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OHADA UPDATES ITS LAW ON ARBITRATION AND IMPLEMENTS A NEW ACT ON MEDIATION

| 07/12/17 | Marie Danis

Favouring alternative dispute resolution mechanisms, the OHADA Council of Ministers adopted on 23 and 24 November 2017 three major texts: a Uniform Act on Mediation, a new Uniform Act on the Law of Arbitration and revised rules of arbitration of the Common Court of Justice and Arbitration.

Over the past few years, Africa has become a center of exponential economic growth with large projects emerging all over the continent in the energy, natural resources, banking and telecoms sectors. In this context, 17 West and Central African countries created in 1993 the Organization for the Harmonization of Business Law in Africa ("OHADA"), which aim is to streamline the legal environment of corporations, better secure economic activities and stimulate foreign investments. To this end, the OHADA creates rules of business law directly applicable in the member States through Uniform Acts that the Common Court of Justice and Arbitration (the "Common Court"), acting as a supranational judicial authority and as a court of arbitration, has the duty to implement in deciding business disputes between nationals of the members States.

The texts of November 2017 are the latest expression of the rationale underlying the creation of OHADA.

New Act and revised rules of arbitration

The new Uniform Act on arbitration amends the initial text adopted in 1999. The spirit is clear: ensuring promptness of proceedings and strength of arbitral awards while maintaining the parties' ability to adapt the procedure to meet their particular needs and solve their dispute. As a result:

- The principle of "competence-competence", under which it belongs to the arbitral tribunal to make a prior determination as to its own jurisdiction, evolves. Prior to the new Act, a State court had jurisdiction over a dispute involving an arbitration clause only when the arbitral tribunal was not yet constituted and when the arbitration clause was manifestly void. Similarly to French law, this solution is extended to cases where the clause is *prima facie* inapplicable,[1] thereby enabling State courts to rule on disputes where the arbitration clause has obviously no link or effect on the dispute;
- The procedure to challenge an arbitrator is revised[2] and the party wishing to do so must start its action within 30 days from the date when this party was informed of the facts and circumstances on which the challenge is based. The challenge must be decided by a State judge within 30 days and can be appealed before the Common Court;
- As to arbitral awards, the parties can now waive their right to seek their annulment,[3] as provided in French international arbitration law.[4] The Act also sets strict time limitations to the proceedings against awards, which must be started within a month after the award is rendered.[5] The State court must rule on the challenge within 3 months, failing what the claim can be brought within 15 days before the Common Court which must issue its ruling within 6 months.

The revised rules of arbitration of the Common Court are also innovative on certain procedural matters:

- The Common Court has now jurisdiction to decide investments disputes brought on the basis of BITs or investment contracts[6]. Probably inspired by the European case law on arbitrators' civil liability, it is now required that the arbitrator carry out his mission with diligence and celerity.[7]
- The revised rules also provide for joinder[8] and voluntary[9] intervention of third parties, as well as for disputes involving multiple parties[10] or arising out of multiple contracts[11].

Introduction of mediation

With the new Uniform Act on Mediation directly applicable in its members States, the fundamental principles applicable to mediation proceedings become available: confidentiality,[12] prompt approval of the settlement agreement[13] and combination with other dispute resolution mechanisms.[14] The mediator must be and remain independent and impartial[15] and cannot be an arbitrator or expert in the same dispute, unless otherwise provided by the parties.[16]

The Uniform Act is applicable to all mediation proceedings initiated after its entry into force, regardless of the date when the agreement to mediate was made.[17] Both *ad hoc* and institutional mediation are covered by the provisions of the new Uniform Act, without regard as to who decided to proceed with mediation, be it a State judge, an arbitral tribunal, a competent public authority or the parties themselves.[18]

These innovations strengthen the legal framework of alternative dispute resolution mechanisms available to the parties in the OHADA zone and increase its attractiveness as a secure place for creation of business.

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- [1] Uniform Act on arbitration, section 13
 - [2] Uniform Act on arbitration, section 8
 - [3] Uniform Act on arbitration, section 25
 - [4] French Code of civil procedure, section 1522
 - [5] Rules of arbitration, section 27
 - [6] Rules of arbitration, section 2.1
 - [7] Rules of arbitration, section 4.1
 - [8] Rules of arbitration, section 8.1
 - [9] Rules of arbitration, section 8.2
 - [10] Rules of arbitration, section 8.3
 - [11] Rules of arbitration, section 8.4
 - [12] Uniform Act on mediation, section 10
 - [13] Uniform Act on mediation, section 16
 - [14] Uniform Act on mediation, section 11
 - [15] Uniform Act on mediation, section 6
 - [16] Uniform Act on mediation, section 14
 - [17] Uniform Act on mediation, section 17
 - [18] Uniform Act on mediation, section 1
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