

# Kluwer Arbitration Blog

## New Arbitration Rules For The Economic And Monetary Community of Central Africa (CEMAC)

Jimmy Kodo · Friday, May 6th, 2022

The Economic and Monetary Community of Central Africa, also known as the [Central African Economic and Monetary Community \(CEMAC\)](#),<sup>1)</sup> has recently enacted a *Supplementary Act N° 01/21-CEMAC-CJ-CCE-15 establishing the Statute of the Arbitration Center of the Community Court of Justice* (Supplementary Act No 01) and a *Supplementary Act N° 02/21-CEMAC-CJ-CCE-15 on the Arbitration Rules of the Court of Justice of the CEMAC* (CEMAC Arbitration Rules). The Supplementary Act No 01 became enforceable upon its signing by the President of the Conference of Heads of States of the CEMAC on October 5, 2021. This post provides an overview of and commentary on the Supplementary Act No 01, the CEMAC Arbitration and related issues/developments.

### Structure of the Newly Created Arbitration Center and Highlights of the Supplementary Act No 01

The institutions of the CEMAC include a Community Court of Justice (Court of Justice). Like the Common Court of Justice and Arbitration under the [OHADA Treaty](#) (which encompasses seventeen African countries including the [six member States of the CEMAC](#)) the Court of Justice has been entrusted with three main functions: judicial, advisory and administration of arbitration proceedings. The Arbitration Center which is established by Supplementary Act No 01 forms part of the Court of Justice and by virtue of Article 35 §1 of the [Convention governing the Court of Justice](#), arbitration cases can be referred to the Center by any of the [CEMAC Member States](#), and [Institutions and Bodies](#) of the CEMAC, pursuant to an arbitration agreement.

The Center is responsible for organizing and administering arbitration proceedings as provided under Article 1 of the *Supplementary Act No 01*. Article 13 of the Supplementary Act No 01 further provides that the bylaw of the Arbitration Center is expected to set its functions. However, the bylaw is yet to be enacted by the Conference of Heads of States which, under Article 36 of [Convention governing the Court of Justice](#), is competent and no information is publicly available on the date of its enactment. The Center's jurisdiction is derived from Article 5 of *Supplementary Act N°01* which states that '*[t]he Center is competent to hear disputes arising from an agreement stipulating a clause conferring on it the right to rule in the case regardless of the domicile or usual place of residence of the parties concerned*'.

There are three main bodies that make up the Center:

- the Case Management Committee;
- the Secretariat General; and
- the Arbitral Awards Review Committee (Appellate Body).

Each is discussed in more detail in the following sections.

### 1. The Case Management Committee

The Case Management Committee has a broad mandate spanning from appointing authority to supporting judges via scrutiny of arbitral awards, among others. As an appointing authority, it appoints and confirms arbitrators, assesses their performance, and contributes to the renewal of the roster of arbitrators. It ensures that arbitral proceedings run smoothly and that the rules on procedural incidents and arbitrator misconduct are in compliance with the ethics of the Center. Additional tasks of the Case Management Committee include suggesting amendments to the CEMAC Arbitration Rules and contributing, along with the Court of Justice, to the research, training, and promotion of the Arbitration Center. These functions are similar to the courts of arbitration in some arbitraiton centers. However, unlike the general practice within most arbitration centers, where each arbitral tribunal has the power to draft their terms of reference in consultation with parties to the proceedings, it is noteworthy that the Case Management Committee, and not the arbitral panel, is entrusted with the task of drafting the terms of reference of arbitral tribunals per Article 6 of Supplementary Act No 01. Given the importance of the terms of reference in any arbitration proceedings, an arbitral tribunal acting under the CEMAC Arbitration Rules should pay close attention to the phase during which the terms of reference are drafted, since they do not have the upper hand.

### 2. The Secretariat General

The Secretariat General assumes the tasks usually reserved for the secretary general of arbitration centers such as the one of the CCJA or the ICC. Additionally, it proposes amendments on the arbitrators' schedule of fees to the Case Management Committee. The Secretariat General is solely authorized by Article 7 of the Supplementary Act No 01 to receive and transfer all communications during arbitral proceedings. Such practice can be potentially risky as there may be instances where the Secretariat fails to forward all communications simultaneously or fails to do so within the required time. This may lead to a violation of due process and a detrimental risk to the arbitration.

### 3. The Arbitral Awards Review Committee

The Arbitral Awards Review Committee functions as an appellate body. It is chaired by the President of the Court of Justice assisted with two Justices of the Court. It handles *exequatur* requests and hears challenges to arbitral awards rendered under the CEMAC Arbitration Rules.

It is pertinent to point out the provisions dealing with appointment and sanctions of arbitrators under the Supplementary Act No 01, the reason for which will be seen shortly. Article 9 §1 of the Supplementary Act No 01 suggests that only citizens of Member States can be appointed as arbitrator under the CEMAC Arbitration Rules, however Section 9 §2 allows the appointment of arbitrators outside the list, after they are confirmed by the Case Management Committee. In addition to this, under Article 9 §3(2), arbitrators can be removed by a  $\frac{3}{4}$  majority ruling of the Court of Justice. This provision seems to be in conflict with Article 6 §1 of the Supplementary Act

No 01 which authorizes the Case Management Committee to rule on any violation of the ethical code of arbitrators. It is unclear the type of sanctions the Case Management Committee can issue while handling disciplinary matters involving an arbitrator, since as mentioned above, only the Court of Justice has the power to remove an arbitrator. The Court of Justice may provide more clarity on this in due time when a related issue arises.

### **Highlights of the CEMAC Arbitration Rules**

The Rules entered into force upon their signature by the President of the Conference of Heads of State of the CEMAC on October 5, 2021. This section highlights some noteworthy aspects.

**Interim measures:** Under Article 7 §1 and 7 §2 of the CEMAC Arbitration Rules, the Arbitration Center can order provisional measures where it deems necessary. Such measures may be ordered in the form of an interim arbitral award or provisional arbitral award for which enforcement can be sought.

**Representation of parties:** Contrary to the rules applicable in several African countries which do not require any licensed attorney appearing on behalf of a party in judicial or quasi-judicial proceedings to display a special power of attorney, anyone appearing on behalf of a party to arbitral proceedings under the CEMAC Arbitration Rules must be given, by their client, a duly signed special power of attorney (“*Mandat special*”), which must specify whether representation, assistance or both are contemplated (Article 9 of the Supplementary Act No 02).

**Appointment and confirmation of arbitrators:** It is noteworthy that under Article 10 of the Rules, any arbitrator appointed by a party must be approved by the other party. The wording of the rule seems to suggest that, contrary to the CCJA or ICC Rules, each party appointed arbitrator must be approved by the other party before confirmation by the Center. Under the CCJA and ICC Rules, a party appointed arbitrator does not have to be approved by the opposing party, who may only challenge the party-appointed arbitrator by raising a reasoned objection to their confirmation. There is a difference between allowing a party to object to the appointment of an arbitrator by the opposing party, as is the case under the CCJA and ICC Rules on one hand, and requiring that a party-appointed arbitrator must be approved by the opposing party, which seems to result in joint appointment of all arbitrators by parties, under the the CEMAC Arbitration Rules.

**Case management conference:** The case management conference is convened by the Case Management Committee (Article 18 of the CEMAC Arbitration Rules), which is also different from the pattern in the majority of other arbitration rules. For instance, under Article 15 of the Arbitration Rules of the OHADA Common Court of Justice and Arbitration, the case management conference is to be convened by the arbitral tribunal. So is the case under Article 24 of the ICC Arbitration Rules currently in force.

**Post hearing submissions:** Under Article 24 of the CEMAC Arbitration Rules, after the closure of debates, and before the issuance of the award, any party can take the initiative of a post-hearing submission (“*Note en cours de délibéré*”) and send it to the tribunal after having submitted a copy to the opposing party. This practice is contrary to the practice under the majority of arbitration rules, under which a post hearing submission must be authorized, unless requested by the tribunal itself. See for example, Article 27 §4 of the ICC Arbitration Rules 2021 and Article 19 §1 of the

Arbitration Rules of the OHADA Common Court of Justice and Arbitration (2017). This majority rule ensures avoidance of dilatory tactics by parties that may be acting in bad faith. It also limits the risk of proceedings being dragged over the time allowed.

**Drafting of awards:** Under Article 27 of the CEMAC Arbitration Rules, an arbitral award must be drafted in full after it has been read to the parties. It remains unclear how the scrutiny will be made if the award is not already drafted at that stage.

**Dissenting opinions:** Where an arbitrator dissents and refuses to sign an arbitral award, the reason of refusal must be indicated in the award (Article 27, § 4 of the CEMAC Arbitration Rules).

**Publication of awards:** The publication of arbitral awards is allowed, subject to prior and written consent of the parties (Article 11, § 2 of the Supplementary Act No 01).

**Liquidation of costs:** Under Article 34 of the CEMAC Arbitration Rules, costs of an arbitration proceedings are liquidated by the Case Management Committee, not by the arbitral tribunal; however, it is still the tribunal that allocates cost among the parties.

## Concluding Remarks

The new arbitration rules of the CEMAC have been enacted to comply with the revised [Treaty](#) establishing the CEMAC. Since the new arbitration center of the CEMAC has been created inside the Court of Justice, its jurisdiction is limited to the matters governed by the CEMAC Treaty and its subsequent legal instruments (pursuant to Article 22 and 35 of the [Convention governing the Court of Justice](#)), there is no risk of conflict between the OHADA Arbitration Rules which are enforceable in all the [six member States of the CEMAC](#). The innovations reflected in the newly enacted CEMAC Arbitration Rules bring CEMAC's procedures and practices in line with the latest global best practices.

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## References

- <sup>1</sup> CEMAC is the French acronym for “*Communauté Economique et Monétaire de l’Afrique Centrale*”

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