficiency. The revised Arbitration Act expressly provides that arbitration proceedings should be conducted diligently and that the parties should not use dilatory tactics.(Art. 14 of the Arbitration Act) Under the Rules, a party which fails to immediately raise an irregularity is precluded from raising it at a later stage of the proceedings.(Art. 16 of the Rules)

Duty and standard of impartiality and independence. Although arbitrators acting under the previous Arbitration Act were already subject to the duty of impartiality and independence, the revised Arbitration Act clearly states their duty—throughout the pendency of the proceedings—to inform the parties (Art. 7 of the Arbitration Act) and the Secretary General of the CCJA (Art. 4.1 of the Rules) of any circumstances likely to give rise to any doubts affecting their impartiality and independence. Article 8 of the Arbitration Act, which details the procedure for challenging an arbitrator in OHADA arbitration, now imposes a time limit for bringing a challenge, namely a period *"not exceeding 30 days from the discovery of the fact which gave rise to the challenge".* (Art. 8 of the Arbitration Act) The lack of any such time limit in the previous version of the Arbitration Act allowed parties to raise challenges at times that might strategically disrupt the smooth running of the arbitration. As an additional safeguard against undue delay in respect of challenges to arbitrators, the revised Arbitration Act provides that if the competent state court before which the challenge has been brought does not issue a decision on the challenge within 30 days, the challenge may be brought before the CCJA. (Art. 8 of the Arbitration Act) The parties thus have in principle the possibility of receiving a decision on the challenge that would not be unduly delayed by the case load of the relevant state court, provided that the CCJA is able to render such a decision in a reasonable period of time.

Constitution of the arbitral tribunal. The Arbitration Act regulates the constitution of the arbitral tribunal, which is composed of a sole arbitrator absent an agreement between the parties. (Art. 5 of the Arbitration Act) Whereas the previous version of the Rules gave little guidance as to how the CCJA selected arbitrators in the absence of party agreement on a method of appointment, the revised Rules adopt the list procedure for such arbitrator appointment. Under such procedure, the CCJA will send the parties the same list of at least three names, the parties will then have the opportunity to strike unsuitable candidates and rank the remaining names in their order of preference, and the CCJA will then appoint the tribunal based on the final list.(Art. 3.3 of the Rules) The revised Rules also add the availability of the potential arbitrator to the criteria to be taken into account when making the appointment.

Prompt recognition of arbitral awards. The revised Arbitration Act imposes strict time-limits on state courts to decide on recognition and enforcement of arbitral awards. Competent state courts must rule on a request for recognition *"within a period that may not exceed fifteen days from its referral"*.(Art. 31 of the Arbitration Act) This period is very short in comparison to the several months that have often been necessary to render such decisions in many OHADA jurisdictions. If the state court fails to issue its decision (granting or rejecting recognition) within the 15-day time limit, the revised Arbitration Act specifies that the award will be deemed to be recognised by the state court, which is a rather radical remedy.(Art. 31 of the Arbitration Act) In terms of enforcement, under the revised Rules, the CCJA must rule on a request for enforcement within a 15-day time limit.(Art. 30.2 of the Rules) Finally, the CCJA has only 3 days to decide on any provisional or protective measures in the context of enforcement proceedings.(Art. 30.2 of the Rules) The foregoing features will undoubtedly be welcomed by the international business community, which is eager to obtain effective court decisions on recognition and enforcement quickly within the OHADA region.

Waiver of setting aside proceedings. Following the 2011 Decree which reformed French arbitration law and reforms in several other jurisdictions (Switzerland, Belgium, Sweden, etc.), the new Arbitration Act provides that parties may agree in their arbitration clause or otherwise to waive their right to challenge the arbitral award before the competent state courts (Art. 25 of the Arbitration Act) and the CCJA (Art. 29.2 of the Rules), as long as such a waiver is not contrary to international public policy.

Challenge of arbitral awards before the CCJA in case of delay in state proceedings. Under the revised Arbitration Act, competent state courts must rule on annulment requests within three months of the date of receipt of the application. This new time limit seems extremely ambitious. By way of comparison, setting aside proceedings before the Paris Court of Appeal take on average between 12-18 months. If the state court does not decide the annulment request within the three-month time limit, the challenge to the award may be brought before the CCJA, which, in turn, is supposed to render its decision within six months thereafter.(Art. 27 of the Arbitration Act) Another new feature is that when the CCJA steps in to hear an application to set aside an award in replacement of a state court, the procedure will be an accelerated version of the regular procedure of the CCJA.(Art. 27 of the Arbitration Act) Nevertheless, a six-month time limit will most likely be a challenge for the CCJA,

which has tended in the past to take one or two years to render its decisions. Moreover, since there is no sanction for the CCJA's failure to meet the six-month deadline, it is highly likely that the ambitious targets set in the Arbitration Act will not be met in practice.

As a preliminary conclusion, the revised Arbitration Act and Rules are in line with the modern rules and regulations of key arbitration-friendly jurisdictions and leading arbitral institutions providing a flexible and efficient dispute resolution mechanism. The revision is without doubt a positive step towards offering investors a predictable and efficient arbitration framework within the OHADA region. It nevertheless remains to be seen how, in practice, the local state courts and the CCJA will interpret the new rules and succeed in implementing them.

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