OHADA Arbitration - A Critical Analysis
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The Organisation for the Harmonization of Business Law in Africa (Organisation pour l’Harmonisation en Afrique du Droit des Affaires – OHADA) has existed for more than 20 years now, and the instruments for OHADA arbitration were promulgated more than 15 years ago. OHADA arbitration has been a very successful initiative, promoting the rule of law in the OHADA Member States. Today, as the system has attained certain maturity, it is a good opportunity to see whether and how it could be improved.

OHADA came into being with the ratification of the OHADA Treaty at Port-Louis, Mauritius, on 17 October 1993. It presently has 17 member states, most of which are francophone and predominantly follow the civil law tradition. OHADA is a result of the common goal of its Member States to foster legal and judicial security and boost the confidence of foreign investors, in order to facilitate and stimulate trade. It was considered that the legal diversity existing among the OHADA nations had resulted in unpredictability, which, coupled with the negative perception that foreign investors had of certain Sub-Saharan African domestic court systems, had inhibited foreign investment and economic growth in the area. Accordingly, OHADA was established to harmonize commercial law and to generalise the use of arbitration as a means for the resolution of commercial disputes across the OHADA zone.

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Indeed, before the late nineties it was unadvisable to choose a seat of arbitration in an OHADA Member State, as most Member States had no arbitration laws, and those that did, did not have modern legislation on the subject.6

OHADA Member States adopted a number of Uniform Acts pertaining to various aspects of business law, including the Uniform Act on Arbitration (UAA) adopted in 1999.7 The UAA came either to fill a gap for the states that did not have a legal text on arbitration, or to replace the existing local national laws for the states that had out-dated arbitration laws.8 OHADA has also created a unique, hybrid body: the Common Court of Justice and Arbitration (CCJA), a supranational court of nine judges of OHADA Member States9 elected by the OHADA legislative body (i.e., the Council of Ministers, comprised of the Ministers of Justice and Finance – the Council of Ministers). The CCJA is based in Abidjan, Ivory Coast.10 It decides upon appeals of a commercial nature from national courts of OHADA Member States – thus guaranteeing the uniform interpretation and application of OHADA law – but also administers arbitration proceedings.11 The CCJA is the leading arbitral institution in francophone Western and Central Africa.

The basis of OHADA arbitration can be found in two texts: the Arbitration Rules of the CCJA, which were adopted by the Council of Ministers on 18 April 1996, and the UAA, in force since 11 June 1999 – in particular Title 4, Articles 21 to 26.

In the context of CCJA arbitration, the CCJA, which also exercises the functions of a regional supreme court as will be seen below, is responsible for granting a “regional exequatur” of CCJA awards, which means that such awards can be directly enforced in each Member State.12

Uncontestably, OHADA has been a very successful initiative, largely meeting its objective. Legal certainty in business law has been fostered in the OHADA Member States. Moreover, arbitration has significantly developed as a means of resolving disputes and rendered justice in business matters speedier and more efficient.

Recently, a revision process of the UAA rules, in combination with the CCJA Arbitration Rules was introduced,13 and a partnership between the CCJA and the ICC in Paris, aiming to

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7 The UAA was enacted on 11 March 1999 and came into force on 11 June 1999.
8 It is also noteworthy that five of the OHADA Member States are still not signatories of the New York Convention: Chad, Congo, Equatorial Guinea, Guinea-Bissau and Togo. The OHADA creation of a uniform law on arbitration is particularly important in relation to these states.
9 OHADA Treaty, Article 31.1.
12 CCJA Arbitration Rules, Article 30.2; Gaston Kenfack Douajni, “La procedure arbitrale applicable devant la CCJA”, Revue de droit uniforme africain, n° 3, at p. 28.
enhance cooperation between the two organisations and to promote, professionalise and standardise the practice of arbitration in OHADA Members States, was launched in June.¹⁴ The present article aims at pointing to certain particularities of the OHADA arbitration system, be it with respect to the UAA, the CCJA rules or the interplay between the two, which may be worth re-assessing in the current reviewing process, or practices of the CCJA as arbitration institution which should be revised in the context of the partnership with the ICC.

**The Interplay Between the UAA and the CCJA Rules**

The UAA and the CCJA arbitration rules were developed and promulgated independently of each other. As a matter of fact, the CCJA Arbitration Rules were adopted in 1996, more than three years before the entry into force of the UAA.

Even though the general idea is that CCJA arbitration is subject to the UAA, the texts of the UAA and the CCJA Arbitration Rules are drafted in a way that allows for CCJA arbitrations to be subject to a *lex arbitri* other than the UAA.

The applicability of the UAA is determined by the seat of the arbitration. Article 1 of the UAA provides that the Act shall apply to an arbitration when the seat is in an OHADA Member state – with no further distinction between domestic and international arbitration. The UAA will thus apply to both *ad hoc* arbitrations seated in an OHADA Member State, and to institutional arbitrations (mainly CCJA arbitrations but also arbitrations subject to other institutions’ rules), in which case the few, mandatory provisions of the UAA¹⁵ will apply irrespective of the content of the applicable rules; otherwise, the UAA will simply play a gap-filling role.

CCJA arbitration requires a link with one or more Member States. Article 21 of the OHADA Treaty states that a contractual dispute may be submitted to CCJA arbitration where (i) one of the parties is domiciled in one of the Member States or has its place of business in one of the Member States, or (ii) the contract has been performed, or should be performed, either in whole or in part, on the territory of one or more of the Member States.

Therefore, if the parties to a contract which is to be performed in the OHADA zone provide for CCJA arbitration and select as seat of the arbitration a place outside the OHADA area, the CCJA Arbitration Rules will be applicable; however, the arbitration will be subject not to the UAA, but to the law of the seat of arbitration. In the *International Business Corporation v SNH* case for example, the seat of the CCJA arbitration was in Paris,¹⁶ and therefore the UAA was not applicable to the arbitration.

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In the International Business Corporation v SNH case, proceedings for the setting aside of the award took place before the CCJA, pursuant to Article 25 of the OHADA Treaty and 1.2 of the CCJA Arbitration Rules. However, the Paris court of appeal could also consider itself competent to decide upon such a setting aside request, on the basis of Paris being the seat of arbitration. This entails a risk of seeing conflicting court decisions regarding the annulment of the award. Therefore, parties who consider providing for CCJA arbitration of their contractual disputes should only provide for a place inside the OHADA area as the seat of arbitration.

The Multiple Functions of the CCJA: A Need for Creation of a Separate Arbitration Institution?

The CCJA’s mission is twofold. On the one hand it is the body granted with the task of supervising the uniform application of the OHADA legislation, by acting as a regional supreme court. The uniform application of OHADA law ensures legal certainty, especially given that the CCJA’s decisions are public. On the other hand, the CCJA operates as an arbitration institution.

As a judicial authority, the CCJA is first of all entrusted with the judicial review of the decisions of national courts of appeal. It operates as a regional supreme court, whose decisions are binding upon OHADA Member States.

The CCJA is also granted with post-arbitration judicial powers with respect to CCJA awards. In accordance with Article 25 of the OHADA Treaty and 1.2 of the CCJA Arbitration Rules, the CCJA is entrusted with deciding upon requests to set aside CCJA arbitration awards, as well as granting the exequatur of CCJA arbitration awards. Indeed, the CCJA is competent to grant, at the end of arbitral proceedings, a “regional exequatur” of arbitral awards, which means that such awards can be directly enforced in each Member State. This “regional exequatur” is granted following a limited review of the award by the CCJA.

The CCJA does not have the same authority for ad hoc arbitration awards issued under the UAA. In that case, the national judge will have the authority to hear annulment requests or

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18 Article 14 of the OHADA Treaty states that the CCJA “is responsible for the uniform interpretation and application of the Treaty, of the regulations promulgated to further the Treaty’s implementation, of the Uniform Acts, and of other actions”.
19 CCJA decisions are published on the OHADA website. Since 2014, Article 42 of the CCJA Rules of Procedure specifically includes a publication requirement: “A collection of rulings of the [CCJA] shall be published by the Registrar-in-Chief under the supervision of the President or a Judge appointed for this purpose”.
20 OHADA Treaty, Articles 14 and 15.
21 CCJA Arbitration Rules, Articles 29.1 to 29.5, and Article 30.6.
22 CCJA Arbitration Rules, Article 30.2; Gaston Kenfack Douajni, “La procedure arbitrale applicable devant la CCJA”, Revue de droit uniforme africain, n° 3, at p. 28.
23 Article 30.6 of the CCJA Arbitration Rules sets out an exhaustive list of the grounds on which the CCJA may refuse exequatur: (i) absence of agreement to arbitrate, or agreement to arbitrate which is null or has expired; (ii) non-conformity of the award with the arbitrator’s mission; (iii) violation of the equality of arms principle (principe de la procédure contradictoire); or (iv) violation of the international public policy.
requests for exequatur. However, the CCJA may hear these disputes at a later stage, as a regional supreme court hearing appeals against national court decisions.

As an arbitration institution, in accordance with Article 21 of the OHADA Treaty, the CCJA appoints or confirms arbitrators, deals with challenges of arbitrators, oversees arbitration proceedings and reviews draft awards. The administrative functions of the CCJA are under the management of the Chief Registrar, who ensures that the relevant notifications to the parties are made. The CCJA’s decisions regarding the supervision of arbitral proceedings cannot be appealed.

Therefore, the nine judges who constitute the CCJA are responsible for (i) administering CCJA arbitrations and operate a formal review of arbitral awards, (ii) hearing requests for annulment of awards that they have reviewed, in arbitrations that they have themselves administered, or (iii) requests for exequatur. At the same time, the Chief Registrar of the CCJA as an arbitration institution also acts as the Chief Court Registrar of the CCJA as judicial authority.

This double function can lead to situations, in which by the time it is presented with a request for annulment or a request for exequatur, the CCJA has already formed a view on the performance of the arbitrators’ mission, on each party’s attitude in the proceedings, etc., which risks creating an unconscious bias in favour of one or the other party, and in favour or against the arbitrators. Separating the two main missions of the CCJA would, in this respect, be an important step towards securing due process in post-award CCJA litigation.

Apart from acting as arbitration institution and judge in post-arbitration litigation, the CCJA may, at least in theory, be asked to judge a dispute on the merits as well. In the event that the CCJA annuls an arbitral award rendered under its auspices, it may, upon the request of both parties, decide on the merits of the case (an alternative option is that the arbitral proceedings be resumed, upon request of one of the parties, as from the last valid act of the arbitral tribunal). This power of the CCJA is broadly criticized, and correctly so, as it leads to the CCJA being the institution administrating the procedure, the judge on the merits and the judge enforcing the decision, all at the same time.

We note however that on the basis of the published decisions of the CCJA, this power appears never to have been used – because in none of the cases where one of the parties asked for the CCJA to judge on the merits did the other party consent, as is required under the CCJA Arbitration Rules.

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24 CCJA Arbitration Rules, Article 2.2.
26 CCJA Arbitration Rules, Article 1.1.
28 CCJA Arbitration Rules, Article 29.5 in fine.
30 Nestlé Sahel v. Société Commerciale d’Importation Azar et Salame, dite Scimas, CCJA Decision on a Request to Set Aside the Award, n° 028/2007, 19 July 2007, Penant, n° 867, at p. 226, Note Bakary Diallo; Société Inter
In order to avoid potential conflict of interest situations, and in the interest of justice, a general re-structuring of the CCJA, to separate the function of arbitration institution from the judicial function would be ideal. In that case, judges who participate in the administration of an arbitral proceeding would not participate in any litigation following the issuance of an arbitral award.

**Immunity of the CCJA and CCJA Arbitrators**

Article 49 of the OHADA Treaty provides that arbitrators appointed or confirmed by the CCJA enjoy diplomatic privileges and immunity.\(^{31}\) Such immunity emanates from the general immunity that the OHADA enjoys as an organization,\(^{32}\) also applies to the CCJA judges and to its administrative staff and may be waived only by the Council of Ministers in exceptional circumstances.\(^{33}\)

The diplomatic immunity in favour of the CCJA as an arbitration institution, its administrative staff and arbitrators is to a certain extent surprising: the CCJA enjoys immunity as part of the general immunity conferred by the OHADA Member States to the OHADA organization. However, such immunity ignores the contractual relationship that is created between an arbitral institution and the parties, or the arbitrator and the parties – which has no equivalent in the function of the CCJA as a judicial authority.

In any event, even if one considers immunity of arbitrators a necessary prerequisite of their independence, the scope of the immunity is subject to criticism; an arbitrator appointed by the CCJA could escape conviction in case of fraud, corruption or wilful misconduct taking place outside the exercise of his or her duties.\(^{34}\)

Moreover, such immunity does not cover arbitrators appointed by the parties in *ad hoc* arbitration in accordance with the UAA,\(^{35}\) which creates an unwelcome inequality of treatment between arbitrators in *ad hoc* arbitration and arbitrators designated in accordance with the CCJA Arbitration Rules.\(^{36}\) This inequality cannot be justified in light of the arbitrators’ mission, as the arbitrators’ mission is the same in both CCJA and *ad hoc* arbitrations under the UAA.
On a more practical note, such diplomatic immunity in favour of arbitrators is almost impossible to put in place, as OHADA cannot grant diplomatic passports or visas – these can only be granted by the country of the arbitrator’s nationality or residence.

**Gaps in the CCJA Arbitration Rules?**

The CCJA rules lack certain clauses that are rather standard in other arbitration rules.

a. The CCJA Rules do not refer to the competence-competence principle, *i.e.* that the tribunal will decide the case even when one party argues that the arbitration agreement is non-existent or invalid.

b. Article 22.1 of the CCJA Rules provides that “unless otherwise agreed by the parties, and only if such agreement is legally permissible, all the awards must be motivated”. Article 20 of the UAA requires that awards be motivated. The question arises whether it would be possible to have non-motivated awards, should the seat of arbitration in a place where there is no mandatory legal requirement for reasoned awards.

c. the CCJA Rules do not refer, as a reason for the annulment of an award, to the irregular composition of the tribunal, or to the lack of reasoning of the award.37

To the extent that the UAA applies as gap-filling mechanism (or, in the case of the possibility to issue a non-motivated award, that it contains mandatory provisions on the issue), there will be no problem in practice. A problem might however arise if the seat of arbitration is in a jurisdiction which does not contain the relevant provisions of the UAA.

**Duration and costs of the arbitration**

Both the CCJA rules and the UAA provide for a speedy conclusion of the proceedings.

The deadlines set out in Article 15 of the CCJA Rules can easily be modified,38 by agreement of the parties, by the tribunal or, with respect to the requirement that an award be issued within three months after the closing of the proceedings, by the CCJA, subject to a request by the tribunal or one of the parties.

With regard to *ad hoc* arbitration, Article 12 of the UAA provides that subject to a different agreement of the parties, proceedings shall not exceed six months from the date the last arbitrator accepted his or her mission. An arbitral award issued after the expiry of that time limit may be subject to annulment.39 That deadline would appear unrealistic, except in the

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37 CCJA Arbitration Rules, Articles 29.1 to 29.5 (1) and Article 30.6. The CCJA can set aside an award or refuse to grant the exequatur if: (i) the arbitral tribunal ruled without arbitration agreement or on the grounds of an arbitration agreement void or that had expired, (ii) the arbitral tribunal ruled without conforming to the mission it was conferred, (iii) the principle of adversary procedure was not respected or (iv) the award is contrary to international public policy.


39 Court of appeal of Cameroon, decision n°52/civ, 6 February 2008, OHADAT-zA J-10-249: in this case, the arbitral tribunal issued an arbitral award after the mandatory six months deadline. The arbitral award was set aside due to the tribunal’s failure, amongst other things to comply with the deadline.
case of particularly simple disputes. The deadline can be extended if both parties agree, or by decision of the competent national judge upon request of one party or the arbitral tribunal. However, it may not be practical to need to revert to the national judge to extend arbitration deadlines. Therefore, parties who negotiate an ad hoc arbitration agreement with the seat of arbitration in an OHADA Member State should consider adding a provision authorizing the arbitrator to grant an extension of the deadline, in the event that one of the parties so requests.

With regards to the costs of arbitration proceedings, the amount of the administrative fees and arbitrators’ fees in CCJA proceedings are calculated by the CCJA depending on the amount of the dispute, in application of the following scales established by the CCJA General Assembly and approved by the OHADA Council of Ministers’ decision of 12 March 1999:

<table>
<thead>
<tr>
<th>Amount of the dispute</th>
<th>Administrative fees</th>
<th>Arbitrators’ fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum</td>
<td>Maximum</td>
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<tr>
<td>0,01% to 0,05%</td>
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</table>

In exceptional circumstances, the CCJA may adjust the administrative fees and the arbitrators’ fees.

A significant effort has been made to keep the arbitration costs low. It is thus estimated that CCJA costs, as well as arbitrators’ fees, represent between half and two thirds of the equivalent costs of ICC arbitration proceedings. For instance, the minimum amount of arbitrators’ fees under the ICC Rules is USD 3,000, whereas the CCJA’s minimum fee is around USD 865. In the same way, for a dispute amounting to about USD 1,000,000 arbitrators’ fees under the ICC Rules will range from about USD 7,000 to USD 36,000, whereas CCJA arbitrators’ fees will range between around USD 5,000 and USD 20,000.

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41 UAA, Article 12.
44 Exchange rate as of June 2016: 1 FCFA = 0,00168022 USD.
45 CCJA Arbitration Rules, Article 11.1. Regarding the arbitrators’ fees, see Decision No. 004/99/CCJA, Article 6.
Such low costs and fees is generally good news for the parties – except to the extent that they could prevent renowned arbitrators from accepting to sit in CCJA arbitrations. This is indeed a very likely risk, especially since the recent – and already notorious – annulment decision in the *Getma* case.47

In that case, the CCJA set aside a CCJA arbitral award condemning Guinea to pay €38 million in damages plus interest, notably on the ground that the arbitrators had breached the CCJA rules and failed to fulfil their mandate by negotiating their fees directly with the parties, at an amount of €450,000, instead of the amount of 40 million CFA francs (approximately €60,000) to which the CCJA had limited their fees.

This case has been heavily criticized for the intransigence of the CCJA concerning the arbitrators’ possibility to enter into agreements with the parties with regard to their fees48 and, mainly, for the extremely heavy sanction of setting aside the award, which caused a significant prejudice to the winning party, rather than the arbitrators.49 The arbitration costs set by the CCJA in the *Getma* case are also shocking: the amount of fees that the CCJA set as payable to the arbitrators, approximately €60,000, was lower than the CCJA’s administrative fees, set at €90,000. This is unjustifiable on the basis of the table above regarding the cost of CCJA arbitration proceedings and represents an absurdly low fee to a tribunal which allegedly spent around a thousand hours working on the case.

Hopefully, the *Getma* arbitration and annulment decision will remain an exception in CCJA’s track record as arbitration institution and annulment judge.

**A Need of Enhanced Transparency Regarding CCJA Arbitrations**

Moving away from legal analysis, it strikes the arbitration user who is not accustomed to the OHADA specificities that contrary to most arbitration institutions, the CCJA does not have a dedicated website. The arbitration rules of the CCJA are easily accessible. However, this is not the case for other information concerning CCJA arbitration, such as:

a. the names of the nine judges who serve on the CCJA;50
b. the name of the registrar of the CCJA;51 and

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47 *Getma International v. République de Guinée*, CCJA Decision on a Request to Set Aside the Award, no 139/2015, 15 October 2015, 19 November 2015.

48 It must be noted, however, that institutional rules often forbid a direct agreement between the arbitrator and the parties on the arbitrator’s fees. See for example ICC Arbitration Rules, Appendix III “Arbitration Costs and Fees”, Article 2(4): “The arbitrator’s fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.”


50 The following individuals currently serve on the CCJA: Mr Abdoulaye Issoufi Toure, Mali (who serves as acting President, the former President, Mr Marcel Sérékoïsse-Samba, having been suspended in July this year); Ms Flora Dalmeida Mele, Congo; Mr Antoine Joachim Oliveira, Gabon; Mr Namuano Francisco Dias Gomes, Guinea Bissau; Mr Victoriano Obiang Abogo, Equatorial Guinea; Mr Mamadou Deme, Senegal; Mr Idrissa Yayé, Niger; Mr Djismana N’Dorningar, Tchad; Mr Marcel Sereköisse Samba, Central African Republic.

51 The current registrar of the CCJA is Mr Narcisse Aka.
c. the administrative costs of a CCJA arbitration or the arbitrators’ fees.

Moreover, the CCJA does not publish any statistics regarding the CCJA arbitration cases, arbitrators, or awards. Further, the CCJA decisions on requests for annulment of arbitral awards are not systematically published.

This lack of transparency risks making the non-informed user hostile to CCJA. The development of OHADA arbitration generally and CCJA arbitration more specifically can only go hand in hand with enhanced transparency.

Hopefully, the forthcoming cooperation between the CCJA and the ICC, agreed and announced on 25 June 2016, \(^{52}\) will help bringing more transparency into the system, and eliminate or at least minimize a number of its idiosyncrasies.

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