EFFECTIVENESS OF THE ARBITRATION LAW PROVIDED FOR BY THE OHADA TREATY

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTERS DEGREE IN INTERNATIONAL ECONOMIC AND BUSINESS LAW

BY:

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DECLARATION

I, OBONE MBANG Sara Yéléna, a student at Kigali Independent University (ULK), Post-graduate studies, Master's in International Economics and Business Law do hereby declare that this final dissertation entitled "The effectiveness of the arbitration law provided for by the OHADA treaty", under the supervision of Dr.Fructuose BIGIRIMANA, is my original work to the fulfillment of Master's Degree in law and it has never been presented partially or fully by anybody else at any University or High Learning Institution nor elsewhere for any academic qualification. Where any other persons' works have been used, references and bibliography have been acknowledged.

Date...../..... /..... Signature.....

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DECLARATION BY THE SUPERVISOR

I, Dr.Fructuose BIGIRIMANA, appointed supervisor of the work presented in this dissertation entitled "The effectiveness of the arbitration law provided for by the OHADA treaty", hereby confirm that I have supervised this thesis and that submission is made with my approval.

Date: ...../..... /..... Signature: ..... Dr. Fructuose BIGIRIMANA

DEDICATION

To my lovely family especially my Mother NNEGUE ASSEKO Diane,

To this great man Farselle Kombila that I carry a lot in my heart,

To my friend Alexia Sima who is always there for me,

May the Almighty God, bless all of them extremely.

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LISTS OF ABBREVIATIONS AND ACRONYMS

Art: article

BAMREL: bureau Africain et mauritanien de recherches et d'études législatives

OHADA : organisation pour l'harmonisation en Afrique du droit des affaires

CCJA : Cour Commune de Justice et d'Arbitrage

AUA : acte uniforme relatif à l'arbitrage

ADR: Alternative Dispute Resolution

ICSID: International Center for Settlement of Investment Disputes

Cass: cassation

Civ: civil

Para: paragraph

Dr: doctor

ULK: Université Libre de Kigali

PR: professor

Rev: review

No: number

P: professor

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CHAPTER ONE: GENERAL INTRODUCTION

1.1 Background of the study

For a long time, economic operators were suspicious of African states south of the Sahara in view of the legal and judicial insecurity that prevailed in some states (if not all). This insecurity resulted from the obsolete nature of the legal texts in force in most States, their insufficiency in relation to modern economic law, the delay or even the absence of publication of the texts, for lack of resources. With regard to judicial insecurity, it consisted of the slowness of procedures, the unpredictability of the courts, the corruption of the judicial system, the difficulties in enforcing court decisions, etc.

Faced with the slowdown in investment flows, the need was felt to rebuild the legal structure of all the countries of the franc zone in order to restore confidence to economic operators. Because, indeed, some States still lived under the colonial legislation. This was the case in Burkina Faso, Cameroon, the Central African Republic, Guinea Conakry and the Ivory Coast before the reform introduced by the law of August 9, 1993, when it had codified its private judicial law since 1972. Others, on the occasion of the reform of their private judicial law, had introduced provisions of the New French Code of Civil Procedure on domestic and international commercial arbitration.

In this perspective, the idea of a unification of African rights appeared as the only solution to this obstacle to development that constitutes the disparity of legislations. Within the framework of the Common African and Malagasy organization, the African and Mauritian Bureau of Research and Legislative Studies (BAMREL) was created with the objective of drafting unified legal texts likely to be adopted by each of the States of 'French speaking Africa. This project did not last long.

Faced with this acknowledgment of failure, the African states of the franc zone undertook, in 1991, to develop a unique regional business law, modern and likely to promote economic development. This project of unification and renovation of business law texts was carried

out within the framework of an international organization called Organization for the Harmonization of Business Law in Africa (OHADA[1]).

The treaty relating to the Harmonization of Business Law in Africa was signed in Port Louis (Mauritius) on October 17, 1993 by the States of sub-Saharan Africa, members of the franc zone, wishing to promote the development of their respective territories in through the legal and judicial security of the economic activities that take place there.

This Treaty of Port Louis, which was amended in Quebec (Canada) on October 17, 2008, created the Organization for the Harmonization of Business Law in Africa (OHADA), hence the expression OHADA Treaty, to designate the Treaty of Port Louis modifies in Quebec.

The OHADA treaty has, in fact, a great ambition which is reflected in particular by its vast area delimited by its article 2 in these terms: "*for the application of this treaty, fall within the field of business law: all rules relating to company law and the legal status of merchants, the collection of debts, sureties and means of execution, the regime for the recovery of companies and judicial liquidation, the law of arbitration, the law of the work, accounting law, sales and transport law, and any other matter that the Council of Ministers would decide, unanimously to conclude there...*"

At the institutional level, OHADA has an institutional system structured around five bodies: the Conference of Heads of State and Government, the Council of Ministers, Permanent Secretariat, the Common Court of Justice and Arbitration (CCJA) and the Regional Superior School of Magistracy (ERSUMA). OHADA institutions fulfill three specific missions:

• Develop, for the Member States, business law that is harmonized, simple and adapted to the business environment.

[1] Organisation pour l'harmonisation en Afrique du droit des affaires (french)

• Streamline the resolution of business disputes by promoting diligent, independent justice supported by appropriate procedures as well as by promoting arbitration and other alternative dispute resolution methods.

• Ensure adequate training of legal and judicial staff and economic actors, promote research in OHADA law and, more broadly, in business law.

The acts taken for the adoption of the common rules are qualified as "uniform acts", in accordance with article 5 of Title II of the OHADA Treaty. It consists in particular of: the uniform act relating to arbitration (AUA)[2], the uniform act relating to contracts for the carriage of goods by road (AUCTMR)[3], the uniform act relating to general commercial law (AUDCG)[4], the uniform act relating to accounting law and financial information (AUDCIF)[5], the uniform act relating to the organization and harmonization of company accounting(AUHCE)[6],the uniform act relating to mediation (AUM)[7],the uniform act relating the uniform act organizing collective procedures for the clearance of liabilities (AUPCAP)[8], the uniform act organizing simplified recovery procedures and means of (AUPSRVE)[9], the uniform act on the organization of securities (AUS)[10], the uniform act relating to the law of cooperative companies (AUSC)[11], the uniform act relating to the law of commercial companies and economic interest groupings (AUSCGIE)[12]. As of its entry into force, any uniform act of OHADA is integrated into the internal legal order of the States Parties without recourse to any national measure.

The Uniform Acts are directly applicable and binding in the States Parties notwithstanding any contrary provision of domestic law, prior or subsequent. Their application in the matters they govern is therefore not an option but an obligation imposed on national courts.

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[2] Acte Uniforme relatif à l'arbitrage (French abbreviation)
[3] Acte Uniforme relatif aux contrats de transports de marchandises (French abbreviation)
[4] Acte uniforme relatif au droit commercial general
[5]Acte Uniforme relatif au droit comptable et à l'information financière
[6] Acte Uniforme portant organisation et harmonisation des comptabilités des entreprises
[7] Acte Uniforme relatif à la médiation
[8] Acte Uniforme portant organisation et harmonisation des comptabilités des entreprises
[9] Acte Uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution
[10] Acte Uniforme révisé portant organisation des suretés
[11] Acte Uniforme relatif au droit des sociétés coopératives
[12] Acte Uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique

Cameroon, for example, by ratifying the treaty, has integrated it into its internal legal order and therefore imposes itself on anyone on its territory. This rule is enshrined and reiterated by article 3 of the Cameroonian Civil Code which provides that "*police and security laws oblige all those who live on Cameroonian territory*". Furthermore, Article 10 of the Treaty repeals or prohibits the adoption of any previous internal provision contrary to or identical to those of the Uniform Acts.

1.2 Scope of study

We know that recourse to arbitration is a constant in internal but also international commercial relations. We will see that extent the arbitration provided for by OHADA law is a factor in promoting commercial activities within the different Member State. Our study will essentially consist of studying but also criticizing the contributions of AUA and CCJA arbitration.

From the preamble to the OHADA Uniform Act, its signatories proclaimed their desire to "*promote arbitration as an instrument for settling contractual dispute*[13]. With OHADA, the arbitration rights of the States parties have been unified and modernized by a uniform act on arbitration law adopted on March 11, 1999 in Ouagadougou[14]and entered into force on June 11, 1999. Indeed, arbitration in the OHADA area is governed by the uniform act relating to arbitration and the arbitration rules of the CCJA. To date, 17 States are members of OHADA and in which therefore these forms of arbitration are in force: Benin, Burkina-Faso, Cameroon, Central Africa, Ivory Coast, Congo, Comoros, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo, Senegal, Chad and Togo.

1.3 Interest and motivation of the study

This subject is of both legal and economic interest. From a legal point of view, it allows us to explore the legal effectiveness of OHADA arbitration law. This right tends to offer an outcome of the arbitration procedure guaranteed by security and efficiency. Indeed, whatever the result of an agreement between the parties during the procedure or a decision

[14] Ouagadoudgou, capital of Burkina Faso.

of the court seized, the arbitral award is reasoned and has the authority of res judicata as soon as it is rendered. This award may be accompanied by provisional execution to allow the parties to quickly benefit from the effects of the decision rendered without exhausting the entire procedure, in particular the various remedies that may catch up with it. This award may be accompanied by provisional execution to allow the parties to quickly benefit from the effects of the decision rendered without exhausting the entire procedure, in particular the various remedies that may catch up with it. This provisional execution remains valid even when an action for annulment is filed against the award in question.

As a general rule, the arbitral award must be enforced in order to be enforced. The decision relating to the application for exequatur[15] is obtained before the competent court in the State party within 15 days, deemed acquired in the event of silence by the court seized, during this period. It is likely to appeal in cassation only before the CCJA when it is only negative. The sentence thus rendered is not subject to opposition, appeal or cassation. It may nevertheless be subject to review or an action for annulment before the competent court in the State party whose decision is only subject to appeal in cassation before the CCJA. The flexibility of the OHADA arbitration procedure results from the fact that clauses waiving recourse for annulment can be provided for the parties provided that they are not contradictory to international public order. The new Community arbitration law thus places the OHADA space as a new place of international arbitration that is very attractive, particularly for foreign investors in Africa.

In terms of economic interest, a mechanism that simplifies conflict resolution would be an effective solution to the mistrust of foreign investors who find it difficult to place their trust in the state legal systems of African countries.

1.4 Problem statement

Therefore, we are entitled to question the effectiveness of this form of arbitration provided for and governed by OHADA community law in its Member States. Indeed,arbitration is the primary motivation for creation of OHADA to fight against legal insecurity and promote its development. This arbitration is inspired by the material rules of international

[15] Article 30 paragraph 5 of RA/CCJA.

arbitration is inspired by the material rules of international arbitration which gives particular importance to the will of the parties. Let us also remember that the OHADA texts relating to arbitration offers a harmonized legal framework for business in the sub-region, which facilitates the creation of a favorable business environment. Moreover, they have been in force in member states for a decade.

However, some difficulties may arise. For example, OHADA rules can sometimes be considered too rigid, which can make it difficult to apply them in complex situations. In addition, some Member States may not be able to implement OHADA rules effectively due to budget constraints or limited capacity. Finally, there is a multitude of texts relating to arbitration and economic activities which may conflict with the OHADA arbitration texts and thus pose difficulties in term of recognition. Doubts as to the effectiveness of OHADA arbitration may therefore exist.

1.5 Research questions

1. Therefore, what are the advantages and positive changes resulting from OHADA arbitration after so many years of application within the Member States?

2. What are the challenges affecting the effectiveness of OHADA arbitration within member states?

3. What are the possible solutions to meet these challenges and improve its efficiency?

1.6 Hypothesis

1. OHADA arbitration in addition to contribute to legal stability in members states; offers an outcome of the arbitration procedure guaranteed by security and efficiency. Whether it is the result of an agreement between the parties during the procedure or a decision of the court seized. The arbitral award is reasoned and has the authority of res judicata as soon as it is rendered.

2. OHADA arbitration is faced with challenges such as texts that lack clarity and are quite limited in space that can hinder the credibility of OHADA arbitration and discourage the parties from resorting to this method of dispute resolution.

3. Increase the powers and autonomy of the arbitral tribunal and a modification by the legislator of certain texts in order to make them more precise will aim to improve the quality of OHADA arbitration by strengthening the training of legal actors; improving the transparency and impartiality of arbitrators and accelerating arbitration proceedings.

1.7 Research methodology

The responses to the various issues raised required the analysis of legal instruments such as the uniform acts contained in the OHADA treaty; internal but also international law; doctrine and some declarations.

1.8 Structure of work

In the perspective of an exhaustive study, our work will be divided into **six chapters. Chapter one** is a general introduction to the subject in which we will address the context of our subject, we will define it, we will limit it, we will see the interest of studying it, the problems relating to it, the different central questions that it raises, the research method and the structure of this study. In **chapter two** we will analyzed the general consideration on harmonized law. **Chapter three** we are going to discuss the different contributions of OHADA arbitration to securing economic activities. **The chapter four** has for optics to expose the weakness of the arbitration provided for by the treaty. In the **Chapter five**, we will make some proposals likely to improve the proper functioning of OHADA arbitration and enable the treaty to best pursue its objectives. **The chapter six for its part**, is a general conclusion of our study and some recommendations.

CHAPTER TWO: GENERAL CONSIDERATIONS ON HARMONIZED LAW

2.1. LITERATURE REVIEW

2.1.1. Definitions of key concepts

2.1.1.1. Legal security

Legal certainty is a principle of law which aims to protect citizens against the negative side effects of the law. It is one of the aspects of the right to security to which all individuals can claim. Non-compliance can lead to complaints, disputes, and breakdowns in equality and harm the economic attractiveness of the country.

Furthermore, legal certainty is an element of security. As such, it has its basis in article 2 of the declaration of 1789[16] which places security among the natural and imprescriptible rights of man in the same way as freedom, property and resistance to oppression.

The principle of legal certainty seeks in particular to combat:

- Inconsistencies in the law;

- The multiplication of standards;

- Legal instability and unpredictability, too frequent changes;

- The non-normative nature of certain laws;

- The retro-activity of laws that affect already established contractual situations.

To respect the principles of legal certainty, the legislator must ensure that each new standard:

- Is understandable, that those to whom it is addressed can understand the context and measure its scope, that the provisions are precise and the formulations are unequivocal;

[16] Declaration of the rights of Man and citizens of 1789.

- Relates to the general interest, the common good;

- Meet ethical requirements;

- Has an obligatory, coercive nature;

- Is within the competence of the legislator.

The legislator must assess based on the risks of insecurity:

- The complexity of the legislative system, number of codes impacted, consequences on the pyramid of standards;

- The multiplicity of social groups concerned;

- The consequences for the security of organizations.

2.1.1.2 The Uniform Acts

The uniform acts are the legal form imagined by the treaty, to establish "*common rules, simple, modern and adapted to the situation of their respective economies (economies of the State parties)…*" A set of standards is likely to contribute to legal certainty if it is complete, precise and coherent. We will successively examine the Uniform Acts from the point of view of these three criteria.

The complete nature of a normative system implies that the norms it carries fully – or at least substantially – cover the relationships that the system intends to govern. From the point of view of their field of application, the Uniform Acts must cover business law. This is defined by Article 2 of the Treaty, by means of a list of a set of rules relating to "*company law and the legal status of traders, the recovery of debts, securities and avenues of "execution, the corporate recovery and liquidation regime, arbitration law, labor law, accounting law, sales and transport law*...". With the exception of labor law, all the matters listed in Article 2 of the Treaty have been the subject of Uniform Acts. With regard to the field of application covered, and therefore the complete nature of the system, the assessment that can be drawn up 10 years after the first Uniform Acts is therefore satisfactory. The enumeration in Article 2 of the Treaty is however not exhaustive, since the same provision continues the enumeration with the mention that "any other matter"

may be included in business law, provided that the Council of Ministers of OHADA decides, unanimously, to include it. This only reflects the fact that business law is a branch of variable content, without precise limitation. Business law is therefore intended to encompass all the rules of law relating to business, the production and circulation of economic wealth. This is how, without a doubt, the criminal law of certain specialized commercial professions, the law of financial services, the criminal law of business, industrial and commercial property law, civil society law, the law of new information and communication technologies, competition and consumer law, the law of certain special contracts, as well as private international law. It is certain that, to be able to adequately fulfill their function of unification, simplification and modernization of business law, the Uniform Acts must cover, if not all, at least the essentials, of the legal rules applicable to business and to economic activities. However, the extension of the areas of application of the Uniform Acts is likely to generate two types of difficulties.

This extension is such that, for certain Uniform Acts, one can question their extension or the refusal to extend their scope of application to the civil aspects of the matters dealt with. Thus, the preliminary draft Uniform Act on the law of contractual obligations raises the question of whether it should cover only commercial contracts, or all civil and commercial contractual obligations, would make the law of obligations excessively complex contractual. We would, in fact, have two distinct legal regimes for contractual obligations - one for civil contractual obligations governed by the Civil Code, the other for commercial contractual obligations governed by a Uniform Act - while perhaps waiting for a third different regime for consumer contracts. This is why the extension of the Uniform Act to civil and commercial contracts is the solution recommended by the author of the preliminary draft. We know that the extension to civil aspects, of the matters dealt with in the Uniform Acts, to civil and commercial contracts, of the matters dealt with in the Uniform Acts, was the solution chosen on several occasions by the Uniform Acts.

This is the case, for example, for the Uniform Act on the Law of Arbitration, which applies "to any arbitration, when the seat of the arbitral tribunal is in one of the States parties"[17].

[17]Article one of the Uniform Act relating to arbitration.

This is also the solution adopted for security law, the provisions of the Uniform Act of which apply, to both civil and commercial security. These extensions of the field of application of the Uniform Acts to the civil aspects of the matters dealt with are undoubtedly legitimate, but they necessarily have the effect that the unification of law achieved by OHADA goes far beyond the limits of business law, and therefore, the very object of the Organization as defined in Article 1 of the Treaty.

2.1.1.3. Treaty for the harmonization in Africa of business law

The Organization for the Harmonization of Business Law in Africa (OHADA) is an international organization that aims to harmonize business law in French-speaking African countries.

The objectives of OHADA is to facilitate trade and attract investments in Africa. To do this; it harmonizes the rules of business law in member countries. OHADA also promotes arbitration and mediation for the resolution of commercial conflicts.

OHADA was created in a context of acute economic crisis and drastic drop in the level of investments in Africa, legal and judicial insecurity being then identified as a major cause of investor mistrust. Obsolescence, disparity and inaccessibility of the rules governing economic operations generated legal uncertainly resulting in uncertainty about the rule in force, while the destitution of the courts, the insufficiency of judicial personnel, the lack of training of the latter in law economic, judicial delays and problems of ethics constituted the leaven of judicial insecurity resulting in a certain unpredictability of judicial decisions. In order to remedy this, OHADA has been given the task of rationalizing the legal environment for businesses in order to guarantee the legal and judicial security of economic activities, with a view to stimulating investment and creating a new pole of development in Africa. To achieve this, OHADA is working to:

* develop, for its Member States, simple, modern, harmonized and adapted business law, in order to facilitate business activity;

* This common law is contained in Uniform Acts which, once adopted, apply identically in all Member States;

* guarantee that this right is applied diligently, under conditions capable of guaranteeing the legal certainty of economic activities; this objective is achieved by securing the judicial settlement of business disputes and the promotion of alternative dispute resolution methods.

By the extent of the material field covered and the legislative technique used, OHADA appears to be one of the most successful experiences of legal integration.

2.1.1.4. Arbitration

Arbitration is a procedure in which the disputes is submitted, by agreement between the parties, to one or more arbitrators who render a blinding decision. By deciding to resort to arbitration, the parties opt for a private dispute resolution procedure instead of a judicial procedure.

Its main characteristics are as follows:

* Arbitration is a consensual procedure; it can only take place if both parties have consented to it. With respect to future disputes arising from a contract, the parties include an arbitration clause in the contract. An existing dispute may be subject to arbitration by means of an ad hoc agreement concluded between the parties. Unlike mediation, a party cannot unilaterally withdraw from the arbitration proceeding.

The parties choose the arbitrators or a single arbitrator by mutual agreement. If they opt for an arbitral tribunal composed of three members, each party appoints one of the two arbitrators subsequently called upon to appoint the arbitrator who will preside over the arbitral tribunal.

* Arbitration is neutral

In addition to choosing neutral intermediaries of the appropriate nationality, the parties can decide on such important matters as the applicable law, language and venue of the proceedings. This allows them to ensure that no party benefits from an advantage linked to the conduct of the procedure in its country.

* The decision of the arbitral tribunal is final and easy to enforce

The parties agree to execute the decision of the arbitral tribunal without delay. Arbitral awards are enforced by national courts under the New York Convention[18], which only allows exceptions to this rule in a very limited number of cases. More than 140 states are party to this convention.

2.1.1.5 Alternative Dispute Resolution (ADR)

If recourse to the courts of the judicial order constitutes the classic way of resolving conflicts, there are alternative ways for litigants, which are now in full development. In order to unclog the courts, the legislator indeed wishes to limit more and more the recourse to the judge[19].

The major advantages of these alternative methods are as follows:

* Presence and involvement of the parties in the resolution of the disputes;

* Absence of cumbersome and slow procedure;

* Lower costs and known in advance.

In addition to arbitration, we distinguish four others alternative methods of dispute resolution:

2.1.1.5.1. The negotiation

Its objective is to resolve conflicts amicably, by seeking a satisfactory solution for all parties through dialogue and compromise. It can be implemented directly by the parties in dispute or through directly by the parties in dispute or through their respective lawyers and can also involve a third party, chosen by mutual agreement by the parties. Negotiation is not subject to rules or a precise framework. Nor does it require specific training for the people who practice it.

[18]The Convention on the recognition and enforcement of foreign arbitral awards, also known as the "New York Arbitration Convention", is one of the key instruments in International arbitration.

[19]In 1998, a French law of December 18 provided for two series of provisions very favorable to the development of alternative methods: it made it possible to obtain legal aid when the parties attempted to reach a transaction before the institution of proceedings.

2.1.1.5.2. Conciliation

It is a voluntary process between the parties to a dispute who decide to call upon a neutral third party, called a conciliator, to help them resolve their dispute in a confidential setting. A third party specializing in a particular area of expertise may also be called upon.

The conciliator has an active role: he takes note of the parties' points of view and gives his opinion. After expressing themselves, the parties expect him to propose options or settlement solutions that they are free to accept or not.

2.1.1.5.3. Mediation

People in conflict, helped by a mediator, are led to find a solution to their difficulties themselves. The mediator does not decide the dispute. The parties are therefore at the center of the debates and play a very active role.

The mediator (neutral, independent and impartial) will help them to find and achieve a fair and reasonable solution that takes into account the interests of all parties. He therefore does not act as a legal adviser, judge or arbitrator. In other words, unlike the judge, the mediator does not impose any decision, it must come from the parties.

2.1.1.5.4. Collaborative law

Collaborative law is a voluntary and confidential process for resolving conflicts through. This process brings together the parties in conflicts and their respective lawyers (who are specifically trained in this process), who advise and assist them until the agreement is reached. Unlike mediation, collaborative law does not involve a mediator.

The parties refrain from having recourse to the courts, except to ratify the agreements obtained through the collaborative law process.

2.1.1.6. Uniform Act relating to Arbitration

The AUA states in its article 1 that it is intended to apply to any arbitration when the seat of the arbitral tribunal is in one of the Member States. In other words, if the place of arbitration is located in one of the States parties, the AUA can apply if such is the will of

the parties or if they have not clearly expressed this will (in case the arbitration clause simply states that "disputes relating to this contract will be settled by arbitration").

This text applies to both civil and commercial arbitration. Indeed, the OHADA treaty under which the AUA was adopted relates to business law. However, business law deals with a large part of “commercial law, civil law, and tax law”. Since business law includes certain disciplines falling under civil law, it can be concluded that the arbitration referred to in the AUA refers to that practiced in both commercial and civil matters.

Moreover, article 2 paragraph 1 of the AUA links arbitration to the availability of rights, it follows, in fact, from the said text that "*any person may resort to arbitration on the rights of which he is free. Arrangement ".*

Having the free disposal of a right implies that it is available: a right is available when it is under the total control of its holder, to such an extent that he can do anything about it and in particular alienate it or even give it up. However, we can have a right both in commercial matters and in civil matters, except to specify that in civil matters, we will never compromise to sanction a search for paternity, the validity of a marriage or even a divorce while that pecuniary rights arising from family property law (quantum of alimony, dispute over an open succession, etc.) constitute examples of arbitral rights in civil matters.

2.1.7. The Common Court of Justice and Arbitration

CCJA[20] arbitration, on the other hand, is the one that operates within the permanent framework of arbitration within the CCJA. This administers the arbitration and, unlike other Arbitration Centers, has jurisdictional powers. Like any permanent arbitration center, the CCJA has arbitration rules. We therefore understand that this arbitration is not governed by the AAU. It is also distinguished by its spatial field. Indeed, it follows from the terms of article 21 of the OHADA uniform act that this arbitration is open only in the case of disputes in which at least one of the parties has either his domicile or his habitual residence in a state party to OHADA; or disputes arising from contracts whose performance takes place, or is scheduled to take place, in whole or in part, on the territory of a State Party.

[20] Cour Commune de Justice et d’arbitrage (french abbreviation)

This spatial limitation of CCJA arbitration is easily understood because it is framed, administered, by the CCJA and must, therefore, be circumscribed within the territorial jurisdiction of the said court.

2.1.7.1. The organs of the CCJA arbitration system:

The institutional mechanism of CCJA arbitration consists of five bodies:

1. **The president of the CCJA**: he is the president of the CCJA Arbitration Center. The President proposes decisions to the General Assembly aimed at ensuring "*the implementation and successful completion of arbitration proceedings and those related to the review of the award"*[21]*;* he can "*take in case of emergency, the decisions necessary for the establishment and the end of the arbitration procedure, subject to informing the court at its next meeting, excluding decisions which require a judgment of the court*". Finally, by virtue of the seizing of a request for the purposes of arbitration, the President issues an order by which he designates the member of the Court responsible for reporting on the case.

2. **The Plenary Assembly of the Court**: it intervenes in particular for the appointment and confirmation of the arbitrators, in the procedures of challenge and the preliminary examination of the arbitral award.

3. **Restricted panel**: instituted, under 2.4 of the RA/CCJA[22], by the Internal Rules of the CCJA in matters of arbitration, it comprises a president and two members appointed by order of the President of the Court. It can be contacted for any question concerning an arbitration procedure and, when it is unable to decide, it refers to the next meeting of the Plenary Assembly.

4. **The General Secretariat**: it receives and registers the requests for arbitration, notifies them to the defending parties by attaching a copy of the RA/CCJA. It follows from the terms of articles 8 and 13 of the RA/CCJA that the Secretary General seizes the court for

[21] "Article one paragraph 2 of the arbitration regulations of CCJA.

[22] Article 2.4 of RA/CCJA "*during their term, the President, the first vice-president and the second vice-president take precedence over the other members of the Court*"

the fixing of the provisions and the costs of arbitration, for the implementation of the arbitration and, possibly, for the fixing of the place arbitration in the event of the parties' silence.

The Secretary General prepares the information documents intended for the parties, their counsel and the arbitrators. When the award is rendered, the Secretary General notifies it to the parties after they have fully paid the costs of the arbitration.

Finally, under the terms of article 5.5 of the rules of procedure in matters of arbitration, "the Secretary General keeps in the archives of the Court all the awards, the minutes establishing the subject of the arbitration and fixing the course of the procedure, the decisions of the court, as well as the copy of the relevant correspondence drafted by the secretariat in each arbitration case".

5. **The Revenue and Expenditure Board**: headed by a manager appointed by decision of the President of the Court, the Board is responsible for collection operations and expenses related to arbitration proceedings.

2.1.7.2. The organization of the court

The Common Court of Justice and Arbitration is composed of nine judges. However, the Council of Ministers may, on the basis of a detailed and in-depth report from the Permanent Secretary, seized for this purpose either by the President of the Court or by a State Party, and taking into account both the service requirements and the financial possibilities of organization, set an odd number of judges greater than nine. The mandate of the members of the Court begins to run on January 1 of the year following their election. The term of office of a judge elected to replace another judge, in accordance with Article 35 of the Treaty, begins on the date of the solemn declaration provided for in Article 34 of the same Treaty[23]. They are elected for a non-renewable term of seven years.

- **The Presidency of the Court**

[23]Article 34 of OHADA treaty "after their election, the members of the court make a solemn declaration to fulfill their functions well and faithful with all partiality.

The president is elected by the court for a period of three and six months, without this duration exceeding that of the term of office of the person concerned as a member of the court[24]. Article 6.3 of the RA/CCJA stipulates that the president is not eligible for re-election. He may, however, be re-elected once at the end of his first mandate if the latter was conferred on him for a period of less than three years and six months, the duration of the mandate of Chairman not being able, in any case, to have the consequence of lengthen his term of office as a judge beyond seven years. The vote takes place in plenary assembly, by secret ballot, after the member of the Court exercising the presidency has recalled the number of votes required to be elected. Only the members of the Court present take part in the vote.

- **The Chambers of the Court**

The court sits in plenary session. It may, however, form chambers of three or five judges. These are constituted by order of the President of the Court and chaired by the President of the Court or by vice-presidents.

Thus, Article 1 of the said Treaty clearly states that its purpose is, among other things, *"to encourage recourse to arbitration for the settlement of contractual disputes*" and Article 2 of the same Treaty mentions arbitration among the legal disciplines that fall within the realm of law. This uniform act, given the objective and the spirit of the treaty, repeals and replaces the rights of state arbitration.

2.1.1.7. International Center for Settlement of Investment Disputes (ICSID)

ICSID is the world's leading institution dedicated to resolving international investment disputes. He has extensive experience in this field, having administered the majority of cases relating to international investments. States have designated ICSID as the forum for

[24] Article 6 of RA/CCJA.

the settlement of investor-State disputes in most international investment treaties as well as in many investment laws and investment contracts.

ICSID resolves disputes through conciliation, mediation, arbitration or fact-finding procedures. The ICSID process is designed to take into account the specific characterics of international investment disputes and the parties involved, maintaining a fair balance between the interests of investors and those of host States. Each case is examined by a conciliation commission or an independent arbitral tribunal, which rules on the evidence produced by the parties and their legal arguments. A dedicated ICSID team is assigned to each instance and provides its expertise and assistance throughout the procedure. To date, more than 900 cases have been administered by ICSID[25].

2.2 Theorical framework

2.2.1. The literature review on OHADA

To achieve its aforementioned objectives, OHADA has an institutional system structured around five (5) bodies: the Conference of Heads of State and Government, the Council of Ministers, Permanent Secretariat, the Common Court of Justice and Arbitration (CCJA) and the Regional School of Magistracy (ERSUMA).

OHADA institutions fulfill three specific missions:

- develop, for the Member States, business law that is harmonized, simple and adapted to the business environment. Streamline the resolution of business disputes by promoting diligent, independent justice supported by appropriate procedures as well as by promoting arbitration and other alternative methods of dispute resolution. Ensure adequate training for legal and judicial personnel and economic actors, promote research in OHADA law and, more broadly, in business law.

* **The Council of Ministers** is composed of the Minister in charge of Justice and the Minister in charge of Finance in each of the Member States, the Council of Ministers is the deliberative body and, above all the legislative body of the Organization. In the exercise of

[25] ICSID statistics: http//icidfiles.worldbank.org

its normative power, it adopts Uniform Acts, Regulations and Decisions. The Uniform Acts adopted by the Council of Ministers are directly applicable in all Member States and repeal any contrary or identical national rule[26].

* **The Permanent Secretariat** is an executive body of OHADA, the permanent Secretariat is headquartered in Yaoundé, Cameroon, and it ensures the general coordination of the functioning of the institutions and the harmonization process, prepares draft texts, coordinates and organizes the sessions of the Council of Ministers[27].

* **The Common Court of Justice and Arbitration** (CCJA) is made up of thirteen (13) judges, the CCJA has its headquarters in Abidjan in Ivory Coast. Sitting last and in cassation, it has the monopoly of the interpretation and application of OHADA law, instead of the national Supreme Courts. It is also vested with advisory powers to issue opinions on the interpretation of the OHADA treaty and acts of derived la w. The CCJA finally houses an institutional arbitration center.

* **The Higher Regional School of Magistracy** (ERSUMA) is attached to the Permanent Secretariat and based in Porto-Novo in Benin, ERSUMA is a training, development, documentation and research center in business law. ERSUMA provides its training at its headquarters, in other member States or remotely, by videoconference, for legal professionals[28].

* **The Accounting Standardization Commission of OHADA**: created by regulation No. 002/2009/CM/OHADA relating to the creation, organization and operation, the OHADA relating to the creation, organization and operation, the OHADA Accounting Standardization Commission, called CNC-OHADA, is a body responsible for assisting OHADA in the development, interpretation, harmonization and updating of accounting standards in the Member States.

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[26] The adhering States assume for the first time the presidency of the Council of Minister in the order of their accession, after the turn of the signatory countries of the treaty (article 27 of the revised OHADA treaty).

[27] Article 11 and 29 of OHADA treaty.

[28] The treaty of Quebec did not expressly include ERSUMA among organs of OHADA. In the event of silence, there is no reason to believe that ERSUMA retains its previous status.

The CNC-OHADA ensures the coordination and synthesis of theoretical and methodological research relating to the standardization and application of accounting rules. As such, the CNC-OHADA is responsible in particular for:

- To draw up any project to reform accounting rules;

- To develop projects for permanent updating of the accounting system, based on international legal, economic and financial developments;

- To monitor and ensure the application of the OHADA accounting system in the Member States;

- encourage the implementation of the harmonization of tax returns in the Members States;

- develop draft sector accounting standards.

2.2.2 Literature review on arbitration

The date of the birth of arbitration is unknown and its historical study gives rise to discussions. Briefly, specialists in primitive and ancient societies believe that arbitration certainly existed in all ancient societies, as a form of justice more evolved than personal vengeance since instead of using violence, the protagonists left it to the judgment of a third party that they chose[29]. This third party could be a relative or a trustworthy mutual friend. It was then distinguished from "civil" justice, which also appeared gradually in ancient societies, but unlike the first, it was exercised by public authorities, by priests or even by the people gathered in an assembly, and this in the name of the social group, for example in the name of the City. Today in France, public justice is rendered in the courts in the name of the French people, while arbitration is rendered by private courts. There is a similarity between the arbitration mechanisms of today and those of the first centuries AD. Stelae, but also documents written on papyrus or tablets are added to literary sources such as the pleadings of Cicero to show us how close the arbitral justice of the Roman era was to ours. For example, tablets found on the site of Pozzuoli in Italy[30]show how arbitrators were appointed to decide a dispute in the 1st century in this region of

[29] H. Levy-Bruhl*, Research on the actions of the law*, Sirey , 1960, pages 3 and next.
[30] G.Camodeca*, Roma, Quasar*, 1999, Volume I, pages 104 and next.

Europe. The parties wrote an arbitration agreement (compromissum) on a tablet on which they identified their dispute and designated the arbitrator who should decide it and where, presumably. They called on several witnesses who countersigned the tablet and could be required to prove the existence and content of the agreement, if necessary. As these forms of writing are solemn (wills could also be written on such media), one can imagine the importance given to these arbitration compromises! Archaeological sources show a historical preference for knowledgeable arbiters in the field in question. Among the numerous sources found, the experts analyzed epigraphic sources (inscriptions on stone or metal) which reproduce arbitral awards and provide us with information about the arbitrators and their authors. For example, the Histonium inscription[31] relates the arbitral award of a man from the 1st century AD, C. Helvedius Priscus, called to resolve a boundary dispute between private properties. The language of this arbitrator demonstrates specific knowledge in the territorial domain and indicates that arbitrators could at that time be chosen for their knowledge in the dispute at hand. If ever the referees lacked knowledge, the same sources attest that they relied on experts to make their decision. Finally, this arbitration is similar to ours not only by the content of the parties' commitment to submit to arbitration, but also sometimes by the identity of the arbitrators, since even today it is common to resort to arbitration. Arbitration in technical fields, relying on the reassuring knowledge of experts in the field, such as former sailors for maritime arbitration.

Moreover, arbitration developed thanks to the Romans because they brought the law to a rare level of technicality. If the sources attest to the use of arbitration between Greek cities[32], it was the Romans who identified the technical characteristics that we know today: its contractual source and its jurisdictional nature and their consequences. Thanks to a major compilation commissioned by the Emperor Justinian (482-565), we have legal texts from the entire classical period (from the 1st century to 284 AD) which show that the Romans posed the basic notions of arbitration as it is known today. Thus Paul, a Roman

[31] For the translation and interpretation of this inscription: Ido Israelowich "C.Helvidius *Priscus arbiter ex compromisso*", kilo, 101/2, 2019.

[32]Epigraphic inscriptions:J. Velissaropoulo-Karakostas*, GREEk law from Alexandria to Augustus* (323 BC-14 AD). People-Goods-Justice, Paris, De Boccard, 2011, vol 1, pages 78 and next.

jurist and civil servant who lived between 160 and 230, wrote that "the compromise [of arbitration] is similar to actions before the judges of the Empire and tends like them to put an end to disputes"[33]. The Romans considered before us that the arbitrator involved was obliged to continue his mission of resolving the dispute to the end; and from the time of Emperor Justinian, the law obliges the parties to respect the arbitration agreement under certain conditions.

We see that the mission of arbitration has always been the same: to allow the parties to determine most aspects of the process to meet their needs and the nature of the dispute. In addition, the parties can choose the arbitrator, which the traditional legal system does not allow.

[33] Paul*, Second Book on the praetor's edict*, Digest, 4, 8,1.

CHAPTER THREE: THE CONTRIBUTION OF OHADA ARBITRATION TO SECURING ECONOMIC ACTIVITIES

Whether carried out domestically or abroad, economic activity is largely composed of risk-taking. This is the reason why economic players are constantly looking for rules that are likely to secure their investments. Thus, security appears to be a sine qua non condition for investment and, by extension, development. This means that it is the desire to secure economic activities that led the initiators of OHADA to make arbitration a preferred instrument for resolving contractual disputes with a view to creating an environment conducive to business. . Arbitration was therefore much more than other harmonized matters and is called to promote the legal and judicial security so desired by the founding fathers of OHADA. Reading the texts establishing the general framework of arbitration in the community space, namely the OHADA treaty, the uniform act relating to arbitration law and the CCJA arbitration regulations will therefore allow us to demonstrate that arbitration of OHADA contributes to a certain extent to the security of economic operations both legally (3.1) and judicially (3.2).

3.1. The contribution of OHADA arbitration to the legal security of economic operations

As previously stated, investing is risking. Also the desire to resort to arbitration is a way for economic operators to reassure themselves regarding the risks they take in their activities. Seen from this angle, arbitration turns out to be “the only realistic method of resolving commercial disputes”. Superior guarantee of security of economic activities, its supranational character in the OHADA area guaranteed to investors wishing to escape state justice, its accessibility, its predictability and its stability (3.1.1), its modernism and its originality are a guarantee of legal security within the Member States (3.1.2).

3.1.1- The supranationality of OHADA arbitration law as a guarantee of accessibility, predictability and stability

A return to the political history of sub-Saharan African states, most of which are now parties to the OHADA treaty, reveals that in the former French colonies, arbitration was

marked by “the principle of legislative specialist”. In application of this principle, only texts promulgated in mainland France and declared expressly applicable were to receive application in the overseas territories. The legislative specialty was applied to countries such as Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Ivory Coast, Gabon, Guinea, Madagascar, Niger, Senegal and Chad. Civil procedure, commercial law and administrative law constitute examples of the application of this principle in matters of arbitration.

As for civil procedure, by virtue of the decree of May 15, 1889 relating to the reorganization of Senegal[34], a significant part of the French Civil Code 1806 was made applicable to the former French possessions in West Africa. However, the provisions relating to arbitration contained in Book III were missing[35].

In commercial law, it was following the decrees of August 6, 1907 and January 15, 1910 that the Commercial Code was declared applicable in certain overseas territories, then to the whole of AOF and AEF[36] . Later, thanks to the decree of March 16, 1954, the law of December 31, 1925 supplementing the provisions of the Commercial Code and authorizing the arbitration clause in commercial matters was declared applicable to these former territories. However, the arbitration clause will only be authorized in the cases provided for in Article 631 paragraph 1 of the Commercial Code, namely: disputes relating to commitments between traders, merchants and bankers, disputes between partners due to a partnership commerce and finally to disputes arising from perfect commercial acts, regardless of the person and with regard to whom the jurisdiction of the commercial court is exclusive.

In administrative law where recourse to arbitration for public law legal entities was prohibited in principle, the French law of April 17, 1906 exceptionally authorized recourse to arbitration to settle disputes relating to public works supply contracts. In administrative law where recourse to arbitration for public law legal entities was prohibited in principle,

[34] Decree No 1889-205 of May, 5, 1889, relating to the judicial reorganization of Senegal.
[35] Decree No 1889-037 of august 1, 1889, regulating the political and administrative organization of the Southern Rivers of Senegal.
[36]Afrique occidentale française (French West Africa), Afrique équatoriale française (French Equatorial Africa).

the French law of April 17, 1906 exceptionally authorized recourse to arbitration to settle disputes relating to public works supply contracts. In administrative law where recourse to arbitration for public law legal entities was prohibited in principle, the French law of April 17, 1906 exceptionally authorized recourse to arbitration to settle disputes relating to public works supply contracts.

It therefore appears that apart from Article 631 paragraph 1 of the Commercial Code, recourse to arbitration was not provided for anywhere. The principle of legislative specialty therefore had limits, due to its selective, piecemeal and incomplete application. This is also what explained the disparity in rules from one territory to another, from one colony to another or even between the metropolis and its colonies.

Continuity took place actively in some States and passively in others. The States having opted for active continuity had proceeded to the more or less complete introduction of provisions relating to arbitration in their Civil Code as they were in France upon their accession to independence.

Concerning the States having adopted for passive continuity, they had not adopted French arbitration law as it stood at the time of their accession to independence. There was therefore a legal vacuum in the matter which reflected an anomaly in the legal systems of these States, to the extent that, if there was a text which authorized, although restrictively, the arbitration clause, namely article 631 paragraph 1, we noticed the absence of procedural rules allowing arbitration to function. This situation was at the origin of a jurisprudential hesitation in Ivory Coast. Indeed, by judgment rendered on May 17, 1985 in the Talal Massi c/omais[37] case. The Abidjan Court of Appeal, hearing incidents relating to the exequatur of an arbitral award, concluded that the contested order was legal. She also declared that "it is clear that article 631 of the Commercial Code authorizes the arbitration clause desired and accepted by the parties in question, they have even expressly waived any recourse to the courts to hear their possible disputes (…). The arbitration clauses inserted in the protocols of agreement are in no way contrary to Ivorian public order (…). It follows that the sentence currently under appeal is valid." In a different opinion, the Supreme Court

[37] Talal Massi c/Omais,decision of 1989 of the Abijan Court of Appeal.

overturned the decision of the Court of Appeal of Abidjan, on the grounds that "the parties can insert into an act which binds them, an arbitration clause aimed at an arbitration procedure, it does not nevertheless remains true that the conditions and modalities of this arbitration must be provided for by the legislator. Consequently, although recognizing the validity of arbitration clauses, the Supreme Court considered that in the absence of state regulations in the matter, the arbitral award could not be validated. The interpretation that the Court of Bouake[38] refused to follow with regard to its judgment rendered dated November 25, 1987 in which it declared that "the arbitral award does not contain anything contrary to public order, it is wrong that the order granting exequatur to the said sentence has been retracted.

Faced with such resistance from trial judges, the Supreme Court had to meet in plenary assembly to adopt a definitive position. Thus, by judgment of April 4, 1989, it established the lawfulness and validity of the arbitral award. Based on the following reasons: "after having listed the disputes which are within the jurisdiction of the commercial courts, article 631 of the Ivorian Coast Commercial Code provides in paragraph 2 that, however, the parties may, at the time they contract, agree to submit to arbitrators the disputes listed above when they arise. It follows from this text that the principle of recourse to arbitration is admitted in the Ivory Coast; that if it is established that the code of civil, commercial and administrative procedure neither provides for nor organizes arbitration, it is no less established that for the application of the said text, the Ivorian courts have recourse either to general principles of law, or to the provisions of Book III of the French Code of Civil Procedure as a written reason; that it follows that the Court of Appeal, by declaring valid the arbitration clause and the resulting award, has in no way violated the texts in this way."

It is therefore in the face of all these jurisprudential hesitations that the Ivorian legislator, drawing inspiration from the reforms carried out in France in 1981, reacted by adopting law no. 93/671 of August 3, 1993 relating to arbitration.

In the English-speaking countries governed by the "indirect rule", unlike the French system, the legislative extension covered all of English procedural law as it was in force in

[38] Bouake, city of Ivory Coast.

England on the date of its introduction in the colonies. . Unlike France, England had extended the old "arbitration act" of 1889 to all its colonies.

It therefore emerges from the selective extension of French law, the absence of a procedure allowing arbitration to be implemented in certain States, the silence of certain legislation in matters of arbitration, the reference to article 631 of the Code of trade of 1807[39] which was already outdated and unsuitable, the obsolete, scattered and incomplete nature of certain legislation on arbitration were a source of legal insecurity for economic operators wishing to invest in Africa. This legal insecurity for economic operators wishing to invest in Africa. This legal insecurity materialized in the uncertainties and inconsistencies which made access to this method of dispute resolution difficult, if not impossible, even though it is considered in investment matters as the most valuable guarantee that can be granted has an investor.

Also, by using the technique of harmonization, the OHADA States have adopted supranational legislation in matters of arbitration. This supranationalization made it possible to obtain a single right of arbitration in the States parties, procedural rules that are readable, intelligible and endowed with significant clarity, given their wording in simple and precise terms, making them easily understandable and therefore substantially or intellectually accessible to any economic actor wishing not to resort to state justice to resolve disputes arising from its operations.

Therefore, to pastiche the French Council of State, we can maintain that the supranationality of OHADA arbitration allows national and international investors to be, without it requiring insurmountable efforts on their part, able to determine what is permitted and what is prohibited in arbitration matters. As stated previously, we will see to what extent the supranationality of OHADA arbitration law is a source of accessibility (3.1.1.1), predictability (3.1.1.2) and stability (3.1.1.3) of the legal security of economic activities within the OHADA space.

Article 631 of French code of trade "The commercial courts will hear: the disputes relating to commitments and transactions between traders, merchants and bankers; disputes between partners, due to a commercial partnership; those relating to acts of commerce between all persons. However, the parties may, at the time they enter into a contract, agree to submit to arbitrators the disputes listed above, when they arise".

3.1.1.1 The supranationality of OHADA arbitration law: guarantee of accessibility

If the principle of legal certainty requires that the legal rules be sufficiently readable, clear and intelligible, it also requires that the recipients of said rules be able to know their content. Xavier SOUVIGNET[40] wrote that "without a minimum of accessibility and intelligibility of the rule of law, there is only arbitrariness and chaos, that is to say the very opposite of the law". The author referring to material or formal accessibility, the second facet of the notion of accessibility, the latter positively means that users of the law have the possibility of material access to the body of legal rules. Negatively, it implies the absence of an obstacle to material access to the rule of law and therefore to "the ability of its recipients to flush it out".

In OHADA law, material accessibility is guaranteed by the principle of publicity of uniform acts. The Uniform Act relating to arbitration law and the CCJA regulations cannot deviate from the rule, so they can only be enforceable against the States parties provided that they have been the subject of adequate publicity measures. As such, the laws cannot be binding without being known, the procedure for publishing the Uniform Acts is regulated by the OHADA treaty which provides that they are published in the official journal of OHADA by the Permanent Secretariat within sixty days following their adoption. This publicity made at the community level is supplemented at the national level by the publication of the Uniform Acts in the official journal of the States parties or by any other appropriate means.

The organization has an official journal in addition to that existing in each State party, a website, annotated codes in which we find all OHADA legislation, a directory of case law and finally a magazine where one could find doctrinal articles focused on OHADA arbitration.

All these means facilitate the material accessibility of common arbitration law to all the States of the organization. If we can conclude that supranationality constitutes a material

[40]Xavier SOUVIGNET, "International journal of comparative law", Bruylant, june, 27,2011, p.117.

accessibility factor to OHADA arbitration law, it remains to be demonstrated that it is also a source of predictability and stability.

3.1.1.2. Supranationality of OHADA arbitration law: guarantee of predictability

In its relationship with time, the rule of law must allow its recipients to foresee the legal consequences of their actions. The latter must therefore be able to count on their forecasts when they update their actions over time. Seen in this sense, predictability contains the rules of non-retroactivity and respect for acquired situations.

Regarding the non-retroactivity of the rule of law, this principle means that laws only have effects for the future and should therefore not govern previous situations. As for respect for acquired situations, this is a rule which requires that a change in the law or a right must not constitute a threat to legitimately acquired situations. The law being the toy and the instrument of passions, the questioning of what has been done and legally done constitutes one of the worst threats that can weigh on the relationships of men towards each other. Legal certainty therefore requires that these rules be respected.

In the OHADA area, the supranationality of arbitration law constitutes a source of predictability of this law. Indeed, Article 35 of the AUA provides “this uniform act takes the place of law relating to arbitration in the States Parties. It is only applicable to arbitral proceedings entered into after its entry into force.” thus, users of arbitration can without fear make their forecasts on the basis of the text in force at the time of carrying out their transactions. In a judgment number 001/2002 of January 10, 2002, the CCJA[41] had the opportunity to rule on the non-retroactivity of the AUA and the respect of acquired situations in these terms "given in this case that the act uniform relating to arbitration law to which the applicant refers was adopted on March 11, 1999; that it decrees in its article 35 that “this uniform act takes the place of law relating to arbitration in the States parties. This is only applicable to instances arising after its entry into force”; that paragraph 2 of article 36 of the same uniform act specifies that it will come into force in accordance with

[41] MAN DITE CTM transport company vs/COLINA, judgment No 001/2002of January, 10,2002, CCJA.

the provisions of article 9 of the treaty relating to the harmonization of business law in Africa.

Whereas in view of the above-mentioned provisions, it clearly appears that the aforementioned uniform act could not be applicable to the proceedings due to its prior nature; that in fact, on the pronounced date of 1999, the said uniform act had not yet entered into force (…) that it is therefore necessary to declare itself incompetent and to refer the applicant to take further action". We can therefore maintain that supranationality has favored the establishment of a publicity regime which guarantees the predictability of arbitration law in the OHADA area.

3.1.1.3. The supranationality of OHADA arbitration: guarantee of stability

Like the requirements of accessibility and predictability, stability is a facet of legal certainty. It is essential to a point where the French Council of State was able to say that disposable laws cannot be respectable. George RIPERT[42], one of the most fervent defenders of the virtues of the stability of the law wrote "the law which takes its value in continuity also takes its legitimacy there", or should not imagine that the law is anything other than order and continuity, nor that the world can experience happiness in the absence of the security conferred by law. However, more than true insecurity, the instability of the law refers to a feeling of insecurity. This is an insinuation in the minds of users of the law, a suspicion of the existence of insecurity for their personal situation.

According to the author Thomas PIAZZON[43], "instability is the absence of change in the content of the rule by the person who has the competence to modify it". According to this author, instability results from the modification of the solutions provided to problems already known and regulated by positive law.

Which would imply that at the heart of the notion of instability is the idea of pathology. Thus, far from relating to the change as such of the positive rule of law, which can be

[42] George RIPERT," commercial law treaty", January, 6, 2011, LGDJ editions.
[43] Thomas PLAZZON, *legal security*.

modified when it ceases to protect users, the real problem is linked to the multiplication of changes, given that the rule of law, whether legislative or jurisprudential, finds much of its value in stability.

In the OHADA area, anxious to create a legal and judicial environment favorable to development, the OHADA States have renounced part of their sovereignty at both the legislative and judicial level. Through this approach, the latter entrusted the community legislator with the task of legislating on all matters arising from business law, which allowed the creation of supranational rules of law, including that relating to arbitration effect, directly applicable and obligatory in the States parties, notwithstanding any contrary provision of domestic law, prior or subsequent, the AUA has a repealing force which makes it the common law of arbitration in the legally integrated space.

This is also what emerges from Article 35 paragraph 1 of this text which provides: "this uniform act takes the place of law relating to arbitration in the States Parties". We are therefore witnessing the neutralization of the normative power of the States parties, which results in the prevention of any attempt at change5 or untimely modification of the rules applicable to arbitration or even a possible normative inflation in this area in space. OHADA. Seen from this angle, it is appropriate to recognize that supranationalization promotes the stability of arbitration law in the legally integrated space. Moreover, the very first reform of the AUA in 1999[44] only took place recently.

Ultimately, it emerges from the above developments that the supranationalization of arbitration law in the community space has made it possible to obtain accessible, predictable and stable rules; this for the benefit of investors who, now, have the possibility of substantially and materially accessing the rules applicable to arbitration in OHADA, of making their forecasts on the basis of the law in force and of carrying out economic transactions, without fear of untimely changes to the rules or possible normative inflation in matters of arbitration. It can therefore be argued that the establishment of supranational arbitration law constitutes a source of legal security for economic transactions in the

[44] The initial Uniform Act on arbitration of June 11, 1999, contained six chapters: the composition of the arbitration, the Court of Arbitration, the arbitral award, the appeal against the arbitral award, the scope, recognition and execution of arbitral awards and final clauses.

OHADA area. This legal security of economic transactions in the OHADA area. This legal security is all the more guaranteed by the originality and modernism of community arbitration.

3.1.2. The originality and modernism of OHADA arbitration: a guarantee of legal security in the OHADA area

In his report relating to the business law harmonization project, Judge KEBA MBAYE[45] pointed out the obsolescence of the legal texts. As we indicated previously, arbitration law was marked by this reality.

Also with the aim of making it a better guarantee for economic operators, the States parties to the OHADA treaty have adopted an arbitration law demonstrating both originality (3.1.2.1) and modernism (3.1.2.2), thereby ensuring certain legal security within them.

3.1.2.1. The originality of OHADA arbitration law

The originality of OHADA arbitration law lies in the establishment of a principle of unity of legal regime (3.1.2.1.1), which the African legislator nevertheless wanted to limit, taking into account the realities of international trade.

3.1.2.1.1. The establishment of the principle of unity of the legal regime of arbitration in OHADA law

It is established that the legal regime of arbitration often finds its basis in the internal or international nature of the dispute.

In OHADA law, the community legislator has opted for the unity of the legal regime by providing in Article 1 of the AUA that “this uniform act is intended to apply to any arbitration when the seat of the arbitral tribunal is located in one of the States Parties.

Therefore, unlike other legislations, the African legislator makes no distinction between domestic arbitration and international arbitration under private law. According to certain authors: "the distinction between domestic arbitration and international arbitration has long

[45] Keba MBAYE, *the harmonization of law in Africa,* international review, January, 2012.p.114.

been threatened by two phenomena: the protagonists increasingly want to escape state laws, the rules specific to international arbitration exerting an attraction on internal arbitration.

Also, given the very strong internationalist character demonstrated by the uniform law which is intended to apply to all States Parties, establishing a new border between this area and other countries in the world may prove unnecessary and dangerous. This means that the unity of the regime brings several advantages. Indeed, it allows jurists to be spared the difficulty of defining and establishing the criterion of internationality which very often varies depending on the country. In this respect, it is appropriate to remember that internationality is mentioned to mark the difference between internal arbitration and that which crosses national borders. Thus, two criteria used separately or cumulatively make it possible to define the concept of internationality: one legal and the other economic. Legally, determining the internationality of arbitration consists of focusing attention on the parties (nationality, domicile, head office), on the terms of the contract, namely the place of conclusion or execution or even on the place of arbitration. Economically, the internationality of arbitration is based on the nature of the dispute such that it involves the interests of international trade. This is also the concept that has been adopted by French case law. Some countries, on the contrary, have opted for the combination of both criteria. This is particularly the case for Guinea and Algeria.

The one-tier system also makes it possible to avoid the delicate question of qualifying the dispute. It therefore becomes useless to seek the criteria of distinction between a national fact and an international fact, consequently justifying the nature of arbitration of arbitration. This therefore means that the unitary approach has the advantage of breaking with the usefulness of the definition of the internationality of arbitration and as Professor FOURCHARD[46] noted in the summary report on OHADA arbitration, during a conference held in Alexandria: “it is obvious, it is simpler, in itself, to have only one body of rules. But it is especially during their implementation that this advantage is tangible, because dualism requires a decision on a qualification problem: is the arbitration internal or

[46] Professor FOUCHARD, “French Law of Arbitration”, comparative legislation society 2007, p.722.

international? The difficulty is greater or lesser depending on the criterion used to distinguish domestic arbitration from international arbitration."

We therefore believe that the Legal Regime Unit contributes to strengthening the legal security of economic activities in the OHADA area given the fact that it facilitates the implementation of community arbitration law.

- The exception to the principle of unity of the legal regime of arbitration in OHADA law

While it is certain that it presents considerable advantages, it also remains true that the unity of the legal regime between domestic and international arbitration can only be relative, the complete assimilation of the two types of arbitration being possible.

A good illustration of the inadvisability of a total merger of the two regulations is provided by the law applicable to the substance. The latter can undoubtedly concern the arbitral procedure but in the case of an internal dispute having no foreign element[47], it cannot relate to the law applicable to the merits of the dispute as provided for in Article 15 paragraph1[48] of the uniform act. Indeed, the problem of choosing the law applicable to the substance of the dispute only arises in a relationship which presents a foreign element; which is by no means the case for purely internal relationships. Also the question of the law that the arbitral tribunal must apply for the resolution of a dispute on the merits only arises for international private law arbitration. It is therefore based on this reality that the African legislator wanted to limit the monist regime to the arbitration procedure. Article 15 paragraph 1 of the AUA provides: "*the arbitral tribunal shall decide the merits of the dispute in accordance with the rules of law chosen by the parties. In the absence of a choice by the parties, the court applies the rules of law that it considers most appropriate, taking into account, where applicable, the practices of international trade".*

[47] The legal situation which includes a foreign element is one which brings into play several national rights (the subject in question are of different nationalities, they are located elsewhere than in their country of origin, the goods in question are located in different countries).

[48] Article 15 paragraph 1*"the cassation appeals provided for in article 14 are brought before the common Court of Justice and Arbitration either directly by one of the parties to the proceedings or upon referral from a national court ruling on cassation seized of a case raising questions relating to the application of uniform acts*".

Ultimately, the unity of the legal regime of arbitration and its framework presents itself as a remarkable originality which, taking into account the objective of regional economic and legal integration pursued by OHADA, allows maximum unification of the law of business, removing any risk of conflict of laws. In this way, such originality constitutes a guarantee of legal security for economic transactions, given that it lays the foundations for arbitration adapted to the global evolution of trade. This adaptation is also enhanced by the indisputable modernism demonstrated by the arbitration system.

3.1.2. The modernism of OHADA arbitration

The business world needs a stable environment and legal rules capable of providing serenity and fluidity. Building on this reality, the OHADA States have adopted modern arbitration law, the aim being to provide sufficient guarantees to economic operators in internal and international trade.

A vector of legal security, this modernism is marked by, on the one hand, the extension of arbitrality to public law legal entities (3.1.2.1) and by the taking into account of lex mercatoria[49] in OHADA arbitration (3.1.2.2) of somewhere else.

3.1.2.1. The extension of subjective arbitrality to legal entities under public law

In order to carry out their public service missions, they are often required to conclude agreements with foreign or national companies. Concluded either by themselves, or through their commercial companies qualified as public companies or public establishments of an industrial and commercial nature, these contracts can relate to the realization of works of general interest, just as they can be of a purely commercial nature. The problem therefore arises of access to arbitration by public law legal entities, given the balance of power that exists between the latter and the individuals with whom they contract. This is therefore an opportunity to recall that before the advent of OHADA, the principle was the restriction of the ability to compromise in international arbitration. Thus, it was in principle not permitted for public law legal entities to conclude an arbitration agreement

[49]Lex mercatoria: set of rules intended to resolve conflicts in an international trade context and without reference to national laws.

within the framework of an internal arbitration. This restriction was first enshrined by the French judge and then by international law.

In France, it was the Myrtoon Steamship case law[50], handed down by the Paris Court of Appeal on April 10, 1957, which established the restrictions placed in domestic law on the arbitrability of disputes concerning public law persons. In this case, the Court had ruled for the first time that "the prohibition imposed on the State to compromise is limited to internal contracts and without application to conventions having an international character" and that "the prohibition which resulted from articles 83 and 1004 of the Code of Civil Procedure is not of international order." Several other judgments confirming this solution will be rendered, among which the most famous, the Galakis judgment[51], of May 2, 1996. In this case, the Court of Cassation rejected the appeal in cassation, finding that "given that the prohibition deriving from articles 83 and 1004 of the Code of Civil Procedure does not raise a question of capacity within the meaning of article 3 of the Civil Code; that the Court of Appeal only had to rule on whether this rule, enacted for internal contracts, should also apply to an international contract concluded for the purposes and under conditions consistent with the customs of maritime commerce; that the contested judgment precisely decides that the above-mentioned prohibition is not applicable to such a contract and that subsequently, by declaring valid the arbitration clause thus subscribed by a legal entity of public law, the Court of Appeal, disregarding of all other reasons which may be considered superabundant, has legally justified its decision."

French administrative law also prohibits the use of arbitration by public law legal entities. In a Eurodisney opinion of March 6, 1986, the Council of State considered that this principle results from "the general principles of French public law, confirmed by the provisions of the first paragraph of article 2060 of the French Civil Code[52] only subject to the exemptions arising express provisions or, where applicable, international conventions incorporated into a domestic legal order, public law legal entities cannot evade the rules

[50] Myrtoon steamship, French Tribunal of Conflict, May 15th, 2010, published in Lebon collection.
[51] Galakis judgment, Cass. Court, May, 2, 1996.
[52] French Civil Code article 2060 "We cannot compromise on questions of status and capacity of persons, on those relating to divorce and legal separation or on disputes concerning public authorities and public establishments and more generally in all matters which concern the public order".

which determine the jurisdiction of national courts by leaving the solution to the decision of an arbitrator disputes to which they are parties and which relate to relationships falling within the domestic legal order. according to the Council of State, this principle is based on the fear that the interests of public entities are not as well protected by arbitrators "(...) legal entities qualified, by the law applicable to them, as legal entities of public law have the power to validly conclude arbitration agreements. Likewise, the Washington Convention of March 18, 1965 for the Settlement of Disputes relating to Investments between States and nationals of other States which was ratified by numerous States which today constitute OHADA, demonstrates that most States does not consider that disputes which may oppose them to foreign investors are not arbitrable. This was the state of the question in the French-speaking states prior to OHADA. Also, the innovations brought by the AAU can be described as unprecedented.

As such, article 2 paragraph 2 AUA provides: “States and local public authorities, public establishments and any other legal entity under public law may also be parties to arbitration, whatever the legal nature of the contract, without being able to invoke their own right to challenge the arbitrability of a dispute, their capacity to compromise or the validity of the arbitration agreement. From the exegesis of this provision, it appears that OHADA arbitration law establishes without restriction the use of arbitration by public law legal entities. The latter can compromise both in a purely internal arbitration and in one where the dispute presents a foreign element. To tell the truth, it must be recognized that it is not the extension of the faculty of public persons to compromise in internal arbitration which is new, because this faculty already existed in other legislations, subject to certain authorizations.

This is also the case in France where article 2060 of the civil code provides: “we can compromise (…) on disputes concerning public authorities and public establishments and more generally in all matters which concern the order audience. However, categories of public establishments of an industrial and commercial nature may be authorized by decree to compromise.” in the same spirit, Iranian law subjects the arbitrality of disputes concerning public persons to the formalism of authorization, also article 139 of the Iranian constitution of November 15, 1979 provides that "the settlement of disputes concerning

public property and governmental or recourse to arbitration to settle said disputes is subject, in each case, to the approval of the Council of Ministers and must be communicated to the assembly. In cases where the opposing party is foreign, and in important domestic cases, it must also be approved by the Islamic consultative assembly. The law determines the important cases." This means that the innovation lies in the absence of prior authorization to compromise which characterizes OHADA arbitration law. This is therefore a remarkable innovation which guarantees legal certainty to investors, with public legal entities no longer being able to assert against their co-contractors their rights and prerogatives of public authority in order to avoid the arbitration procedure to which they would have consented. Thus, by agreeing to resort to arbitration, public legal entities agree in turn to comply with the rules of the game provided for by the AUA and more precisely those contained in said provision. The pure and simple extension of the arbitrality of disputes concerning legal entities under public law, therefore undeniably represents a certain interest for private individuals, brought to contract with the African state entities of the States parties to OHADA, it being understood that, scalded by abuses of state sovereignty, international investors find in arbitration a guarantee against arbitrariness.

We can therefore affirm that such a choice by the African legislator contributes to strengthening the stability and predictability of the rules of law in matters of arbitration which investors need.

3.1.2.2. Taking into account lex mercatoria in OHADA arbitration

Understood as the law of traders or of the societas mercatorum, the lex mercatoria finds its source in the practices of international trade which constitute its cornerstone. The latter are understood as being "the behaviors of operators in international economic relations, which have gradually acquired, through their generalization in time and space, that can be reinforced by their observation in arbitral, or possibly state, jurisprudence. Force of real prescriptions which apply without the interested parties having to refer to them, as long as they do not expressly or clearly deviate from them.

According to YOUGONE[53] Nicephore, international trade uses are classified into two main categories. The first grouping together the uses established by the parties between themselves, that is to say the uses between professionals, and the second corresponding to those which go beyond the circle of commercial professionals to apply generally throughout the world and commercial transactions of all kinds. The author demonstrates that the first category of uses can be sectorial or corporate, that is to say limited to a particular type of activity and that among these uses, while some play a specific role in securing exchanges commercial matters such as the presumption of competence of international trade operators, the effectiveness of the arbitration clause and the unenforceability of the lack of authority of the contract negotiator. Others correspond to the need for mutability in commercial relations such as the presumption of acquiescence in the act of execution different from that defined by the contract and the obligation to renegotiate. The particularity of these uses is that they constitute mandatory standards for international trade operators.

As for the second category, we find there the principle of contractual good faith or the prohibition of contradicting oneself to the detriment of others and the obligations arising from a contractual relationship or the prohibition of contradicting oneself to the detriment of others and the obligations arising from a contractual relationship, such as performance in good faith, the obligation of cooperation and information among others. In all cases, established to guarantee the stability, coherence and permanence of the rules which govern the relations between the actors of international trade, the lex mercatoria or international trade constitute a real legal order in its own right which can be qualified as " 'legal-marketing order'. In this respect, OHADA is not left out. Article 15 paragraph 1 of the AUA stipulates: “the arbitral tribunal shall decide the merits of the dispute in accordance with the rules of law chosen by the parties. Failing this choice by the parties, the court applies the rules of law that it considers most appropriate, taking into account, where applicable, the practices of international trade.

YOUGONE Nicephore, *“international commercial arbitration and development”*, l’harmattan edition, september, 22th, 2016, p.49.

Likewise, article 17 paragraph 2 of the CCJA arbitration rules which deals with the law applicable to the merits of the dispute provides that "in all cases, the arbitral tribunal takes into account the stipulations of the contract and the customs of international trade". Thus, in a specific law, the arbitral tribunal may, if necessary, decide on the merits by taking into account the lex mercatoria. This consideration is obligatory in arbitration held under the aegis of the Court. Moreover, in the Société Ivoirienne (SIR) v. BONSA SHIPHOLDING[54]case, the court considered that the arbitrator who referred to the practices of international trade had ruled in law since these are known by the parts and applied consistently. Also, it decided that by referring to commercial customs whose existence was not contested by the applicant, the arbitral tribunal had ruled in law as it was obliged to do, in accordance with the minutes of 13 September 2004. In practice, this could involve, for example, uses codified by the CCI such as incoterms[55], uses contained in the regulations of the cocoa trade federation (FCC) or even the UNIDROIT principles which, according to several actors, are nothing other than a written transcription of the lex mertaria in the broad sense. Such consideration of lex mercatoria in OHADA arbitration reflects the desire of the African legislator to guarantee to economic actors, especially international ones, stability, predictability, readability, coherence and permanence of the rule of law in international trade.

In all cases, the role of lex mercatoria in the legal security of economic activities is especially perceptible in the fact that arbitrators use them either to fill gaps in national laws or to interpret the parties' contract.

3.2. OHADA arbitration law as a factor of judicial security for economic activities within the States Parties

Judicial security presupposes that justice is delivered in such a way as to secure the interests of the parties to the trial. To achieve this result, justice must guarantee fair and equitable

[54] Société Ivoirienne de Raffinage vs/BONA SHIPHOLDING judgment No 029/2007 of July 19th, 2007, CCJA.
[55]Incoterms make it possible to determine the reciprocal obligations of the seller and the buyer, the distribution of transport costs, as well as the place of delivery which represents the point of transfer of risks from the seller to the buyer

trials to litigants. Both contractual and jurisdictional in nature, arbitration is justice administered by private individuals for remuneration.

As such, it is subject to the principles which govern justice administered by state courts. In the OHADA area, the supranational legislator to guarantee the judicial security of economic operations subjects these two types of arbitration to the guiding principles of good justice which are in reality requirements that we will classify into two groups, notably those which are consubstantial with the jurisdictional function (3.2.1) of an art, and those which are of a procedural nature (3.2.2) on the other hand.

3.2.1. The requirements consubstantial with the judicial function

If it is first important to highlight the meaning of the principle of independence and impartiality (3.2.1.1), it is also appropriate to present the means by which the African legislator ensures its effectiveness (3.2.1.2).

3.2.1.1. The meaning of the principle of independence and impartiality

Much more than simple obligations imposed on the holder of the judicial function, independence and impartiality constitute the very essence of the function of judging. Therefore, it is only because the arbitrator is independent and impartial that he can validly hear a case.

Independence presupposes an absence of subordination. Which means that the arbitrator cannot be bound by the parties who appointed him. According to French jurisprudence, “the independence of the arbitrator is of the essence of his judicial function, in the sense that on the one hand, he accedes upon his designation to the status of judge, exclusive of any link of dependence, in particular with the parties, and that on the other hand, the circumstances invoked to contest this independence must be characterized by the existence of material and intellectual links, a situation likely to affect the judgment of the arbitrator by constituting a certain risk of prevention with respect to one of the parties to the arbitration. The arbitrator against whom the existence of a material and intellectual link of dependence or any situation likely to affect his independence of mind and his freedom of judgment is therefore not independent.

Impartiality presupposes the absence of bias, prejudice, preference, preconceived ideas. This is a requirement consubstantial with the jurisdictional function, the purpose of which is to decide between the parties in a fair and equitable manner. According to Alexandre KOJEVE[56] quoted by Thomas CLAY, "a man may be intelligent, energetic, far-sighted, handsome or something else, we will not choose him if he is presumed to be partial (…) conversely if we just know it, we can turn a blind eye to all other faults. This statement testifies to the importance attached to the impartiality of any person exercising a judicial function. Based on this fact, because he is invested with a jurisdictional mission, the arbitrator must be partial. He must completely erase his origin, his convictions, his religion and his culture in front of the parties and in the pronouncement of the sentence. This means that the arbitrator is required to refrain from any favoritism, that he has a strict obligation not to favor any party and to rule only on reasons which relate to the merits of the claims presented by the parties parts. Impartiality would therefore be a disposition of the mind, a psychological state by nature subjective, the purpose of which is to warn the arbitrator with regard to one of the parties. The courts have had to rule on the notion of arbitrator impartiality. This is the case of the Swiss federal court which had to reject the accusations of suspected bias brought against an arbitrator, on the grounds that it was based only "on the sole subjective feeling of a party and not on concrete facts capable of objectively and reasonably justifying distrust in a person reacting normally."

For FOUCHARD, GAILLARD and GOLMAN[57], there are in practice two sets of circumstances constantly invoked in support of requests for dismissal of arbitrators for lack of impartiality. First, the fact that the appointed arbitrator has already heard the dispute or a related dispute in a previous arbitration. The arbitrator is then criticized for no longer having the objectivity and "candor" that must characterize any judge when faced with a new dispute. Secondly, the suspicion of bias is fueled by a previous attitude of the arbitrator, which one party considers to be hostile towards it, for example in a general debate, which would be contrary to the interests of this party. But to be admitted as a cause

[56]Thomas CLAY repeating the words of Alexandre KOJEVE "outline of a phenomology of law", May 2007, Gallimard editions, p.311.

[57]FOUHARD, GAILLARD and GOLMAN "International Commercial arbitration", edited by Emmanuel Gaillard and John Savage

for challenge, the applicant must be able to prove that the alleged remarks are likely to establish intimacy between the arbitrator and him or that they reflect a prejudice with regard to his theses.

In international matters, the nationality of the arbitrator can contribute to creating doubt in the minds of the parties. This is why it is recommended to provide that the third arbitrator or the sole arbitrator be of a third nationality in relation to the parties. Indeed in international matters, it is well established that the parties very often tend to choose as arbitrator a national of their country which should in no way call into question his impartiality because, to quote Professor Pierre MAYER[58], "the arbitrator not being in the camp of any of the parties on the political, religious or ideological ground. As far as possible, he must endeavor, especially in the case of a sole arbitrator, or the president of an arbitral tribunal, to disregard the greatest sympathy he feels for the values defended by the arbitrator. One of the parties, when they pit one civilization or political system against another, from which the other party comes."

If according to some authors, independence and impartiality are almost inseparable, the first quality suggesting the second, others maintain that these concepts can both be and not be linked. In the first case, the one who is not independent is not impartial and in the second, the one who is independent may however not be impartial.

Gaston KENFACK DOUJNI[59] is even more radical because according to him "it would be hypocritical to think that the arbitrator designated by a party could be as independent as the president of the court or the sole arbitrator must be". The author indicates that one can well be dependent and be impartial and that therefore, impartiality should be the only quality to require of an arbitrator. In any case, the African legislator has opted for the meeting of the two requirements; we can also read in article 7 paragraph 3 AUA that "the arbitrator must (…) remain independent and impartial with respect to the parties". It therefore appears that in both texts, the emphasis on the word "remain" is noticeable. Which means that the arbitrator must provide guarantees of independence and impartiality

[58]KENFACK DOUJNI "the principle of good faith before commercial arbitrators".Lebryant editions, 1993, at 543 and next.

[59]*general themes on OHADA and legal integration*, the Cameroonian Arbitration Review n.32

not only at the time of his appointment but also throughout the arbitral procedure until the arbitral award is pronounced. Its neutrality must remain with regard to all parties, regardless of how they have been designated. This requirement posed by the African legislator is nothing other than the manifestation of its will which is to guarantee judicial security in OHADA arbitration. This desire is all the more evident to the extent that it has provided means to ensure the effectiveness of the requirement of independence and impartiality.

3.2.1.2. Means tending to ensure the effectiveness of the requirement of independence and impartiality

Like modern legislation, to guarantee the parties access to an independent and impartial arbitrator, the African legislator has provided both preventive (3.2.1.2.1) and curative (3.2.1.2.2) means.

3.2.1.2.1. The means of preventive order

In OHADA arbitration law, the prevention of the risk of dependence and bias of the arbitrator is ensured by the obligation of disclosure.

Absent in matters of state justice, the obligation of disclosure has been enshrined in arbitration in general and in that of OHADA in particular with the aim of strengthening the credibility of this alternative but jurisdictional mode of dispute resolution.

In common law arbitration governed by the AUA, “any prospective arbitrator informs the parties of any circumstance likely to create in their minds a legitimate doubt about his independence and impartiality and can only accept his mission with the unanimous and written agreement. The CCJA arbitration rules are in the same vein when they provide that “before his appointment or his confirmation by the court, the anticipated arbitrator discloses in writing to the General Secretariat any circumstances likely to raise legitimate doubts about his impartiality or his independence ".

It follows from these texts that the arbitrator who assumes in his person a cause for challenge must inform the parties and possibly the CCJA if the arbitration in question is conducted under the aegis of this Court. This is a permanent obligation in view of the fact

that it lasts throughout the arbitral procedure until the arbitral award is pronounced. However, what is the nature of the facts to be revealed by the arbitrator?

Indeed, the former Uniform Act used the expression "cause for challenge" in a "rather unfortunate" manner to circumscribe the arbitrators' obligation to inform, which left doubt about the extent of the obligation to revelation. Did this mean that the arbitrator was only required to reveal facts which, for a judge, would be likely to result in his challenge? In other words, was the status of the arbitrator, on this point, modeled on that of the judges? A negative response was imposed by the doctrine.

As such, according to Marc HENRY[60], recusal must be understood here in a general sense and not in the technical sense assigned to it for judges by the codes of civil procedure. The uniform legislation did not refer on this point to the civil procedure codes of the OHADA member states. For him, since arbitrators are not comparable to magistrates, there is no justification for the causes of challenge applied to be modeled on those of magistrates. Thus, due to the use of the terms “independence and partiality”, it is appropriate to set aside any restriction that would be implied by the notion of disqualification as applied to state judges. Arbitrators must therefore reveal any fact likely to raise legitimate doubt in the minds of the parties as to their independence or impartiality. This is also very fortunately the new formula enshrined in the 2017 reforms. In any case, when the revelation is made, the arbitrator will only be able to accept his mission with the unanimous written agreement of the parties. The requirement for writing in this case is not accidental.

Professor LEBOULANGER[61] emphasized that it “is undoubtedly a wise precaution, which will avoid attempts to challenge for purely dilatory purposes, but which could, conversely, be a source of blockage, if one of the parties refuses to give its agreement ". In short, the purpose of the disclosure obligation is to guarantee judicial certainty in arbitration by allowing, on the one hand, the parties to highlight their consent by accepting the arbitrator or by revoking it. On the other hand, this obligation makes it possible to neutralize any

[60] Marc HENRY "the arbitrator’s duty of independence”,L.GDJ editions, march 4th, 2013, p.46.
[61]Pr.LEBOULANGER “international arbitration or law versus legal order”, arbitration review, 2013, and p.322.

dispute at a later stage of the procedure, if the parties do not exercise their right in time or do so unsuccessfully.

3.2.1.2.2. The curative means

As a curative measure, the AUA authorizes the challenge of the arbitrator and leaves it to the parties to settle the procedure which will lead to this challenge. This text also specifies that if the parties have not settled the challenge procedure, it will be up to the competent judge of the State party to rule on this request.

The challenge is only allowed for a cause revealed after appointment of the arbitrator. If the party requesting the challenge of the arbitrator had accepted the appointment of the latter while being aware of the cause which it later invokes as grounds for challenge, said request will be declared inadmissible as late.

If after the appointment of an arbitrator, a party discovers that he does not meet the conditions of independence and impartiality required to judge, it may challenge him.

The CCJA arbitration rules are quite precise on the conditions and the challenge procedure. It also indicates that the challenge of the arbitrator can be based on a "lack of independence or on any reason". The request for recusal is made by sending to the General Secretariat a declaration specifying the facts and circumstances on which this request is based. To be admissible, the request for challenge must be submitted by the party either within thirty (30) days following the date on which the party submitting the request for challenge was informed of the facts and circumstances cited in support of its request of challenge, if this date is after receipt of the aforementioned notification. The CCJA can only rule on the admissibility and merits of the challenge request after the secretary general of the court has put the arbitrator concerned, the parties and possibly the other members of the arbitral tribunal, in a position to present their observations in writing within an appropriate time limit. When the Court admits the challenge, it must replace the arbitrator.[62]

Ultimately, the challenge is a sanction which intervenes when the preventive measure which is the obligation of disclosure has not been respected by the arbitrator. These means

[62] Article 4 of arbitration regulation of CCJA.

make it possible to reestablish the bond of trust between the arbitrator and the parties and are therefore a factor in judicial security because they promote the effectiveness of the requirement of independence and impartiality as an element consubstantial with the jurisdictional function of the arbitrator.

3.2.2. Procedural requirements

We will examine in turn the principle of adversarial proceedings (3.2.2.1) and the requirement of speed in OHADA arbitration (3.2.2.2).

3.2.2.1. Adversarial issues in OHADA arbitration

The principle of "adversarial" figures prominently among the established principles established to ensure the parties are guaranteed a fair trial. It evokes respect for the rights of the defense and implies that in a trial, no party can be judged without having been heard or called. Being the first factor of quality justice, the adversarial innervates the proceeding and must be observed, both at the threshold of the proceeding, this principle implies the right for every person to be informed clearly and regularly of the trial which is done to him. During the proceedings he requires that all parties have the opportunity to organize their defense. This means that adversarial proceedings create reciprocal obligations for the parties as well as obligations towards the judge. This rule does not escape the arbitration procedure, arbitration being endowed with a jurisdictional nature.

In OHADA arbitration law and more specifically in common law arbitration, the adversarial principle is enshrined in Article 9 AUA[63] which provides that the parties are treated on an equal footing and that everyone has every opportunity to assert his rights. The arbitral tribunal is therefore prohibited from basing its decision on means, explanations or documents invoked or produced by the parties if they have not been able to discuss them contradictorily. Also, if with regard to the parties the adversarial presupposes that throughout the arbitral procedure, they communicate to each other in good time the pieces

[63]Article 9 of AUA "The arbitrators may only retain in their decision means, explanations or documents which have been the subject of contradictory discussions between the parties. To this end, the arbitrators may invite the parties to provide them with evidence that they consider necessary for the resolution of the dispute".

or documents necessary for the manifestation of the truth so that these can be debated adversarial, it prohibits the arbitrator from rendering decisions on undisputed facts, the right to be heard by the arbitral tribunal being an enshrined right.

The CCJA arbitration rules are not left out. Indeed, for arbitrations developing under the aegis of this Court, the briefs and all written communications presented by the parties, as well as all annexed documents, are provided in as many copies as there are more parties. One for each arbitrator as well as an electronic copy sent to the General Secretariat. Any notifications or communications from the General Secretariat and the arbitral tribunal are made to the address or to the last known address of the party receiving them or its representative, as communicated by the latter or by the other party, on optionally. It can be made by delivery against receipt, registered letter, transport service, email or by any other electronic means allowing proof of sending. When validly made, the notification or communication is considered acquired when it has been received by the interested party or their representative.

After examining the parties' writings and the documents submitted by the parties to the debate, the arbitral tribunal hears the parties adversarial either at the request of one of them or ex officio. He may, if he considers it necessary, hear them separately. In this case, the hearing of each party takes place in the presence of counsel for both parties. It should be noted, however, that in matters of adversarial proceedings, the most important thing is not the appearance of the defendant party, but that it is called. Therefore, if an informed litigant refuses the adversarial debate, this does not prevent the sentence from being pronounced. Also, it was judged that "the argument based on non-compliance with the adversarial principle must be rejected since it is proven that a party was regularly notified of the composition of the arbitral tribunal and of the holding of the arbitral proceedings at which it did not appear and that moreover this party does not provide any evidence justifying its failure to the arbitral proceedings”.

It therefore follows from all of the above that the principle of adversarial proceedings, a guarantee of a fair trial, is strongly affirmed in the OHADA arbitration system. The legislator has made it a principle of public order to the point where its violation by the arbitrator would result in the annulment of the arbitral award. The Court of Appeal of

Pointe Noire recalled this in the case COFIPA INVESTMENT BANK CONGO against Société COMADIS CONGO[64] in these terms: "from the combined provisions of articles 9 and 14 paragraphs 5 and 6 AUA, it follows that compliance with the contradiction by the arbitrator, and whose non-compliance is sanctioned by the annulment of the award, on the one hand, of the obligation which is on him to assert his claims, know those of his opponent and proceed to their discussion, and on the other hand, the prohibition of relying on means raised ex officio without the parties having been previously invited to discuss them, or of carrying out personal investigations alone. In this case, the arbitrator himself carried out an investigation without involving the parties, or even submitting for discussion the elements of fact or law accepted during this investigation.

He therefore clearly failed to observe the adversarial principle, and his sentence is pending annulment." This means that respect for the adversarial principle in arbitration is at the heart of legislative and judicial thinking in the OHADA area. Its respect makes it possible to improve the quality of arbitral justice. A necessary quality for the judicial security of economic activities in the integrated legal space.

3.2.2.2. The requirement for speed in OHADA arbitration

Fundamental, but sometimes neglected or poorly applied, the principle of celerity constitutes the backbone of procedural law, it being understood that justice rendered late is justice rendered late is justice of poor quality because it very often leads to the "paradox of a legally winning party, and an economically losing party." Seen in this sense, judicial delays can only be a source of judicial insecurity.

Enshrined in the African Charter on Human and Peoples' Rights as the right to be judged within a reasonable time, the principle of celerity suggests thinking about the pace, or even the time, of the procedure; the objective being to distinguish "useful times, which improve the quality of the procedure, and dead times which must disappear".

[64]Court of Appeal of Pointe-Noire, judgment of March 4th, 2005, COFIPA INVESTMENT BANK CONGO vs/COMADIS CONGO, ohadata J-13-73.

At the heart of the reflection in OHADA law, the 2017 reforms made in arbitral matters did not ignore procedural deadlines, carefully organizing them with the aim of preventing judicial delays in arbitral matters and neutralizing as much as possible the delaying tactics of the parties and even the judges involved in an arbitral procedure. Therefore, anxious to propose arbitral procedures which meet the expectations of litigants, for whom this method of settling disputes is expensive, the African legislator has placed a remarkable emphasis on deadlines both in the "ante sentiam" phase and in the “sententia” and “post sententiam” phases.

In ad hoc arbitration and at the ante sentiam phase consisting of the moment of the constitution of the arbitral tribunal and that of the instance, in the event of arbitration by three arbitrators, each party appoints one arbitrator and the third is designated by both others. The deadline for designation is thirty (30) days from the request for this purpose from the other party. In the event of disagreement between the two arbitrators on the choice of the third, the parties have a period of thirty (30) days from their appointment to refer the matter to the competent court of the State Party for the purpose of putting an end to the deficiency. The latter in turn has a period of fifteen (15) days from its referral to render its decision which cannot be the subject of any appeal. This period may be shortened by the legislation of the State Party. Indeed, the deadline imposed on the state judge to put an end to the blockage likely to arise during the constitution of the arbitral tribunal constitutes a novelty given that the former Uniform Act was silent on this question; which is a preventive measure which promotes the neutralization of delaying tactics at this phase of the arbitral procedure.

In matters of challenge, the African legislator has once again demonstrated enormous pragmatism by imposing a period of thirty (30) days on the state judge seized of a request for challenge to render his decision; deadline, non-compliance with which is punishable by the relinquishment of said jurisdiction to the benefit of the CCJA. This new measure is beneficial given the judicial environment of the States parties to the OHADA treaty, strongly marked either by the congestion of the courtrooms, or by the errors of the magistrates who sometimes allow themselves to be carried away by the wind of corruption which blows over them, pushing them to make incessant referrals whose sole purpose is to

drag out the trial for the benefit of a party in bad faith. The African legislator also requires that any cause for challenge must be raised within a period which cannot exceed thirty (30) days from the discovery of the fact which motivated the challenge by the party who intends to invoke it.

The arbitration proceedings are also marked by strict deadlines. Also, if the parties have not conventionally set a deadline for their arbitration, the African legislator caps the duration of the procedure at six (06) months from the day on which the last arbitrator accepted his mission. However, the arbitration deadline, whether legal or conventional, may be extended, either by agreement of the parties, or at the request of one of them or of the arbitral tribunal, by the jurisdiction of the State party. . In addition, in the event of difficulty linked to the manifestly void or manifestly inapplicable nature of the arbitration agreement, the state court has a maximum period of fifteen (15) days to rule on its jurisdiction, and the possibility of filing an appeal. Against its decision in the matter reported in the 1999 AUA was in contradiction with the nature of arbitration which is intended to be rapid. The setting of a maximum period of fifteen (15) days and the setting aside of the principle of the double degree of jurisdiction in matters of competence of the state judge is a salutary innovation, having regard to the harmonization between OHADA arbitration legislation and the objective of judicial security for the parties.

In the sentia phase, in the event that the arbitral award requires interpretation or rectification due to errors or omissions affecting it, or even when the judge has failed to rule on a head of claim, the parties have thirty (30) days from notification of the sentence to formulate their request. The arbitral tribunal will then have forty-five (45) days to rule in the first case on the request for interpretation or rectification of material errors, and in the second case to render an additional award[65].

The post sentiam phase is also marked by the principle of celerity. As such, the AUA provides a time limit for filing an appeal for annulment of the arbitral award. The parties can therefore introduce this appeal as soon as the disputed award is pronounced, a possibility which ceases within one month of the service of the award with exequatur. The

[65] Article 31 of Uniform Act relating to arbitration law.

competent court is required to rule within a period not exceeding three (3) months and as in matters of recusal, if it fails to respect this deadline, it will be relinquished in favor of the CCJA which may be seized within fifteen (15) following days. Community Court in turn has six (06) months from the referral to rule. This is also a new measure which aims not only to effectively prevent delaying tactics by those involved in the arbitral process, but also any other form of delay likely to harm the creditors of the execution of the arbitral award.

CCJA institutional arbitration does not deviate from the principle of celerity. The African legislator has spared no effort to regulate procedural deadlines applicable to this type of arbitration. Also, when a party has sent a request for arbitration to the Secretary General of the Court, the defendant(s) have thirty (30) days from receipt of said response to respond with an additional note. When constituting the arbitral tribunal, the CCJA arbitration rules provide for a period of thirty (30) days within which the parties must appoint the sole arbitrator. This period runs from the date of notification of the request for arbitration to the other party. In the absence of agreement between the parties within this period, it runs from the date of notification of the arbitration request to the other party. In the absence of agreement between the parties within this period, the arbitrator is appointed by the Court. If the parties have not fixed by mutual agreement the number of arbitrators and the Court deems it necessary to constitute a collegial tribunal, the arbitration rules indicated above grant a period of fifteen (15) days to the parties. To designate their referees. When several claimants or defenders must submit joint proposals to the Court for the appointment of an arbitrator and these are not agreed within the time limit, the Court may appoint the entire arbitral tribunal. The request for challenge must, under penalty of foreclosure, be submitted either within thirty (30) days following receipt by the party requesting it of notification of the appointment or confirmation of the arbitrator by court, or within thirty (30) days following the date on which the party submitting the challenge request was informed of the facts and circumstances that it cites in support of its request, if this date is after receipt of the file, the arbitral tribunal summons the parties or their representatives, as well as their counsel to a scoping meeting as quickly as possible and at the latest within forty-five (45) days of its referral. The provisional timetable for the arbitral procedure will be set there and it will specify the dates for submission of the respective briefs deemed necessary and,

where applicable, the date of the hearing must not be set beyond six (06) months. Unless extended by the Court of its own motion or at the request of the court, the sentence is drawn up and signed within ninety (90) days following the order closing the proceedings[66].

However, the Court examines the draft sentence and issues its opinion within one (01) month following the date of referral. As in ad hoc arbitration, in the event that the arbitral award requires interpretation or rectification due to errors or omissions affecting it, or even when the judge has failed to rule on a head of claim, the parties have thirty (30) days from notification of the award to formulate their requests. The general secretariat communicates, upon receipt of the request, the court and the opposing party so that it can send its observations to the court and the opposing party within thirty (30) days. After having examined the points of view of the parties and any documents submitted, the court is required, within forty-five (45) days of its referral, to send the draft additional or corrective award to the Court. If a party wishes to file an action for annulment of the award, this action will be admissible as soon as the said award is pronounced, this action will be admissible as soon as the said award is pronounced and will cease to be admissible within two (02) months of its notification. The Court will rule within six (06) months of its referral. The arbitral award is subject to exequatur upon its delivery. This may also be granted within fifteen (15) days of filing the request, by an order from the President of the Court or the judge delegated for this purpose. This procedure is non-contradictory. With regard to provisional or protective measures, the exequatur decision in the matter is rendered within three (03) days following the filing of the application with the Court[67]. In the event of refusal of the exequatur, the requesting party may refer the matter to the Court within fifteen (15) days of notification of the rejection of the request. This period is reduced by (03) days when the appeal relates to provisional or protective measures[68].

It appears from the above that the OHADA arbitration system is strongly imbued with the requirement of speed. It exists at all phases of the arbitration process, whether in the ante sentiam phase, in the sentia and post sententiam phases. The African legislator has carefully

[66] Article 8 of Uniform Act relating to arbitration law.
[67] Article 13 of Uniform Act relating to arbitration law.
[68] Article 27 of Uniform Act relating of arbitration law.

regulated the procedural deadlines so that the arbitration does not exceed a duration of six (06) months, unless otherwise agreed by the parties. Such concern for speed has the merit of putting into music the arbitration system of the organization and the objective of the latter which is to guarantee judicial security to investors through arbitration.

CHAPTER FOUR: THE LIMITS OF OHADA ARBITRATION

The texts which govern arbitration in the OHADA area are largely inspired by French law and the material rules[69] of international arbitration. The latter imbued with a liberal philosophy establishes the primacy of the parties in the development of the arbitration agreement, in the constitution of the tribunal and the conduct of the arbitral proceedings. International arbitration places a very important place on the autonomy or independence of the arbitration agreement, the principle of competence of arbitrators and the execution of arbitral awards. These material rules of international arbitration are taken up and codified by different national legislations[70].

The uniform act brings an essential innovation, it adopts a single arbitration law. The reasons why a legislator chooses a legal regime for arbitration varies from one country to another and often depends on several factors. The latter are often linked to the history of the country, its legal traditions[71], the greater or lesser experience of international trade[72], or procedural reasons[73]. In France, it is jurisprudence which has gradually introduced a dualist regime, to compensate for the unsuitability of the very rigorous and restrictive rules of domestic arbitration for international arbitration. This jurisprudential concept was enshrined by the decree of May 12, 1981 modified by that of January 2011[74]. Unlike French law from which it was inspired, OHADA arbitration law does not make a distinction between domestic and international arbitration. In our opinion, this choice can be explained for reasons linked to the harmonization and legal integration of the Member States. Two different arbitration regimes coexist in the OHADA area. We have on the one hand, the

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[69] In private international law, material rules are defined as norms or rules in which the international situation finds its direct application or regulation. These material rules are the work of jurisprudence. They have the advantage of avoiding the difficult application of conflict rules.

[70]Article 4 of the Uniform Act codified a material rule of validity of the arbitration agreement which takes up the terms of the Dalico judgment; Cass.Civ.I, December 20 1993.

[71]J-M. JACQUET, "the law applicable to the merits of the dispute*", OHADA and the perspectives of arbitration in Africa*, Brussels, Bruylant, 2000, pp.100-107.

[72] English arbitration law does not distinguish between international arbitration and domestic arbitration.

[73] Switzerland, for procedural reasons, has opted for the dualist system which can be explained by the constitutional distribution of powers between procedure and substantive law. P.LALIVE, "A false problem: monism or dualism in arbitral legislation*", the law of international and international arbitration in Switzerland*, Lausanne 1989.

[74] E.GAILLARD, "*the new French law of internal and international arbitration*", recueil Dalloz, Jan.2011.

uniform act which is the common law of arbitration, which regulates internal and international, civil and commercial arbitration and, on the other hand, the Treaty and the regulations of the CCJA which organize institutional arbitration of the Common Court of Justice and Arbitration[75]. The object of our reflection is not to compare them but rather to analyze the obstacles to a good application of these texts (4.1). Then, our analysis will focus on the difficulties of applying the arbitration agreement (4.2).

4.1.Problems linked to the application of the texts

Certainly the various texts governing arbitration in the OHADA area are inspired by international arbitration law, the fact remains that they contain shortcomings. It is appropriate to examine the legal regime of the uniform act (4.1.1), then to study that of the institutional arbitration of the CCJA (4.1.2).

4.1.1. The legal regime of arbitration in the uniform act

Under the terms of Article 1 of the uniform act: "this uniform act is intended to apply to any arbitration when the seat of the arbitral tribunal is in one of the Contracting States". This clearly reflects the choice of the unity of the legal regime (4.1.1.1), but beyond its advantages in arbitral practice, it has limits (4.1.1.2).

4.1.1.1. The consecration of the unity of the legal regime

The legal regime of arbitration often depends on its internal or international character[76]. The community legislator, for his part, chose the unity of the legal regime, in article 1 of the uniform act cited above. He clearly demonstrates great originality and pragmatism. Indeed, it makes no distinction between domestic and international arbitration; likewise, the uniform act applies to both commercial and civil arbitration. It also applies to ad hoc and internal institutional arbitrations as long as the seat of the arbitration is located in the OHADA area. The entire system is therefore based on the notion of seat which the uniform act has not defined. In our opinion, the expression: "the seat of the arbitral tribunal is in one of the States Parties"[77], designates an arbitration taking place in the territorial space of

[75] G.Kenfack-DOUAJNI, "*C.C.J.A arbitration rules*" (international business law review), 1999, n.7 p.827.

[76] Some countries such a France, Switzerland, Denmark and Ireland have chosen to separate domestic and international arbitration. On the other hand, other countries such as England and the Netherlands have chosen the duality of legal regime. Finally, a certain number of exceptions to it, or provisions specific to international arbitration.

[77] Article 4 of Unifom Act relating to arbitration.

OHADA. This area is made up of 17 states, mainly French-speaking countries in sub-Saharan Africa. The unity of the legal regime has several advantages. It allows jurists to avoid the difficulties of defining and assessing the criteria of internationality which vary from one country to another. The one-tier system also makes it possible to avoid the very delicate question of qualifying the dispute. It therefore becomes useless to seek the criteria of distinction which make it possible to qualify the disputed fact as national or international and consequently justifying the nature of the arbitration. The unity of the legal regime of arbitration chosen by OHADA is logical and meets the objectives of economic and legal integration. This involves, as one of the drafters of OHADA arbitration law revealed: "harmonizing the internal affairs law of States, without reserving the new rules for national or regional relations"[78].

This unitary approach has the advantage of making a definition of the internationality of arbitration unnecessary. As Professor FOUCHARD[79] noted in the summary report on OHADA arbitration, during a conference held in Alexandria: "It is obvious, it is simpler, in itself, to have only a single body of rules. But it is especially during their implementation (rules) that this advantage is tangible, because dualism requires a decision on a qualification problem: is the arbitration internal or international? The difficulty is greater or lesser depending on the criterion used to distinguish domestic arbitration from international arbitration. The drafters of the uniform act on arbitration, after several months of discussions and hesitation, ended up proposing to the community legislator the regime of unity of the legal regime, without dissipating the numerous reservations. These reservations mainly concern the substantive rules applicable to internal arbitration. This leads us to analyze the limits to the unity of the legal regime.

4.1.1.2. Limits to the unity of the legal regime

The unity of the legal regime certainly presents considerable advantages but it presents limits in relation to the law applicable to the substance, to the arbitration agreement and to a certain extent, to the execution of arbitral awards.

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[78] PH. FOUCHARD, *OHADA and the perspectives of arbitration in Africa*, Brussels, Volume 1, ed.Bruylant, 2002,p.235.

[79]Ph.FAUCHARD, *"when is an arbitration international?"* conference at the French arbitration committee, arbitration review 1970, p 75.

In comparative law, the frank opposition between domestic and international arbitration is rather rare. When a country has two entirely distinct regulations, it is most often because it has adopted the UNCITRAL model law to govern international arbitration, while leaving its regulations for domestic arbitration in place[80]. This is the case for certain Maghreb countries, for example, Mauritania, Tunisia, Algeria and Morocco. Furthermore, in Europe, as Mr. LALIVE says: "there are legislative specificities", for example, countries like England and Germany have unique legislation on arbitration but other countries like France and Switzerland, have a dual regime[81].

The question is not, in reality, as Doyer Mayer[82] says: “should we distinguish or not? But rather: to what extent should we distinguish between international and internal arbitration? ". Certainly, a total absence of identity of the rules as done by the uniform act on arbitration is possible but it would be necessary to make a strong distinction without taking into account the specificity of certain rules of substance and form applicable to arbitration internal ?

Indeed, the unity of legal regime between internal and international arbitration can only be relative. A good illustration of the undesirability of a total merger of the two regulations is provided by the law applicable to the substance. The latter can undoubtedly concern the arbitral procedure but in the case of an internal dispute having no foreign element, it cannot relate to the law applicable to the merits of the dispute as provided for in Article 15 paragraph 1 of the uniform act. Under the terms of this provision: “the arbitrators shall decide the merits of the dispute in accordance with the rules of law designated by the parties or failing that chosen by them as the most appropriate taking into account, where applicable, the practices of international trade”. Article 15 paragraph 1 is inspired by French international arbitration law[83].

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[80]A.DIMOTLISA, “*points of divergence between the new Greek law on arbitration and the UNCITRAL model law*”, Rev.Arn.2000, pp.227-228.

[81]P.LALIVE, “*A false problem: Monism or Dualism in arbitration legislation*”, this contribution made to the University of Geneva is available online: https://www.lalive.law.

[82]Doyen MAYER “*Should we distinguish between domestic arbitration and international arbitration*?” arbitration review 2005, p.361-374.

[83]On the law applicable to the merits of the dispute, OHADA takes up article 1511 of French international arbitration law modified by Decree No.2011-48 of January 13, 2011 reforming arbitration which provides:

This provision establishes the primacy of the will of the parties which is the basis of arbitration. This preeminence of the will of the parties exists from the beginning to the end of the arbitration. But it happens that in their arbitration agreement, the parties have not been able to provide for the law that applies to the resolution of their dispute. In this case, it is up to the arbitrators to choose for the parties by applying "the most appropriate rules of law"[84]. However, as Article 15 al 1 is worded, the choice of law applicable by the parties or the arbitrator is not only limited to international disputes. Does this mean that the drafters of the uniform act on arbitration wanted to confer such freedom also for a purely internal relationship?

This difficulty could arise in the context of an internal arbitration if the parties had not provided for the applicable law in their agreement. In this eventuality, the arbitrators could apply the rules of law that they consider appropriate. We will illustrate these risks of difficulties in applying the unity of the legal regime in the context of purely internal arbitration. Please note that the following case is fictitious.

Assuming that the industrial and cement marketing company (French company), based in Rufisque (Senegal) has signed a contract for the sale and delivery of cement with a Senegalese real estate company, in which the State of Senegal is the main shareholder. This company must build social housing. The parties mutually agree to possibly resolve their dispute through arbitration. Given the numerous power cuts that occurred, combined with a high demand for cement, the cement plant was unable to honor its commitments. Following several unsuccessful conciliation attempts, the two parties decided to resort to arbitration but they were unable to agree on the applicable law in their agreement. They then submit their dispute to the arbitrators. The arbitrators decide to apply a foreign law on the basis of articles 14[85] and 15 of the uniform act. An arbitration award rules in favor of the cement company. The State of Senegal files an action for annulment with the Dakar

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"The arbitral tribunal decides the dispute in accordance with those it considers appropriate. It takes into account commercial practices in all cases. This provision only applies to international arbitration in France.

[84] Article 15 of the AUA: "the arbitral decides the merits of the dispute in accordance with the rules of law chosen by the parties. In the absence of a choice by the parties, the arbitral tribunal applies the rules of law that it considers most appropriate, taking into account, where applicable, international trade practices.

[85] Article 14 states: "the parties may directly or by reference to arbitration rules regulate the arbitration rules regulate the arbitral procedural aw of their choice. In the absence of an agreement, the court may proceed with arbitration as it deems appropriate…"

regional court on the grounds of fraud in the law and violation of the internal public order of the State of Senegal. The opposing party maintains the opposite, relying on Article 15 of the uniform act.
The question that is asked is whether in the context of an internal arbitration between two parties of different nationalities, in the absence of a law chosen by the parties, the arbitrators can apply a foreign law to an internal situation.

In the absence of a choice of applicable law by the parties, the arbitrators may determine the applicable law. But if this scenario is common in international arbitration, in an internal dispute, it must take into account the rules of internal public order, at the risk of being considered as a fraud on the law.

In the absence of choice by the parties, we believe that in this case the arbitration does not present any foreign element, the dispute takes place exclusively in Senegal, and the judge could invoke either fraud against the law, or retain a violation of public order.
In the case of a purely internal economic relationship, arbitrators should not apply foreign law. This would be a fictitious, artificial internationalization which would constitute a fraud on the law[86] with a view to evading internal and community public order provisions.
In our opinion, the judge could annul the disputed award based on article 26 of the uniform act which provides that an award may be annulled: "if the arbitral tribunal has violated a rule of international public order of States signatories". This case is one of the six means of annulment of the award[87].

In terms of applicable law, it is difficult to completely assimilate domestic arbitration and international arbitration[88]. In international arbitration, the parties can choose the law applicable to the merits of the dispute. In the absence of such a choice, a problem of conflict of laws arises for the arbitrator: he will have to determine the law which, among others,

[86] In law, the notion of fraud against the law designates the manipulation of a legal situation with the aim of transgressing a law, in its spirit or in its law. The constituent elements are bad faith and the use of a device derived from its purpose. In private international law, evasion of the law generally aims to circumvent the classic rules for attribution of legal jurisdiction, that is to say, to choose the competent court.
[87] MAYER and V.HEUZE, international private law, Montchrestien edition, 9,No 391,p.291.
[88] P.MEYER, "Uniform Act of March 11, 1999 relating to arbitration law", in OHADA Treaty and uniform acts commented and annotated, Juriscope, 2002, p.123.

could have been intended to apply and govern the merits of the dispute. However, such problems obviously do not arise in the context of internal arbitration because the latter being that of an internal contract, it is governed by internal state law with regard to the substance of the dispute. The unity of legal regime nor can it concern all aspects of the legal regime of the arbitration agreement. Under the terms of article 4 paragraph 1 of the uniform act on arbitration: "The arbitration agreement is independent of the main contract. Its validity is not affected by the nullity of this contract and it is assessed according to the common will of the parties, without necessary reference to state law. This provision is inspired by the DALICO[89] case law but unlike the latter, it does not include any reservation to the validity of the arbitration agreement. What should be remembered from this provision is that it targets arbitration agreements in general and not only arbitration agreements under private international law[90].

Does this mean that Article 4 intends to assess the validity of an internal arbitration agreement? If this is so, it remains silent on the conditions of formation and validity of the arbitration agreement. Indeed, if the contract is the law of the parties, it must obey the conditions of substance and form. The substantive conditions concern the consent, the object, the cause and the capacity of the persons to compromise. These are governed by the law of the parties. In our opinion, in the context of internal arbitration, it is inconceivable that the arbitrators have the power to set the conditions for the formation of the arbitration agreement.

The Common Court of Justice and Arbitration and the national courts must not delay in ruling on these delicate questions. Indeed, any internal agreement, even an arbitration agreement, can only be assessed in relation to the state law from which it derives its binding force. It is therefore rationally unthinkable for an internal contract to escape the conditions of validity that state law lays down. On this point, it is difficult to equate internal and international arbitration. The importance of the rules of public order can be manifested at the level of the execution of arbitral awards, because it is in the interest of the parties that they are executed. The uniform act sets standards for the recognition and enforcement of

[89] Cass.Civ,first,December 20,1993, Dalico, JDI, 1994 432, note E.GAILLARD; Arbitration Review, 1994.116.
[90] Idem, p.123.

arbitral awards, taking into account the New York Convention[91].
In application of its article 31 paragraph 4, the uniform act provides that: “recognition and exequatur are refused if the award is manifestly contrary to the international public order of the States Parties”. It should also be added that the national judge could rely on Article 31 cited above and combined with Article 26 paragraph 5, which provides: "the action for annulment is not admissible... if the court has violated a rule of international public order of the States parties”.
After having shown the interest and the limits of the legal regime of the uniform act on arbitration, it is up to us to analyze that of arbitration within the framework of the regulations of the C.C.J.A (Common Court of Justice and Arbitration).

4.1.2.2. The legal regime of arbitration of the Common Court of Justice and Arbitration

Encouraging the use of arbitration for the settlement of contractual disputes is one of the means of achieving the harmonization of business law. This harmonization involves the creation of judicial and arbitral institutions. This is how

The Common Court of Justice and Arbitration was created by OHADA with a view to ensuring a triple function: consultative, jurisdictional and arbitral[92]. Before addressing the arbitration regime of the C.CJ.A, we consider that, given its importance in the functioning of OHADA, it is necessary to briefly present its various skills (4.1.2.2.1) then to study its legal regime of arbitration without forgetting its limits (4.1.2.2.2).

4.1.2.2.1. The arbitral and jurisdictional powers of the C.C.J.A

The CCJA stands out for its dual function, it is both a permanent arbitration center and a judicial court controlling the regularity of awards and issuing exequatur.
“Exequatur is the procedure by which the court gives enforceability to a sentence or

[91]United Nations convention of June 10, 1958 known as the New York Convention on the recognition and enforcement of foreign arbitral awards, to which 142 States are parties, including member countries of OHADA.
[92]In its arbitration mission, the CCJA does not decide disputes itself, it ensures the implementation and proper conduct of arbitration procedures and examines arbitral awards, cf. the arbitration rules of C.C.J.A, of March 11,1999, J.O OHADA may 15,15,1999,p.9.

authorizes the execution of a judgment or a foreign act. »[93] The arbitration which can take place under the aegis of the C.C.J.A is organized by Title IV of the OHADA Treaty[94] and the internal regulations of the Court[95]. Article 21 paragraph 2 of the OHADA treaty provides that the "CCJA does not itself resolve disputes. It appoints or confirms the arbitrators, it is informed of the progress of the proceedings and examines the draft awards"[96]. The CCJA arbitration rules include these provisions[97] and specify its powers. The CCJA only appoints arbitrators to sit in a case in the event of failure of the parties. For the procedure, the CCJA does not just receive information and examine the draft sentences, in fact, in many cases, it ensures the smooth running of the proceedings. In particular, it rules on requests for challenge[98] and assesses the appropriateness of replacing an arbitrator[99]. Likewise, article 1.1 of the CCJA arbitration rules indicates that the decisions taken by it within the framework of its powers are of an administrative nature. It should be noted that these decisions concern the arbitration procedure and the examination of the award. These decisions cannot be the subject of unmotivated appeals and have the authority of res judicata. But some[100] maintain that a voluntary appeal is possible. Although the solution may generate some delays, it is still more consistent with the guiding principles of a fair trial. Alongside its arbitral powers, the C.C.J.A also exercises jurisdictional functions, which is rare for an arbitral court and shows its originality compared to other permanent arbitration centers. This specificity is explained

[93] G.GORNU, "legal vocabulary", Guadrige edition, May 1st 2022, p.151.

[94] Title IV of CCJA arbitration regulation from art.21 up to 26.

[95] Judgment No.44 of July 17, 2008, rev.arb.2010. comments from Professor MAYER

[96] Article 24 of the treaty OHADA specifies that following the examination of the award, the CCJA can only propose purely formal modifications.

[97] Article 2.2 of CCJA arbitration regulation.

[98] The CCJA is the court of cassation of States-parties since it is appeal directed against the decisions rendered by the courts of the States-parties in case raising questions relating to the application of the uniform acts and regulations provided for in the OHADA treaty, with the exception of decisions applying criminal sanctions.

[99] Indeed, under the terms of the said article "any party who, after having raised the incompetence of a national court ruling in cassation, considers that this court has, in a dispute concerning it, disregarded the jurisdiction of the common court of justice and arbitration of the contested decision. The court decides on its jurisdiction by judgment which it notifies both to the parties and to the court in question. If the court decides that this court has wrongly declared itself competent, the decision rendered by this court is deemed null and void.

[100] R.BOURDIN "*the regulations of the Common Court of Justice and Arbitration regulations*", Rev.Cam.Arb.1999,No 5, pp.47.

by the fact that the CCJA, unlike other arbitral courts, is a true supranational jurisdiction of the member states of the organization[101]. It is competent for all disputes relating to the interpretation and application of uniform acts. But it should be noted that it is only at the cassation stage that the CCJA intervenes instead of the Courts of Cassation or the national Supreme Courts. It ensures the common interpretation and application of the treaty, the regulations adopted for its application and uniform acts. Thus, "Seized by way of appeal in cassation, the CCJA rules on the decisions rendered by the courts of appeal of the States parties, in all cases raising questions relating to the application of the uniform acts and the regulations provided for to the treaty with the exception of criminal sanctions".[102]

In the event of cassation, it discusses and rules on the merits. Likewise, on the basis of Article 18 of the Treaty, the CCJA has jurisdiction to rule on the action for annulment. Thus, pursuant to Article 29 of its arbitration rules, the CCJA is competent to rule on the validity challenge directed against an arbitral award rendered under the aegis of the CCJA arbitration but on the condition that the parties do not have not waived it in the arbitration agreement. This appeal may only be based on one or more of the grounds listed in Article 30.6 of the arbitration rules authorizing opposition to the exequatur[103]. Which leads us to study the non-jurisdictional powers of the CCJA. Beyond these consultative, jurisdictional and arbitral powers, the object of our reflection consists of examining its legal regime.

4.1.2.2. The legal regime of arbitration of the Common Court of Justice and Arbitration

The OHADA Treaty allows for arbitration in accordance with Article 21 and Article 2.1 of the CCJA Arbitration Rules. Article 21 al.1 provides: "that in application of an arbitration clause or an arbitration agreement, any party to a contract, whether one of the parties has his domicile or habitual residence in a State party, whether the contract is executed or to be executed in whole or in part in the territory of one or more States, may submit a

[101] Under the terms of Article 14 paragraph 3 of the Treaty: seized by way of an appeal in cassation, the courts of appeal of the States parties in all cases raising questions relating to the application of the uniform acts and regulations provided for in this Treaty with the exception of the provisions applying criminal sanctions".

[102] Article 14 of OHADA treaty.

[103] Article 30.6 of aforementioned regulation.

contractual dispute to the arbitration procedure provided for by the treaty.
It follows from this provision that the OHADA Treaty allows recourse to arbitration before the CCJA under three conditions:
-Whether there is an arbitration clause or an arbitration agreement;
-Whether one of the parties to the dispute has his domicile or habitual residence in a State Party or whether the contract is executed or to be executed in whole or in part in the territory of one or more State Parties;
-Whether it is a contractual dispute.

The first condition set by art. 21. Paragraph 1 of the treaty, namely the arbitration clause and the compromise, have not been the subject of a definition, neither by the uniform act on arbitration, nor by the treaty. The second condition determines the territorial scope of the CCJA arbitration which is composed of all the territories of the States parties to the OHADA treaty. These territories are attractive for competence by a double variable: namely on the one hand, the location of the domicile or residence of the parties to the contract and, on the other hand, the execution of the contract.
Finally, the third condition calls for a single comment. It is not necessary for the execution to have started, nor for it to be carried out entirely on the territory of one of the States parties to the treaty: a partial execution, or even a simply planned execution, is sufficient.
While the uniform act relating to arbitration law is based on Article 2 of the Treaty, the CCJA arbitration rules are based on Articles 21 and next. Thus, under the terms of Article 21 of the Treaty, "in application of an arbitration clause or an arbitration agreement, any party to a contract, whether one of the parties has his domicile or habitual residence in a State Party, whether the contract is executed or to be executed in whole or in part in the territory of one or more States Parties, may submit a contractual dispute to the arbitration procedure provided for by the treaty.
What should be remembered from this provision is that, on the one hand, CCJA arbitration is exclusively limited to contractual disputes, and, on the other hand, contracts must be executed in a member state OHADA. In other words, the main criterion for the arbitrability of disputes is the contract. This main criterion must be accompanied by one of the secondary criteria, which consists of the domicile or habitual residence of one of the parties in a Member State. Indeed, if it is true that contractual disputes constitute the majority of

disputes generally subject to arbitration, the fact remains that this restriction does not fit with the objectives of OHADA consisting of encouraging arbitration. To tell the truth, we do not understand the motives which guided the drafters of the Treaty to limit the competence of institutional arbitration. In addition, contracts which may be submitted to arbitration by the Court must either be executed in one of the member states of OHADA, or be contracts in which one of the parties has his domicile or residence in the country, one of the Member States[104]. Such an interpretation would lead to uncertainties and call into question the harmonization project. It is difficult to understand this restriction of the jurisdiction of the CCJA, limited exclusively to OHADA. These arbitrability criteria constitute obstacles to the development and attractiveness of the CCJA, especially since the latter, when it was created, had the objective of removing the European monopoly of the International Court of Arbitration of Paris.
The legal regime of CCJA arbitration, as we have said, is restrictive and contrary to the objectives set by OHADA.

These objectives, remember, consist of fighting against legal and judicial insecurity and attracting foreign investors, who in the event of a dispute, will be able to choose CCJA arbitration. In our opinion, for its prestige and its influence, the arbitration of the Court should have been open to all contractual disputes wherever they come from. To do this, Article 21 of the Treaty and the Rules of Court would have to be amended. Thus, the CCJA, like the Paris International Court of Arbitration, could hear disputes from all walks of life. For example, France is the main economic and commercial partner of the franc zone countries, so a dispute originating from France should not be decided under the aegis of the CCJA since the aforementioned article 21 paragraph 1 excludes, which is not likely to attract and reassure foreign investors who do not have confidence in African justice. To date, the arbitration center of the Common Court of Justice and Arbitration has only received around thirty arbitration requests.

[104] The notion of domicile is understood like that of headquarters. The domicile or residence of natural persons and the headquarters of legal entities are assessed according to identification criteria which do not fall under arbitration law. But we will have recourse either to personal law or to commercial law.

The inaccuracies and inadequacies of the texts are found in the implementation of the arbitration agreement which we will study.

4.2. Problems related to arbitrality and the autonomy of the arbitration agreement

The legislator did not take care to define the arbitration agreement. It can be defined as "the agreement by which the parties decide to resort to arbitration"[105]. The arbitration agreement is a contract which is subject to general conditions of formation and validity of contracts. These terms and conditions are capacity, consent, cause and purpose. This last condition is essential because it makes it possible

To determine the arbitrability of the dispute. The arbitrability of the dispute is one of the fundamental questions of arbitration law because without it, the arbitral procedure is not valid. Arbitrability can be defined as: "the ability of a matter or a disputed question to be the subject of arbitration"[106]. OHADA arbitration law places an important place on the arbitrability of disputes and the autonomy of the arbitration agreement. The question of the capacity to compromise natural and legal persons under public law is taken into account by the uniform act in its article 2[107]. This provision is interesting because it overturns all domestic legislation which prohibited public legal entities from compromising. However, beyond this major innovation, there are inaccuracies and contradictions in the drafting of the texts and especially in the arbitration practice which hinder the smooth running of the arbitration.

Thus, it is appropriate to first examine the problems linked to the arbitrability of disputes (4.2.1) then our reflection will focus on the autonomy of the arbitration clause (4.2.2).

4.2.1.Arbitrability of disputes

Under the terms of article 2 of the uniform act on the law of arbitration: "any natural or legal person has the right to resort to arbitration over the rights of which he has free

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[105] Decree No 2011-48 of January 13th,2011 relating to arbitration.

[106] J.B RACINE, *international commercial arbitration and the public order*, LGDJ, 1999, p.201.

[107] Under the terms of article 2 of the A.U.A "any natural or legal person may resort to arbitration on th rights of which they have free proposal"."States and other local public authorities as well as public establishments may also be party to arbitration without being able to invoke their own law to contest the arbitrality of a dispute".

disposal". Likewise, "States and other territorial public authorities as well as public establishments may also be party to arbitration, without being able to invoke their own law to contest the arbitrability of a dispute, their capacity to compromise or the validity of the arbitration agreement". This text organizes the arbitrability of natural persons and that of legal entities under public law. This is a major development because African states are often criticized for being reluctant to enforce arbitral awards. However, the provision cited above uses the overly general and imprecise formula of French law on the capacity of natural persons[108]. Is this legislative choice not contradictory and restrictive for this law which is intended above all to be harmonizing?
How can we reconcile the ability to compromise public law legal entities with the immunity from execution that they benefit from?
To what extent is arbitrability possible with internal and community public order?
This leads us to first examine the arbitrability of natural and legal persons (4.2.1.1) then, we will study the limits to the capacity of natural and public persons to compromise (4.2.1.2).

4.2.1.1. The arbitrability of natural and legal persons

It includes, on the one hand, the capacity to compromise natural persons (4.2.1.1.1) and, on the other hand, that of legal persons (4.2.1.1.2).

4.2.1.1.1. The ability to compromise natural persons

The OHADA arbitration did not define the notion of "right which is freely available". This generality of the formula raises serious difficulties of interpretation in harmonized legislation because there are several degrees of availability of different rights. Application of this provision requires prior knowledge of the rules on personal status and public order of all OHADA member states. This is a very difficult and time-consuming process to carry out. As a result, we may witness a divergence in the appreciation of the concept of arbitrability within OHADA. For example, in terms of arbitrability, Senegalese law says: "only things that are in commerce can be the subject of agreements"[109]. Likewise, Togo, under the terms of article 275 of its procedural code, provides "that we can compromise on

[108] Article 2059 French Civil Code: "all persons can compromise on the rights they have free disposal".
[109] Article 755 of the Civil Procedure Code of Senegal.

things that are in commerce". These two aforementioned legislations are inspired by French law by taking up the terms of article 1128 of the French civil code[110].

In order to better understand the notion of "free disposition of rights"[111], we will compare it with related notions because it is found in all branches of law, at least at all points of tension between contractual freedom and conceptions. Fundamentals of the legal order. This notion is very difficult to define. The approach chosen to explain it consists of comparing it with notions used in international law. These are related formulas which are often used and which form its legal environment, for example, formulas such as "rights on which one can compromise"[112], or "things which are in commerce", "there is only things that are in commerce which can be the subject of conventions."

Conversely, the last expression would mean that things outside of commerce cannot be the subject of an agreement. Indeed, if this reading can be considered indisputable, the concrete consequences to be drawn from it are uncertain to say the least. To do this, it is enough to consider a few matters where the rule seems to be clearly imposed, to realize the extent of the uncertainties. In the absence of OHADA case law on the notion of "freely available rights", we will use international law to illustrate our points. In France, this generality of the formula has raised serious difficulties of interpretation in case law. The French Court of Cassation ruled, for example, that "tombs and funeral plots are outside legal commerce and therefore inalienable". But subsequently, it ruled "that they can nevertheless be the subject of agreements by which the holder of a concession grants one or more people the right to be buried there"[113].

Of course, it specifies that the "convention is only possible if it is consistent with the aim pursued by the law"[114]. In the same sense, we affirm that public functions are outside of commerce, we reserve the patrimonial element of certain ministerial offices and in the

[110] Under the terms of article 1128 of French civil law: "Only things which are in commerce can be subject of the agreements".
[111]It is the legal quality of the good or the right which can be freely disposed of, its antonym is unavailability.
[112]The criterion is classic and we find it formulated in this way or in a similar formulation, by means of the expression of "rights that can be compromised" in several legislations; see article 2059 French civil code.
[113] LINDON note on the possibility of making an irrevocable donation with funeral grant.
[114]F.TERRE, Y. LEQUETTE, " the obligations", Dalloz, 1974,56.

logical continuation of this reservation, the Court of Cassation ruled that "the holder of the office has the right of presentation of his successor". As we can see, we are witnessing divergences on this concept and an evolution of jurisprudence on "things which are outside of commerce"[115]. Irrefutable proof of this evolution is provided by the validity of certain conventions relating to the organs of the human body[116].

The exceptions are so numerous that we have even doubted the existence of the principle of unavailability of the body. However, it is now established, with the evolution of case law, that this provision does not exempt from arbitration any dispute to which public order regulations are applicable. Despite the difficulties in understanding the notion of "free disposal of the right", it must be remembered that a right is available when it is under the total control of its holder. The latter can then use it, alienate it and even renounce it. Therefore, with regard to this interpretation, disputes relating to uncertain, hypothetical rights, for example, rights which are linked to the state and capacity of persons, are excluded from arbitration. After having explained the concept with its difficulties of interpretation, it is appropriate to question its applicability to the CCJA arbitration system. Unlike the uniform act, the CCJA treaty and arbitration rules are silent on the condition of free disposal of law. Should it be said that the CCJA arbitration system excludes it?

Very early on we implicitly answered in the affirmative[117]. The approach followed was to supplement the provisions of the OHADA Treaty with those of the civil procedure codes of the States which provide for the reservation of free disposal. This is how certain national legislations provided for it, for example, Cameroon[118], Senegal[119], and Togo[120]. However, the reasoning to follow for such a loan is too ineffective, even if the community texts, specifically Article 10 of the Treaty, implicitly repeal the provisions of internal law which

[115] R.FRISON « the market model » archive of philosophy of law, t.40, p287 and next.
[116] A.JACK, "agreements relating to the natural person", international review, 2012.p.212.
[117] AMOUSSOU.GUENOU, "Arbitration in the treaty relating to the harmonization of business law in Africa", R.D.A.I. (International Business Law Review), 1996, No 3, p 324.
[118] For Cameroon, this is article 576 of Civil Procedure Code.
[119] Article 755 of procedure Code of Senegal
[120] For Togo, this is article 275 of Senegalese Civil Procedure Code.

are contrary to them[121].

But what then happens to the other OHADA member countries which have not provided for this reservation of free disposal of law?

There is a real risk of a legal vacuum for States which have not legislated in this area. But these States appealed to French law to fill this legal void. In this logic, the assessment of the "reserve of free disposal" could be imposed from article 1128 of the French Civil Code applicable in several countries of the OHADA area[122] and prohibiting agreements on things outside of commerce. The most significant example of this legal vacuum is provided to us by the Supreme Court of Côte d'Ivoire. Disoriented by this legal void, the Supreme Court called on the State to react[123]. The Ivorian legislator, aware of this dilemma and the recurring legal mimicry, adopted a law on arbitration before the advent of OHADA[124]. After examining the ability of natural persons to compromise, we will study the arbitrability of public legal entities.

4.2.1.1.2. The arbitrability of public law legal entities

OHADA arbitration law has made a significant change compared to previous national legislation which excluded from the field of arbitration cases which concerned the State and its dismemberments. Indeed, article 2 of the uniform act is not only limited to the arbitrability of natural persons, it states in its paragraph 2 that "States and other territorial public authorities as well as public establishments may also be parties to arbitration, without being able to invoke their own right to challenge the arbitrability of a dispute, their capacity to compromise or the validity of the arbitration agreement. The provision cited above is inspired by Swiss law[125], it means that public law legal entities, namely the State

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[121] For the relationships between national provisions and uniform acts, they are regulated by article 10 of the treaty which provides that: "the uniform acts are directly applicable and obligatory in the States parties, notwithstanding any contrary provision of internal law, previous or posterior". Thus, the obligatory force of uniform acts and their substitution for existing and even future legal standards is affirmed.

[122] This omnipresence of French law in the legislation of the OHADA countries is justified by the fact that all the countries were French colonies except Equatorial Guinea and Guinea Bissau. Furthermore, before the entry into force of OHADA (1995), most of these countries applied French law in whole or in part such as the French civil procedure code of 1806. What Mr. A. LOURDE described as "legal colonization".

[123] Arbitration review 1989.530.

[124] Law No 93-671 of August 9, 1993, published in the official journal of September 14, 1993 of Ivory Coast.

[125] Article 177 paragraph 2 of the Swiss law on arbitration which establishes a material rule by which if a party to the arbitration agreement is a State, a company dominated or organization controlled for it, this

and its branches, can no longer rely on the restrictive provisions of their own domestic law to contest the validity of an arbitration agreement. In other words, the rule applies to both domestic and international arbitration. Unlike the uniform act, the arbitration of the Common Court of Justice and Arbitration[126] is less explicit on the arbitrability of natural persons and legal entities under public law, it provides that: "any party to a contract (. ..) May submit a contractual dispute to arbitration".[127]

We believe that despite the general nature of this provision, arbitrability is treated globally. These two cited provisions show that the member States of OHADA have taken into consideration the evolution of international arbitration law by not setting any particular limit to the arbitrability of disputes which concern the State and its dismemberments. Thus, in the presence of an OHADA arbitration, if the arbitral tribunal sits in one of the Member States or if the parties have provided in the arbitration agreement to submit their disputes to the CCJA procedure, the arbitration agreement cannot be contested on the grounds that under domestic law, public legal entities are not authorized to compromise. Likewise, in the case of an arbitration whose seat is located outside the OHADA area, for example in France, for which the uniform act can at best only have the value of procedural law between the parties[128] (if they wished to refer to it), there is every reason to believe that the rule applies in matters of international arbitration as in the BEC and Frères[129] case law. In this case, the Paris Court of Appeal affirms "that it is now established in the French legal order that a State cannot invoke its own national law to defeat the validity of an arbitration clause inserted in an international contract to which he is a party"[130]. This solution is taken up in various national legislations, it is accepted in arbitration case law as evidenced by the

party cannot invoke its own right to challenge the arbitrality of a dispute or its capacity to be a party to arbitration. See also Lebanon: article 809 of the new code of civil procedure.

[126] It should be remembered that arbitration in OHADA law concerns, on the one hand, the institution arbitration of the Common court of justice and arbitration (CCJA) of OHADA is governed by articles 21 and next of the treaty and by its arbitration regulations and, on the other hand, the uniform act on arbitration, which is intended to serve as common arbitration law for member countries.

[127] Article 21 of the OHADA treaty.

[128] Under the terms of article 14: "the parties may directly or by reference to arbitration rules regulate the arbitral procedure, they may submit it to the procedural law of their choice…"

[129] Paris Court of Appeal, February 24, 1994.

[130] French cass. Judgment, 2nd Civ, March 19, 1997, legal week, may, 7, 1997, No 19, p.11.

arbitration dispute which opposed the State of Senegal to an industrial company governed by private law.

The State of Senegal had signed, in application of the Investment Code, an establishment agreement with SOABI (Société Ouest Africaine de Bétons Industriels) which had undertaken to build fifteen thousand social housing units between Dakar and Thiès. It was much later that the State, on the grounds that this agreement fell within the category of administrative contracts, took the initiative to unilaterally terminate the contract. This breach of contract caused significant harm to his partner. The latter then implemented the arbitration clause contained in the agreement in question by requesting arbitration from the international center for the settlement of investment disputes[131]. This case shows that administrative matters are not an obstacle to ICSID arbitration. Indeed, the law applicable to the contract was administrative law, the disputed contract was a public works contract for which arbitration is subject to the same prohibition in principle as in the concession.

The State of Senegal challenged the jurisdiction of the ICSID because the defendant, in this case, the Naïkida Company, was from Panama, a country which has not adhered to the Washington Convention[132]. This argument will be rejected in a provisional award on the grounds that the defendant company was in fact controlled in its organization and operation by Belgian nationals and Belgium has adhered to the ICSID convention. We believe that the arbitrators of the State of Senegal should have invoked, as a reason, the prohibition imposed on the State to compromise for this type of contract. In this case, it was a real administrative contract under Senegalese law which was executed entirely in Senegal. It is an act of public authority and not an act of commerce. From this point of view, such a clause falls, in our opinion, within the domain of disputes subject to communication to the public prosecutor within the meaning of articles 796 and 57 of the code of civil procedure of Senegal. Arbitrators could also raise state immunity from execution or internal public

[131] ICSID arbitration, it is the Washington Convention or BIRD convention which established the international center for the settlement of investment disputes, within the framework of which arbitration and conciliation procedures falling within its field of competence are organized (articles 25 to 27).

[132] The arbitrators, among whom is one of the initiators of OHADA, namely President KEBA M'MBAYE, even take the liberty of giving in their award a real lesson in Senegalese administrative law. However, the argument was ineffective.

policy. But in their defense, if all these reasons were not invoked by Senegal's advisors, this would mean that the State would not seek to benefit from these limits to arbitrability so as not to scare off foreign investors who finance the construction of infrastructure within the framework of concession contracts or public procurement contracts. These contracts between the public and the private sector are increasingly used by public authorities in this context of economic crisis. But public procurement[133] is generally governed by provisions of national law which contain special laws.

These must be articulated with OHADA arbitration law. This legal complexity creates a feeling of distrust towards the arbitration of the C.C.J.A. For example, in the State of Senegal case against the Indian international firm MITTAL, the latter preferred to bring the case before the Paris Arbitration Chamber. Indeed, in this dispute which concerned the exploitation of gold mines in eastern Senegal by MITTAL, the Paris Arbitration Chamber ruled in favor of the State of Senegal on the grounds that MITTAL did not respect its initial commitments and caused considerable financial damage to the State of Senegal. These obstacles lead us to study the limits to arbitrability.

4.2.2. Limits to the arbitrability of natural and legal persons

These limits concern, on the one hand, natural persons (4.2.2.1) and, on the other hand, legal persons (4.2.2.2).

4.2.2.1. Limits to the arbitrability of natural persons

It would undoubtedly be necessary to place ourselves in areas where the question of the arbitrability of disputes is traditionally debated to get an idea of the solution adopted by the legislator. To illustrate our approach, we will take the arbitrability of labor disputes and commercial law as an example.

Is it possible to submit individual and collective disputes to arbitration? Labor law is not yet part of OHADA's harmonized matters. This explains why arbitration is

[133] In Senegal, it is the code of administrative obligations which governs public procurement. Under the terms of article 1 of the French public procurement code: A public contract is a contract concluded for consideration, entered into by the needs of the administration in terms of the provision of services and of works".

viewed with suspicion in labor law, in particular, when it uses the mechanism of the arbitration clause. The employment contract is based on a relationship of subordination between the employee and his employer. This unfavorable relationship to the employee means that an arbitration clause concluded within the framework of an employment contract should be considered void; nullity is often required both on the employment contract and on a collective agreement. In a case between the union of tugboats at the port of Dakar and the workers' union, the Dakar Court of Appeal considered that the award was void on the grounds that it was contrary to labor law and internal public order. . But in another case, between an employee and his employer, the parties appointed an arbitrator to settle their dispute which concerned severance pay. The Abidjan Court of Appeal decided that, despite the public order nature of the employment contract, the arbitration was valid. These two cases, which give rise to different solutions in the same harmonized space, prove the difficulties in assessing and applying the arbitrability of natural persons.

But this decision of the Abidjan Court of Appeal is interesting because in our opinion, it takes into account the moment of availability of the employee's right. Indeed, if the arbitration agreement is concluded before the termination of the employment contract, it is not effective, because the employee is dominated by the relationship of subordination. The employee's right becomes available when he is no longer in subordination, consequently, he can conclude a compromise. This reflection cannot be limited simply to labor law. Take, for example, sales law which is regulated by the uniform act on general commercial law. This right is not entirely available to the parties. In fact, they cannot waive the guarantee of hidden defects between professional traders and customers.

Let us also emphasize that prices are set differently by the public authorities of the different OHADA States for social and economic reasons. This is how to fight against speculation by real estate companies, the State of Senegal passed a law in 2014. This law governing rents and real estate transactions provoked a strong reaction from professionals in the sector who claimed a violation of the community law and threaten not to apply it. Likewise, Senegal had banned

the importation of palm oil into its territory[134]. These different decisions which concern labor law, competition and consumer law show the limits to arbitrability.

4.2.2.2.Limits to the arbitrability of public law legal entities

We will analyze the problem of immunity from execution of legal entities under public law, then our reflection will focus on another limit to arbitrability which is often invoked, the notion of public order.

Under the terms of article 2 paragraph 2 of the uniform act: "States and other public authorities as well as public establishments may also be parties to arbitration without being able to invoke their own law to contest the arbitrability of a dispute , their ability to compromise or the validity of the arbitration agreement. This provision brings the State and its branches to the same rank as natural persons and legal entities under private law. It is very interesting because this rule partially reassures foreign investors who criticize African States for obstructing the execution of arbitral awards. This position is widely accepted in international arbitration and a public law legal entity with a foreign company. But on an internal level, its application is called into question by the principle of immunity from execution. Article 30 provides that: "forced execution and precautionary measures are not applicable to persons who benefit from immunity from execution. However, the certain, liquid and payable debts of public legal entities or public enterprises, whatever their form and mission, give rise to compensation with the equally certain, liquid and payable debts for which anyone will be liable towards them. , subject to reciprocity.

The debts of the persons and companies referred to in paragraph 2 of the preceding article can only be considered as certain within the meaning of the provisions of this article if they result from recognition by them of these debts or from a title having an enforceable nature in the territory of the State where the said persons and companies are located"[135]. This provision clearly establishes the rule of immunity from execution of the State and its dismemberments even if compensation mitigates its effects. But the rule of immunity from execution puts into

[134] Presidential Decree No.2009-872, this ban on the importation of palm oil into Senegal was condemned by the West African Economic and Monetary Union Commission.

[135]Article 30 of the Uniform Act relating to arbitration organizing simplified recovery procedures and enforcement procedures.

perspective the effectiveness of the decision to convict the public person, as evidenced by case law. Thus, in the dispute between the company "African Petroleum consultants", a private company, and the national refining company, a public company, the former had obtained against the latter a sentence which condemned it to pay the sum of two million seven twenty four thousand eight hundred American dollars. But to enforce the award, the plaintiff company submitted to the president of the high court of Buea (province of Cameroon) a request for exequatur on the basis of the New York convention, on law no. 2002/004 of April 18 amended on the investment charter in Cameroon and on the articles of OHADA law granting exequatur. In the operative part, the president of the court issues the exequatur by taking up the plaintiff's arguments. Despite the condemnation of the Cameroonian national company, the winning party did not recover its debts, nor carried out seizures because the public authorities were opposed to it[136]. This case proves, on a legal and practical level, the difficulties of applying the arbitrability of public entities. Another rule hinders arbitrability: internal and international public order. In Ohada arbitration, public order appears to be one of the limits of the arbitration agreement, both the arbitration clause and the compromise[137].

However, neither the legislator nor the case law have defined the notion of public order. A concept with fairly elusive content in domestic law, public order is even more so in international law. The opportunity is given to see this in the Ohada legal space. Indeed, several international public orders coexist: public orders in disorder[138] to use the expression of Mr. ASSI[139]. While the treaty[140] and the arbitration rules refer to a contravention of "international public order", the uniform act on arbitration refers to a violation of "the international public order of the signatory States of the Treaty". So, we see a difference in the understanding of public order by the different legal sources of OHADA. We can explain this difference by the

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[136] Arbitration Cameroon's review, july-August-september 2002, p.13 and next. See R. NEMEDEU "the search for the criterion of arbitrality of disputes concerning public law legal entities in OHADA law", African review of national sciences, volume 06, No1, 2009.

[137] Article 2 and 26 paragraph 5 of the uniform act on arbitration; note that article 4 of the uniform act on arbitration makes no distinction between the arbitration clause and the compromise.

[138] In the OHADA area there are two public orders, "international public order", The international public order of the signatory States of the treaty" and the international public order of the States parties".

[139] On the question, V.E-A.ASSI, "International public order in the uniform act of OHADA relating to arbitration" arbitration review 2007.

[140] Article 25 paragraph 4-4 of OHADA treaty.

fact that there are two types of arbitration, on the one hand, common law arbitration based on the uniform act of March 11, 1999 and, on the other hand, and specific CCJA arbitration resulting from the treaty and the CCJA arbitration rules. In the same sense, another part of the doctrine[141] sees in this difference in the formulation of international public order rather a "nuance of drafting".

But this opinion is not relevant, does this difference not on the contrary reflect divergences of assessments or hesitations which marked the designers of the texts on arbitration, when they had to choose a notion of public order?

Indeed, a return to the preliminary draft uniform law relating to arbitration law finally convinces us of the embarrassment in which the drafters of the uniform act found themselves. We detect two different notions of public order, each corresponding to one and the other of the methods of control of the arbitral award by the judge[142]. Article 28 paragraph 2-5° relating to the control of the regularity of the award, targets the violation of a rule of "public order" while Article 35 concerning the granting of exequatur mentions a contravention of "international public order". We therefore found in the same text two notions not having the same content, public order and international public order of the signatory States[143]. The concept of international public order of the signatory States of the treaty contained in the uniform act relating to arbitration is of particular interest because it is quite singular because it will take a long time to become clearer. Indeed, the concept can only be clarified through judicial and arbitral applications. We will return to arbitral case law in which the reason is based on international public order. Despite the imprecise and vague nature of the concept, the drafters of the uniform act seem to explicitly enshrine that of community public order. But we cannot ignore internal public orders, especially when it comes to internal disputes.

Despite the unity of the legal regime, if it is an internal dispute, it is senseless to speak of international public order under penalty of nullity of the award. In our opinion, by using the

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[141] On specific CCJA arbitration, see to this effect P-G. POUGOUE, p.129 and next.

[142] This concerns the control of the regularity of the award by means of the action for annulment, on the one hand and the recognition there of with a view to the granting of exequatur, on the other hand: on these control methods, P.MEYER, arbitration Law, Brussels, BRUYLANT editions, 2002.

[143] The Uniform Act ultimately retained a single concept, namely that of "the States of the treaty or of the States parties'. In this sense, V.P.MEYER, p.129.

expression "international public order of the States signatories to the treaty or of the States parties", the designers of the uniform act on arbitration aimed at the establishment of a public order common to the different States of OHADA. Concretely, this is an OHADA regional public order[144]. But what will be the consistency of this public order? Will it be a matter of adding up the different international public orders of the States parties, like a commercial agency contract of an international nature?
The expression "international public order of the States Parties" raises another difficulty. Indeed, the uniform act applies to international arbitration but also to internal arbitration[145]. Does this mean that domestic arbitral awards escape any control of compliance with the internal public policy of the State in which they were rendered? The answer to this question actually depends on the matter on which the internal dispute submitted to the arbitrator relates, depending on whether or not it falls within the harmonized matters. The national courts and the C.C.J.A will have to specify the content and areas of internal and community public orders. Overall, it must be remembered that the drafting of the texts with regard to the notion of public order was clumsy, moreover, if there is indeed a disappearance of internal public order in favor of international public order, it nevertheless remains possible to resort to an internal public order reservation as long as the dispute does not present any foreign element.

OHADA arbitration law has taken into account the arbitrability of disputes between individuals, legal entities under private law and persons under public law, the fact remains that in practice, as we have underlined, its application poses problems. These obstacles to the arbitrability of disputes are also found in the arbitration agreement.

4.2.2. Difficulties in applying the arbitration agreement

[144] In this sense, "[…] since it is the CCJA which will resolve the difficulty [the appeal against the decision of refusal of exequatur for violation of the international public order of article 31 paragraph 4 of the uniform act] will it not rather be with regard to "international public order of OHADA"globally, rather than according to the international public order of a given State of this community?", the author deduces that it would have been better to write "international public order" simply rather than international public order" of the States Parties".

[145] Article 35 of the uniform act relating to arbitration indicates that it serves as the law relating to arbitration in the States Parties. The text of OHADA also provides a law on arbitration in state parties which did not have

The texts governing OHADA arbitration, namely the uniform act, the treaty and the arbitration rules of the CCJA, do not define the arbitration agreement, nor the arbitration clause, nor the compromise. Arbitration law, with the exception of the Treaty[146], makes no distinction between the arbitration clause and the compromise. Indeed, the abandonment of this distinction corresponds, on the one hand, to contemporary trends in arbitration and, on the other hand, to the consecration of the unity of the OHADA arbitration regime. Furthermore, the uniform act does not impose any formal requirements regarding the validity of the arbitration agreement. This therefore falls under the principle of consensualism. However, for the administration of proof, Article 3 provides that: "the arbitration agreement must be made in writing, or by any other means of providing proof…"

The written form is privileged in terms of proof of the arbitration agreement without, however, being exclusive since the act provides for "any other means". But it must be said that the meaning of this last part of the provision is not very clear because it does not specify the method of proof which can be used for the arbitration agreement. If the texts on arbitration in the OHADA area codify the principles essential to the validity and autonomy of the arbitration agreement, some are imprecise and show their limits in arbitration practice. Examination of the arbitration dispute reveals the existence of obstacles to the autonomy of the arbitration agreement. Therefore, it is appropriate to examine, on the one hand, the difficulties linked to the autonomy of the arbitration agreement (4.2.1) and, on the other hand, to show that these have repercussions on the effects of the agreement (4.2.5).

4.2.1 Difficulties linked to the autonomy of the arbitration agreement

The autonomy of the arbitration agreement is governed by the texts on arbitration which constitute its foundations (4.2.2.1) but in arbitration practice, it is subject to obstacles (4.2.2.2).

4.2.2.1. The foundations of the autonomy of the arbitration agreement

The autonomy of the arbitration agreement is a key element of arbitration. This principle was first mentioned by the French Court of Cassation. It has favorably developed and enriched thanks to jurisprudence. The Uniform Act in its article 4 and the arbitration regulations of the CCJA in its article 10.4 respectively codified the principle of the autonomy of the arbitration

[146] Article 21 of the Uniform Act relating to arbitration.

agreement[147]. Article 4 paragraph 1 states that: “The arbitration agreement is independent of the main contract”. The legislator is showing audacity because he goes even further than the Dalico case law which he codified by using the term “independence”. This rule means that the arbitration agreement constitutes a contract in its own right, completely independent of the main contract. This rule finds its basis in the common will of the parties. It deviates from the principle according to “the accessory follows the principal”. It is a special agreement which must be subject to special protection. This rule allows the arbitration agreement not to be affected by any contingencies of the main contract. Therefore, it has its own legal regime. It consists of considering the arbitration agreement to be independent from the contract in which it is stipulated so that it is not affected by the invalidity of the latter. In fact, substantial autonomy consists of “immunizing” the arbitration agreement with regard to causes of invalidity likely to affect the contract containing said agreement.

This substantial autonomy of the arbitration agreement above all allows it to have legal autonomy. Article 4 paragraph 2 takes up the terms of the Dalico case law and states: “its validity is not affected by the nullity of this contract and it is assessed according to the common will of the parties, without necessary reference to state law ". This provision clearly establishes the rule of legal autonomy of the arbitration agreement without any reservation conditions or exceptions. This is a remarkable innovation in arbitration law; Article 4 of the uniform act on arbitration establishes a material rule for the validity of the arbitration agreement. How can we codify supposedly evolved jurisprudence? This clearly shows our degree of legal acculturation. “But unlike the Dalico judgment, the uniform act does not include any “reservation to the validity of the arbitration agreement”, not even that of international public order, which is “excessive”[148].

[147] Under the terms of article 4 of the uniform act: the arbitration agreement is independent of the main contract. Its validity is not affected by the nullity of this contract and it is assessed according to the common will of the parties, without necessary reference to state law. Article 10.4 of the autonomy of the arbitration agreement: “unless otherwise stipulated, if the arbitrator considers that the arbitration agreement is valid and that the contract binding the parties is void or non-existent, the arbitrator is competent to determine the respective rights of the parties and rule on their requests are conclusions.

[148] PH.LEBOULANGER, “General presentation of acts on arbitration”, OHADA and the perspectives of arbitration in Africa,Brussels, BRUYLANT,2000,pp.69-88.

Indeed, this liberalism will undoubtedly give rise to difficulties because it will be necessary for "state and community jurisprudence to determine the criteria according to which the validity of consent and the capacity of the parties to an arbitration agreement must be assessed"[149]. The validity of an arbitration agreement is subject to the meeting of several conditions relating to the parties and to the agreement. If it is an internal arbitration, its validity is assessed in light of the rules of internal law. It is the common law of contracts which applies with the substantive conditions (cause, object, capacity and consent) and form. If it is an international convention, with regard to the material rules of law and arbitral practice, conflictual reasoning is banned. It is the legal regime provided for in Article 4 that applies. Should we then conclude that this is a contract without laws? In our opinion, the answer is negative.

There should be limits to the autonomy of the arbitration agreement even if the uniform act does not address them.

4.2.2.2. Limits to the autonomy of the arbitration agreement

Among these limits, we can cite for example internal and community public order. As we pointed out previously, the OHADA arbitration did not specify its content, much less its scope of application. It is often mentioned by the parties in OHADA arbitration disputes, for example, in a case between two Beninese companies in the context of a cotton seed supply contract. The facts are relatively simple, in this case, the supplier undertook to provide the quantities of seeds to its customer for the agricultural campaign. But the supplier did not deliver enough of the seeds agreed under the contract. Complaining of having suffered damage, the customer brings the matter before the arbitration of the common court of justice and arbitration. The sentence rendered is unfavorable to him, he then files an action for annulment before the C.C.J.A. Among the means invoked by the plaintiff is public order.

The plaintiff alleges: "a violation of international public order for misinterpretation of the amicable settlement clause, misapplication of article 274 of the uniform act on general commercial law...» In our opinion, the problem posed is whether in the context of an arbitration under domestic law, the plaintiff can raise international public order. The Court responds that

[149] PH.LEBOULANGER, op.cit,pp.69-88.

"this criticism does not fall within the scope of application of Article 30.6[150] of the same regulations, which exhaustively lists the complaints which may be raised against the award".

If in this case the court responded correctly, it should seize this opportunity to clarify the content and areas of international public order. Indeed, beyond its arbitral and jurisdictional powers, it must also interpret harmonized law. This is the supranational jurisdiction of OHADA. By avoiding one of its responsibilities, in another case the court rendered a curious and very questionable decision. This is the case of PLANOR AFRIQUE against ATLANTIQUE TELECOM. This principled judgment rendered in plenary assembly on January 11, 2011, raises several problems: groups of contracts in the arbitration clause, the joining of arbitral and judicial procedures, and finally public order.

We will deal with public order first because the motivation for the judgment relates to it. Following a dispute between the two companies, the company ATLANTIQUE TELECOM contacted the arbitration court which rendered an arbitration award favorable to ATLANTIQUE. This award was the subject of an appeal contesting its validity and a request to oppose exequatur by PLANOR. The plaintiff maintains that this sentence is contrary to international public order because it calls into question a judgment already rendered by the Ouagadougou Court of Appeal[151]. The Common Court of Justice and Arbitration annuls the arbitral award on the grounds of "the violation of international public order, the award rendered is in contradiction with a court decision which has become final". In our opinion, this court decision is illogical and contradictory. She did not answer the real question which concerned the priority between the arbitrator and the judge. We will return to the question of the joining of two arbitral and judicial procedures when we address the effects of the autonomy of the arbitration clause and the principle of competence-competence. This sentence would risk encouraging the losing parties to use it as a delaying tactic. After having shown the difficulties of interpreting public order, our reflection will focus on the effects of the agreement with groups of companies or groups of contracts for various reasons. Groups of companies, through their subsidiaries, seek markets on all continents. The contracts are often signed by their

[150] Among the grievances relating to the exequatur, there are "the arbitrator to the exequatur, there are "the arbitrator ruled without an arbitration agreement, the adversarial principle, the failure of the arbitrator to respect his mission, and international public order".

[151]Capital of the Republic of Burkina Faso.

subsidiary and they often provide for recourse to arbitration in the event of a dispute. These contracts generate several effects, both towards the signatory parties and third parties in the execution of the contracts. Thus, due to the voluntary nature of arbitration and the principle of the relative effect of contracts, only the parties to the contract should be brought before the arbitral tribunal. But it happens that third parties are involved in the conclusion and execution of contracts without signing them and this is often the case in groups of companies[152]. OHADA law on commercial companies defines the group of companies as: "a group made up of companies united together by various links which allow one of them to control the others"[153]. Such a definition is useful because it is often rare for the legislator to define the concepts but the terms used "various links" and "controls" are general and vague.
To analyze this concept, we retain that used by international arbitral case law because this definition seems more precise. The concept of groups of companies means "a set of legally independent companies but forming the same economic entity dependent on a common power". The question that arises is whether the arbitration agreement signed by a company in a group can be extended to a company in the same group. The uniform act and the arbitration regulations of the common court of justice and arbitration have respectively provided in their articles 3 and 10-3, the extension of the arbitration agreement to third parties but these texts remain silent on the conditions for extending the arbitration agreement to third parties, natural or legal persons. This lack of clarity is often a source of confusion for referees and support judges. Indeed, the uniform act simply alludes to the arbitration agreement by reference while article 10-3 of the rules of the arbitral court evokes the scope of the arbitration agreement.

These inaccuracies in the drafting of the texts are reflected in certain arbitration awards rendered by national and supranational courts. In the aforementioned case, it concerned successive contracts comprising an arbitration clause by which the company Atlantique Télécom and its associates transferred part of their shares to the company Planor Afrique. Following this agreement, these two companies were to work with another telecommunications company called Télé Faso but this collaboration would quickly deteriorate due to differences in the management of the group and, then, a series of mergers followed legal and arbitration

[152]B.HANOTIAU, "Arbitration and groups of companies», Gazette du palais,December 19,2002,No 353, p.6.
[153] See M.KONE "notion of group of companies in OHADA law", in quarterly Review of African Law, july-september 2006, No 856, pp 285-293.

proceedings. The Atlantique Company seized the common court of justice and arbitration of an action to contest the validity, which the defendant contested. The question that arose was whether the arbitration clause formally signed in the shareholders' agreement could be extended to the same group company participating in the execution of the contract.

To this question, the court responds: "given that it is a principle that in matters of international arbitration, the arbitration clause by written reference to a document which contains it is valid, in the absence of mention in the main agreement, when the party to whom the clause is opposed was aware of the content of this document at the time of the conclusion of the contract and that it accepted the incorporation of the document into the contract, that in this case, the court of appeal of Ouagadougou(Burkina Faso) after having examined the various transactions between the parties, has sovereignly noted by a reasoned decision, that the arbitration clause contained in the shareholders' agreement of February 10, 2004 is not enforceable against Planor Afrique , because nowhere does it appear in the file that she was aware of the said clause and that she expressed the desire to be bound by the arbitration agreement.

The interpretation of the Court, in our opinion, is interesting and original insofar as it is very opposed to the practice of international arbitration. The Court, in its reasons, first admits the validity of the arbitration clause by reference but then requires express acceptance of the arbitration agreement to the company Planor Afrique for it to be enforceable against it. Concretely, this means that to be enforceable against third parties, the arbitration agreement must be accepted and signed. If this decision of the Court seems simple and logical, the fact remains that it may be open to some criticism in view of what is done in international arbitration.

This award does not militate in favor of arbitration because the legal effects of the arbitration agreement towards groups of contracts or groups of companies are firmly accepted. The extension of the arbitration agreement to non-signatory third parties originated in France through the work of arbitrators and judges[154]. Indeed, it is in the famous case between Dow chemical and Isover–Saint-Gobain that the arbitral tribunal of the Paris International Chamber of Commerce considers: “that an arbitration clause accepted by certain members of the group

[154] B.HANATIAU op.cit, p.96.

can bind the other companies, provided that they played a role in the negotiation, conclusion or termination of the contract"[155]. This award was subsequently confirmed in a series of cases involving groups of companies, leading to codification in the new French arbitration law[156]. On the other hand, OHADA arbitration law has not taken into account this evolution of arbitration law and practice even though arbitration practitioners have long realized the importance of arbitration. Multi-party arbitration.

Ultimately, the position of the common court of justice and arbitration is far behind and does not take sufficient account of what is happening in international arbitration. In addition, the difficulties of applying the extension of the agreement to third parties also seem to be linked to the effects of the autonomy of the arbitration clause.

4.2.2.2. The effects of the autonomy of the arbitration agreement

The autonomy of the arbitration agreement allows the arbitrators to be fully and entirely competent. This rule is called the principle of competence-competence (4.2.2.2.1), which is very important in arbitration but it is poorly applied by the Common Court of Justice and Arbitration (4.2.2.2.2), finally, we will discuss the place of the judge (4.2.2.2.3).

4.2.2.2.1. The consecration of the principle of competence-competence

By virtue of the principle of the binding force of conventions, when they are valid, they are binding on the parties. This rule finds its full benefit in arbitration because it is the business of the parties. Once it is valid, the arbitration agreement takes the place of law for the parties. It renders state courts incompetent for the benefit of arbitrators. This rule is called the competence-competence principle. It is part of the material rules of international arbitration and considerably reinforces the principle of the autonomy of the arbitration agreement. This principle has not been defined by the community legislator, we will appeal to the doctrine to define it means that: "the arbitrators must have the opportunity to rule first on the question relating to their competence under the subsequent control by state courts".

[155] French CCI case No 4131, September 23, 1982.
[156] J.PELLERIN "French law after decree of January 13, 2011.

This principle is provided for both by the uniform act on arbitration and the arbitration rules of the common court. Thus, under the terms of article 11: “the court rules on its own jurisdiction, including above all questions relating to the existence or validity of the arbitration agreement.
The objection of incompetence must be raised before any defense on the merits, unless the facts on which it is based have subsequently been revealed.”

Article 13 of the uniform act reinforces this rule by adding a principle of priority in the event of voluntary or involuntary connection of procedures. This aforementioned article states: "when a dispute referred to an arbitral tribunal under an arbitration agreement is brought before a state court, the latter must, if one of the parties so requests, declare itself incompetent. If the court has not yet been seized, the state court must also declare itself incompetent unless the arbitration agreement is manifestly void.

In any event, the court cannot automatically notice its lack of jurisdiction.” With regard to this rule, the arbitrators are entirely independent to decide for themselves on their own competence; notwithstanding the challenge by a party to the arbitration agreement. It also prevents a party from using dilatory and obstructive tactics with a view to delaying the progress of the arbitration. Finally, the last paragraph of Article 13 is poorly worded and could call into question the effectiveness of the rule to the extent that the exception of incompetence is not of public order. It must be raised by the parties. In the same sense, the arbitration regulations of the common court of justice and arbitration in its articles 10-3 and 21 have enshrined the principle of competence-competence. It is more explicit in its article 21 because it indicates: “if one of the parties intends to challenge the jurisdiction of the arbitrator to hear all or part of the dispute, for whatever reason, it must raise the exception in the briefs provided for in articles 6 and 7 above, and, at the latest, during the meeting prescribed in article 15-1 above. Article 21-2 continues: “at any time during the proceeding, the arbitrator may ex officio examine his own jurisdiction for reasons of public order on which the parties are then invited to present their observations”.
Finally, “the arbitrator may rule on the objection of incompetence either by a preliminary award, or in a final or partial award after discussions on the merits”. Article 21 of the regulations is more explicit than the uniform act insofar as the arbitrator has the possibility, at

any time during the proceeding, to examine his competence, for reasons of public order. Aware of the delaying tactics which hinder the effectiveness of arbitration, the court's rules provide, even in the event of an appeal for annulment that the arbitration procedure may continue without waiting for the court, in its jurisdictional formation, to have ruled. . If the aforementioned texts have codified the principle of competence-competence, the fact remains that in practice, it is the subject of numerous attacks on the part of state courts and more seriously by the Common Court of Justice and 'Arbitration which is the highest court in the community space. We illustrate our points by relying on case law.

4.2.2.2.1. Violations of the principle of competence-competence

In an arbitration agreement, the parties stipulate: “they undertake to settle disputes arising from the application of these terms amicably. Failing this, disputes are submitted to the OHADA court of justice and arbitration.” The Abidjan court seized by one of the parties and confirmed by the court of appeal considers: "that a dispute relating to the validity and therefore to the very existence of the agreement and not to its application did not fall within the scope of application of the arbitration agreement and that consequently, the arbitration clause which only applies in the execution of the agreement cannot find application in this case. Subsequently, seized of an action for annulment, the Common Court of Justice and Arbitration annuls this decision on the grounds that: "the principle of autonomy of the arbitration agreement imposes on the arbitral judge, subject to a possible appeal against its future award, to exercise its full jurisdiction over all elements of the dispute, whether it concerns the existence, validity or execution of the agreement”[157]. Despite this salutary decision of the high court, in another case, the Ivorian court of appeal to justify its jurisdiction asserts that: "although the protocol of agreement provided in one of its clauses, the said marketing agreement with Mr. May Jean-Pierre, such a mention cannot make it an annex to the said contract to the extent that the signatory parties in both are not exactly the same; that it follows that the marketing contract has its own and autonomous existence such that the express arbitration clause in the memorandum of understanding cannot validly be extended to it.”

[157] CCJA, judgment No 20, of April 24, 2008, aforementioned article, in review of arbitration, 2010, pp.484-485.

This contradictory and questionable decision of the Abidjan Court of Appeal pushed the opposing party to file an appeal for annulment with the high court. The latter declares itself competent and affirms: "given that it results from all of the above, in particular from the above-mentioned provisions of Article 13, paragraphs 1 and 2 of the aforementioned uniform act and those of point 6.4 of the protocol of January 10, 1996 that the competent jurisdiction to hear any dispute or dispute that may arise from the application of the interpretation of the protocol of agreement and its annex can only be an arbitral jurisdiction constituted under the aegis of the international chamber and, having to operate according to the arbitration rules of the latter; that consequently, any state court seized of such a dispute must declare itself incompetent on the one hand, and, retaining its jurisdiction to rule on the merits of the dispute notwithstanding the existence of the arbitration clause on the other hand , the Abidjan court violated the above-mentioned provisions of article 13, paragraphs 1 and 2 of the uniform act and submits two decisions to the cassation; that it was therefore necessary to overturn the two contested judgments and to restore judgment no. 83 of November 5, 1998 to its full and complete effect..."[158].

These two cases raise many questions regarding state courts. Indeed, how can we explain that despite the existence of a valid arbitration agreement, state judges still retain their jurisdiction? In our opinion, several reasons could explain this. The first could result from a lack of knowledge of the rules of arbitration, the most important of which is that of the autonomy of the arbitration agreement having as a corollary the principle of competence-competence. This lack of knowledge often finds its source in the university training of magistrates. Arbitration is often taught in a few lines in commercial law or private international law courses[159]. The second reason could be explained, in our opinion, as a loss of competence and power of state courts for the benefit of arbitrators. Indeed, some judges think that arbitration is reserved for large foreign companies that want to avoid national judicial decisions. To avoid these numerous obstacles to the effectiveness of the arbitration agreement, the common court of justice and arbitration does not hesitate to overturn the judges' decisions but it sometimes renders incomprehensible awards such as, for example, in the aforementioned Planor Afrique

[158] CCJA, 1st chamber, judgment No 12 of February 24, 2005, case of manufacturing company of Ivory Coast MACACI v/MAY.

[159] In Senegal arbitration is taught in the international trade law course.

v Atlantique Télécom case. The high court considers: "given that in any event, even if this judgment was actually the subject of an appeal in cassation as the defendant rightly pointed out herein, it does not remained no less at the time of the pronouncement of the sentence a final decision benefiting from the authority and the force judged as long as it is not annulled (...) than consequently, by ruling again on the request of forced transfer of the same shares, the sentence of the court which thus violates international public order must be annulled". The court's motivation is incomprehensible and open to criticism. The problem posed to it is to know: faced with the joining of an arbitral and judicial procedure, which of the two is it competent? The question seems simple but the court rules on the grounds of public order which is antithetical to jurisdiction. However, the court should have retained the jurisdiction of the arbitrators, based on articles 11 and 13 of the uniform act. Article 13 is very explicit on the question of the priority of arbitral and judicial jurisdiction. It provides: "when a dispute, which is seized by an arbitral tribunal under an arbitration agreement, is brought before a state court, the latter must, if one of the parties so requests, declare itself incompetent. If the court has not yet been seized, the state court must also declare itself incompetent unless the agreement is manifestly void. In any event, the state court cannot automatically raise its incompetence."

This article devotes both the positive and negative effect of the competence-competence principle. The positive effect allows referees to decide first on their own competence. It means that: "arbitrators must have the opportunity to rule and be the first to rule on questions relating to their jurisdiction, under subsequent control by state courts"[160]. Its corollary is the negative effect of jurisdiction-competence which prohibits judges seized of a dispute arising from an arbitration agreement from retaining their jurisdiction. Better still, the judges must suspend their ruling in the event that they are seized before the arbitrator has made his own decision. This is an application of the chronological priority of competence which falls to the arbitrator. In procedural law, it is called lis pendens exception[161]. The texts on arbitration in the OHADA area have not defined the concept but implicitly, they have enshrined it respectively in their articles 13 of the uniform act and 21 of the procedural regulations of the court of arbitration. Lis pendens is "the circumstance by which two courts of the same level have been seized of

[160] PH.FOUCHARD, GAILLARD,B.GOLMAN, "treaty on international commercial arbitration, Paris, January 1996.
[161]B.BAYO BIBI "the effectiveness of arbitration agreement under arbitration law".

the same dispute even though they are equally competent to hear the case"[162]. In arbitration law, lis pendens is the situation in which a state court and an arbitral court are seized of the same dispute. Arbitration law in the OHADA area, through the aforementioned articles, fully enshrines the exception of lis pendens, clearly distinguishing the two hypotheses provided for by the texts.

It appears from these texts that the suspension of the state procedure is fully justified in this case. But the Court motivates its decision by placing itself on the ground: "of the violation of international public order based on the contrariety of the arbitral award with a judicial decision which has become final. In our opinion, this judgment falls short of the material rules of international arbitration. The motivation for this judgment is not relevant because it weakens the competence of the arbitrators and could harm arbitration in the OHADA area. In our opinion, the High Court should have accepted the appeal to challenge the validity of the award introduced by Planor Afrique and provided for by article 29 of the arbitration regulations of the Common Court of Justice and Arbitration.

Ultimately, this very interesting judgment raises the most fundamental aspects of arbitration even if it raises numerous questions and concerns. These should be taken into account by the High Court because this decision is in contradiction with the texts in force which advocate the primacy of the parties. But, however, it is not absolute; it often happens that the parties need the support of state courts to order provisional or protective measures. An interim measure is one which is "taken for the duration of a trial in order to temporarily resolve an urgent situation while awaiting a final decision", for example, the granting of alimony to deal with an urgent situation and vital. A precautionary measure can be defined as an "emergency measure taken to safeguard a right or thing". It is intended to prevent the loss of property or a right, for example, a mortgage registration. Beyond their procedural and arbitral interests, provisional and protective measures occupy an important place in the lives and functioning of individuals and especially businesses. Indeed, in the community area, most of the economic fabric is made up of small and medium-sized businesses. It is necessary to emphasize the importance of

[162] Article 100 of French civil procedure code.

provisional and protective measures in the operation of businesses. If they are not taken in time, they can jeopardize the survival of small and medium-sized businesses.

As such, provisional and protective measures can, for example, preserve evidence and protect the parties from possible indelicacy. Like international arbitration, the community legislator has established provisional and protective measures. They are provided for by articles 13 paragraph and 10 paragraph 5 of the arbitration rules of the C.C.J.A. Under the terms of Article 13 paragraph 4: "the existence of an arbitration agreement does not prevent a court from requesting a party, in the event of a recognized and justified emergency or when the measure must be executed in a State not party to OHADA, orders provisional or protective measures, provided that these measures do not involve an examination of the merits of the dispute, for which only the arbitral tribunal has jurisdiction." In our opinion, this provision allows both state courts and arbitrators to issue these said measures to parties who request them.

The competence of state courts to grant provisional and protective measures is subject to two conditions. The first is, in the event of a "motivated and recognized emergency". This condition is laconic and vague. This competence of state courts should be possible, for example, in the difficulty of constituting an arbitral tribunal. This is often the case when the parties do not agree on the appointment of arbitrators. This condition is waived "when the measure must be implemented in a non-member State"[163]. This is logical and justified to the extent that, in the absence of a bilateral or multilateral convention between an OHADA State and a third State, it is not possible to take such measures. The second condition concerns the nature of the measures. Indeed, given the autonomy of the arbitration agreement, judges must not carry out an examination of the merits of the case. This limit placed on the support and cooperation of state courts in arbitration is justified in relation to the rule of autonomy of the arbitration agreement. Indeed, as Mr. Meyer says: "if an arbitral tribunal is already constituted, this condition must be understood in such a way that even a superficial examination of the merits, such as the non-disputable nature of a claim in the event of a request for a provision, leads to the incompetence of judges"[164]. But if the court has not encountered difficulties in its

[163] Article 13 paragraph 4 of the uniform act relating to arbitration.

[164] P.MEYER "uniform act of March, 11st, 1999 relating to arbitration law", OHADA, treaty and uniform acts commented and reviewed.

composition, such a possibility could be admitted. Thus, “in the event of a recognized and justified emergency”, the judge could order provisional or protective measures. This power of the judge to issue such measures came just after the entry into force of the uniform act.

In a judgment of the Douala Court of Appeal[165], the latter held that: “the stipulation of an arbitration clause does not prevent the intervention of the state judge to take provisional or protective measures”. The Court adds: “that a provisional measure makes it possible to enlighten the judge without prejudicing the merits or taking a position”. Finally, the judge said that provisional measures must be taken in the event of an emergency: “whenever a delay in the decision to be taken risks endangering the interests of a party”. The solution of the Court of Douala is in line with the spirit of article 13 paragraph 4 of the uniform act on arbitration. This jurisdiction of state courts is not exclusive, it is rather shared with the arbitrators. Indeed, under the terms of article 13 paragraph 4, nothing prohibits arbitrators from taking provisional or protective measures. But unlike judges, arbitrators do not have coercive power to constrain recalcitrant parties and especially third parties. In the C.C.J.A arbitration, article 10.5 Arbitration Rules states “the arbitrator is competent to order provisional or protective measures during the arbitral procedure”. This article adds that: “the award ruling on a request for provisional or protective measures is subject to immediate exequatur”. Thus, it clearly appears that the competence of the arbitrators is linked because they are devoid of coercive power hence the support of the judge is necessary. But the competence of the latter is not clearly identified in domestic law, which poses enormous difficulties of application, which must be examined.

4..2.2.2.3 The place of the judge in granting provisional or protective measures

Arbitration can hardly do without state justice because the latter intervenes before, during, and after the proceedings of the arbitration proceedings. This intervention by the judge does not mean that he is taking the place of the arbitrators but it is a question of supporting and helping the parties who request it. Thus, we will not fail to emphasize the place of the supporting judge throughout our reflection. Prior to the constitution of the arbitral tribunal, the parties may ask

[165] Economic capital of Cameroon.

the judge to order investigative[166], precautionary and provisional measures. Although these measures are expressly provided for by the texts, in practice the identification and jurisdiction of the state judge are not clearly established. The place of the state judge in institutional arbitration does not encounter any particular difficulties. Indeed, in most permanent arbitration centers, the assistance and support functions are taken into account by the applicable arbitration rules. Unlike institutional arbitration, the support of the state judge raises numerous problems in ad hoc arbitration even if the latter is very rare in the community area which should be studied.

The determination of the competent supporting judge is not expressly provided for by the uniform act on arbitration. Thus, to resolve this problem, it is necessary to resort to article 49 organizing simplified recovery procedures and enforcement routes. Under the terms of this article: "the competent court to rule on any dispute or any request relating to a compulsory execution measure or a protective seizure is the president of the court ruling in emergency matters or the magistrate delegated by him" .

The question is who is this president of the competent court in each Member State to issue a compulsory execution measure or a precautionary seizure?

The terms of the aforementioned article are very vague, general and do not make it possible to identify the competent jurisdiction to issue protective or provisional measures to the parties because, in matters of civil procedure, several jurisdictions may have jurisdiction[167]. For example, in Cameroon, this article is interpreted differently. For part of the doctrine and case law, article 49 refers to articles 182 and 183 of the code of civil and commercial procedure which designates the president of the competent court of first instance. On the other hand, another part of the doctrine maintains that: the judge designated by the uniform act is an autonomous judge who does not correspond to the other judges in place. This imprecision has

[166] Under the terms of article 14 paragraph 7 of the uniform act: "if the assistance of the judicial authorities is necessary for the administration of proof, the arbitral tribunal may of its own motion or upon request require the assistance of the competent judge in the State party". In the context of arbitration, it happens that evidence is held by third parties but, as arbitrators do not have the power to compel third parties to provide them with this evidence. Arbitrators could seek help from national courts in this regard."

[167] See A-F. TJOUEN, "the camoroonian legislator faced with the question of litigation judge", quarterly Review of African Law, july-september 2013, no 884 pp 367-394.

pushed certain state courts to issue contradictory decisions. In the case of African Commercial and Industrial Relations Company known as SARCI Sarl v. Atlantique Télécom SA and Télécel Bénin SA, which is one of the rare ad hoc arbitrations published, the determination of the competent judge was among the grounds raised. The African Commercial and Industrial Relations Society maintains that the Cotonou First Class Court of First Instance has jurisdiction. On the other hand, the company known as Atlantique Télécom, raises the jurisdiction of the supporting judge. Seized of an appeal, the Common Court of Justice and Arbitration specifies:I n procedural law, whenever a particular text does not attribute to a specific jurisdiction exclusive knowledge of certain matters, said knowledge of these this falls to the common law courts; that consequently, it must be said that the court of first instance of Cotonou has jurisdiction.

This decision of the high court is clear, precise and seems to resolve the problem but certain state courts are reluctant and render decisions contrary to the case law of the community high court. Thus, in another case opposing Mr. Zongo André and Koama Paul, to the general company of civil engineering buildings, following a long procedure, the high court of Ouagadougou held their employer responsible. This judgment is confirmed on appeal and orders the seizure and attribution of their employer's debts. Subsequently, the general building company filed an appeal in cassation to request a release from the seizure and attribution of its debts. By an interim order, the first president of the Court of Cassation of Burkina Faso orders the suspension of the execution of the confirmatory judgment of the court of appeal. The Société Générale d'Entreprise seizes the Common Court of Justice and Arbitration to request the annulment of the order of the Court of Cassation.

The question posed to the court is whether the first president of the Court of Cassation of Burkina Faso is competent to order a seizure and attribution of debts.

The Court considers: "that it appears from the provisions of Article 49 of the said uniform act that any dispute relating to a measure of forced execution falls, whatever the origin of the enforceable title under which it is pursued, to the prior competence of the president of the court ruling in matters of emergency and first instance or of the magistrate delegated by him; that in application of this text, the first president of the court of cassation of Burkina Faso was not competent to order the suspension of the forced execution of judgment no. 50 rendered on April 2, 2004 by the court of appeal from Ouagadougou, the first president of the court of

cassation of Burkina Faso disregarded the provisions of article 49 of the above-mentioned act and exposes his decision to the annulment which it is therefore necessary to annul the order attacked for violation of the law"[168]. This judgment is of particular importance because it generally reminds national courts of cassation that they do not have jurisdiction to issue summary proceedings. In our opinion, the Court would like to say through this judgment that the only competent judge is that of the president of the high court, or that of the court of first instance. This decision is in line with previous decisions of the court. However, certain national judges do not comply with the jurisprudence of the Community Supreme Court. Thus, in Cameroon, faced with this distrust of national courts, the legislator through the law of December 29, 2006 and 2007 proceeded to reorganize the judicial procedure[169].

This law is innovative in that it establishes a judge responsible for enforcement litigation. This law aims to simplify and identify the competent judge in emergency and enforcement procedures. But the wording of certain provisions such as that of article 3 of the Cameroonian law is imprecise and contrary to the objectives of the law.
For example, article 3 of the Cameroonian law of 2007 provides: "the judge in disputes over the execution of national judicial decisions is the president of the court from which the contested decision emanates, ruling in matters of urgency, or the magistrate of its jurisdiction which it delegates for this purpose". The wording of this text shows that there are several competent jurisdictions. In other words, the president of the high court, the president of the court of appeal and that of the Supreme Court are competent. This provision is in contradiction with Community law which is superior to national laws. In fact, these three categories of courts cannot rule on emergency measures and enforcement measures.

This is a violation of the principle of dual jurisdiction, under which it is not possible to appeal against possible decisions rendered by higher courts. In civil procedure, when a court of appeal renders a contradictory decision, the latter can only be challenged by an appeal to the Court of Cassation. If the court of cassation issues a judgment, it acquires the force of res judicata[170].

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[168] CCJA, judgment No 012/2008, case Zongo Andre and Koama Paulc/society.
[169] Article 15(2) of the law number 2006/015 of December, 29th relating to the judicial organization, in review of African law, july-september,2006.
[170] Res judicata mean "particular effectiveness that a court decision has when, not being or no longer susceptible to a suspensive appeal, it become enforceable", G.CORNU.

Therefore, the decisions rendered by the Court of Appeal and the Court of Cassation are not subject to appeal as provided for in Article 49 of the uniform act on simplified recovery procedures. These inaccuracies in the drafting of the texts create legal uncertainty which is in contradiction with the objectives of Community law.
Overall, the will of the parties can in no case, alone, be sufficient to validate an arbitration agreement. As one author rightly points out "an act connot be valid in principle, it is only valid if it meets the conditions of substance and form set by a logically primary norm in relation to this act". The effectiveness of an arbitration law requires that the condition of the tribunal be guaranteed and protected from delaying tactics.

CHAPTER FIVE: SOME PROPOSALS TO IMPROVE THE EFFICIENCY OF OHADA

The member states of OHADA certainly have modern legislative texts. They undoubtedly made it possible to harmonize the business law legislation of member countries because the promotion and development of arbitration constitutes the main motivation for the creation of OHADA. However, it is interesting to note that since the texts came into force, arbitration in the community space has not met all its expectations. We believe that the interpretation of certain rules is necessary because the main players in arbitration are likely to explain certain notions and rules on purpose. In this regard, the proposals for improvements will relate to the legal framework and arbitral practice.

The legal framework includes all the rules applicable to arbitration in the community space. Indeed, it is on the basis of these rules that arbitral practice is assessed positively or negatively. However, we have noted that the lack of clarity and precision of certain notions, such as for example those of arbitrability, public order, competent judge, give rise to disputes. It should also be emphasized in the dispute over the grounds for annulment invoked that the "violation of public order and failure to respect the arbitrator and his mission" are frequently raised.

In this regard, we suggest measures intended to strengthen the legal framework, this involves in particular proposing ways and means intended to restrict the grounds which call into question the autonomy of the arbitration agreement (5.1), then we suggest measures intended to strengthen the autonomy of the arbitration agreement (5.2).

5.1. Restriction of grounds calling in question the autonomy of the arbitration agreement

The reasons which call into question the autonomy of the arbitration agreement are essentially linked to the arbitrability of disputes involving private law persons but our reflection will focus more on public law persons because they encounter real difficulties (5.1.1). Therefore, we will propose concrete measures intended to restrict state immunities (5.1.2).

5.1.1. Arbitrability of disputes between public law legal entities

The validity of the arbitration agreement depends on the arbitrability of the dispute[171]. Under Article 2 of the Uniform Act, arbitrability is based on the availability of the rights of natural or legal persons. This notion is too general and imprecise. It is unsuitable for uniform legislation which brings together several States. In our opinion, the property criterion is more suitable and more precise for assessing the arbitrability of disputes.

Article 2 paragraph 2 of the uniform act establishes the capacity of public persons to compromise. This provision is beneficial because it disrupts all state legislation. However, in practice, arbitrability involving States is characterized by its rigidity (5.1.1.1) hence the need to restrict the immunities of public persons (5.1.1.2).

5.1.1.1. As for the rigidity of state immunities

It is based on the foundations of international law and national rights. The general principle of State immunity is based on the principles of sovereignty, independence and equality of States. These principles of international law prohibit one State from judging another. They are enshrined in the United Nations charter which advocates the principle of equality between States. Immunity is defined as "the right not to be subject to common law"[172]. It is a privilege or a super privilege which allows political, administrative, and judicial and arbitral institutions not to be subject to common law. This is the case, for example, with the OHADA Treaty, which established the immunity of judges and arbitrators[173]. It must be emphasized that the concept of jurisdictional immunities of States includes both immunity from jurisdiction and immunity from execution. The immunity from jurisdiction of a foreign State means that a State cannot be judged without its consent[174]. In international law, this principle has long been applied, absolutely, in matters of immunity from execution. Immunity finds its basis "in customary principles, international law, international courtesy and the rules of public law governing relations between States". The

[171]Concretely, this means to be valid, the arbitration agreement must relate to a dispute that can be the subject of an arbitration procedure.
[172] Larousse, 2015, p.408.
[173] Article 49 of treaty modified in 2008.
[174] Idem, p.408.

French High Court applied this principle absolutely, notably in the “Dame Terrasson widow Carrattier” case. In this case, in a judgment of January 22, 1849, the French Court of Cassation ruled on the immunity from jurisdiction of a foreign State. Indeed, it considers that “a government cannot be subject for the commitments it contracts to the jurisdiction of a foreign State”. Subsequently, in a judgment of May 5, 1885, the Court considered that "it is an absolute principle, in law, that it does not belong to a creditor of the State, even to ensure the execution of a judicial conviction obtained against him, to seize or arrest, in the hands of a third party, funds or other objects which are the property of the State”.

Furthermore, the work undertaken by the International Law Commission of the United Nations over many years was adopted on December 2, 2004 and submitted for signature by States. It should be noted that this convention is not ratified by all OHADA States. In addition, it should be remembered that on the internal level, in general, States benefit from the prerogatives of public power in their contractual relations with private individuals. In this regard, OHADA member states do not deviate from it. These prerogatives of public power combined with internal public order often allow States to terminate contracts or refuse to execute an arbitral award, in the name of the general interest. This is the case, for example, with the State of Senegal which adopted law no. 2002-April 12 amending the code of civil and commercial obligations. In this case, article 194 provides “there is no forced execution against the State, local authorities and public establishments”.

With regard to international and domestic law, the question is raised as to whether these prerogatives of public power do not grant States immunity from execution.

This question is of interest in the current difficulties of executing judicial and particularly arbitral decisions against the OHADA States.

5.1.1.2. As for jurisprudential applications

African state courts have generally been hostile to a restrictive application of the immunity from execution of public law legal entities. With a few exceptions, they prefer to apply them absolutely.

In the case between the Industrial Supply Company of Cameroon (S.F.I.C.) and the National Ports Office of Cameroon (O.N.P.C.), the latter is debtor of the sum of one billion

six hundred sixteen million nine hundred thirty eight thousand five hundred thirty six (1,616,938,538) C.F.A. francs to the (S.F.I.C.). Subsequently, he requested and obtained the release of the seizure that had been imposed on him. In this case, curiously, the Cameroonian motions judge, to justify his decision, relies on very old French case law[175] but also on article 30 of the uniform act relating to the organization of simplified recovery procedures and avenues for recovery execution[176].

Furthermore, in another case between the University of Dschang and one of its employees, the latter had carried out a seizure and attribution on the bank accounts of the first city to obtain payment of the sum of two million two hundred and eighty nine one thousand (2,289,000) C.F.A. francs. In this case, following the University of Dschang in its argument which opposed its immunity from execution on the basis of article 30 of the uniform act on simplified recovery procedures and means of execution, the judge hearing the summary proceedings, by order no. 12 of September 11, 2000, canceled the seizure-attribution[177].

In another case, the Nigerien judge was hostile to applying this article 30 A.U.V.E. with the desirable restriction in the implementation of legal rules designed to secure economic activities. In this case, the creditor of a Nigerien state company had carried out a seizure and attribution on the bank accounts of the latter. Indeed, following the company's appeal which requested the application of article 16 of Nigerien Ordinance No. 86-001 of January 10, 1986, this text conferred on it the benefit of immunity from execution, as well as that of article 30 A.U.V.E., the Court of Appeal of Niamey (Nigerian capital), by judgment no. 105 of June 13, 2001546, confirmed the order by which the district judge, by application of article 30 aroused, ordered the release of the seizure carried out on the public company.

Finally, in the case of Aziablévi and others v/ Société Togo Télécom, the C.C.J.A states: “in application of article 30 of the uniform act on recovery procedures, public companies benefit from immunity from execution”. The Court confirms the judgment rendered by the Togolese appeal judge. This decision of the Court has sowed doubt among those involved

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[175] This is the judgment rendered by the French Court of Cassation, july 9, 1951, Dalloz 1952.141, noted by BLAEVOET.

[176]Article 3 AUVE “forced execution and precautionary measures are not applicable to persons who benefit from immunity of execution”.

[177] Interim order No.12/ord.published in the arbitration Cameroonian review.

in arbitration and in business circles. Indeed, the Court makes a restrictive interpretation of immunity from execution.

The Court confirms the judgment rendered by the Togolese appeal judge. This decision of the Court has sowed doubt among those involved in arbitration and in business circles. Indeed, the Court makes a restrictive interpretation of immunity from execution. This decision is, on the one hand, contrary to international arbitration and, on the other hand, it is inconsistent with the objectives of promoting arbitration and investments set by the OHADA Treaty.

Consequently, it is necessary to overcome these obstacles to the arbitration agreement by restricting state immunities.

5.1.2Measures intended to restrict state immunities

Although containing provisions on the basis of which the courts of OHADA member states can restrict state immunities, national courts and the CCJA apply state immunities restrictively and rigidly. However, it is necessary to restrict these immunities, in order to ensure the effectiveness of the arbitration agreement and to secure economic activities in the OHADA area.

The restriction of state immunities finds its foundations in the objectives of the treaty, in other legal texts (5.1.2.1), also in the contribution of international law (5.1.2.2).

5.1.2.1. As for the objectives of the Treaty and applicable texts

The objectives of the Treaty are solemnly affirmed by the Preamble. This prescribes that OHADA law must be “applied diligently, under conditions suitable for guaranteeing the legal security of economic activities in order to promote their development and to encourage investment, wishing to promote arbitration as an instrument for resolving contractual disputes”.

The spirit of the Treaty covers all contracts. It does not make a distinction between public law contracts and private law contracts. The legislator does not stop at this declaration. In addition, Article 2 of the uniform act relating to arbitration empowers States to subscribe to arbitration clauses in domestic law. In doing so, the latter authorizes States and other

public law legal entities to waive their immunity. It follows from this text that the State and its emanations can compromise and assume all the consequences that result from it. Consequently, the subscription by the State and its emanations to an arbitration agreement constitutes a waiver of its immunity from jurisdiction, unless otherwise agreed. A second consequence must be drawn from this capacity of the State to compromise, this is the renunciation of immunity from execution. This must be so, in particular, when the award whose forced execution is being pursued was rendered on the basis of an arbitration agreement binding the State in question, under the conditions provided for by articles 2 paragraph 2 of the uniform act, 21 et seq. of the Treaty. It should be noted that this article 21 governs the area of institutional arbitration of the CCJA[178].

Although the majority of decisions rendered show that public law legal entities continue to rely on their immunity, the fact remains that certain decisions suggest relative optimism.

In this case, in a case between African Petroleum Consultants (A.P.C.), which is a private law company, and the National Refining Company of Cameroon (SONARA), the former had obtained against the latter an arbitration award rendered in London, on April 17, 2002, which ordered the latter to pay him the sum of 2,724,800 US dollars. In this case, to enforce the said award, the plaintiff (A.P.C.) filed a request for exequatur with the President of the Buea High Court[179], on the basis of the 1958 New York Convention for the recognition and the execution of foreign arbitral awards.

Thus, relying on the aforementioned convention, on article 11 of law n°2002/004 of April 19, 2002 known as the investment charter in the Republic of Cameroon[180], amended by law n°2004/020 of July 2004, as well as that articles 30 and following which regulate the conditions for granting exequatur to arbitral awards, the President of the High Court of Buea granted exequatur to the arbitral award of July 17, 2002. The State of Cameroon appeals of this decision to the Littoral Court of Appeal which overturns the decision and

[178] G.KENFACK DOUAJNI "Remarks on immunities from execution and emanations of States", in arbitration Camerounian review.

[179] It is a city of Cameroon which is located in one of the English-speaking provinces.

[180]This article 11 recalls that Cameroon is a party to the New York Convention of June 10, 1958 for the recognition and enforcement of foreign arbitral awards.

agrees with the State of Cameroon. The company known as APC files an appeal to contest validity before the C.C.J.A. On July 1, 2010, the High Court “invalidated the judgment of the Court of Appeal and ordered the State of Cameroon to pay two billion CFA francs to the plaintiff.”

Despite this decision, the Cameroonian State refuses to execute the decision while Article 29 of the uniform act provides that "the State is required to lend its assistance to the execution of court decisions and to the titles enforceable”.

Despite the audacity of these African judges to limit state immunities, the fact remains that certain obstacles persist and make the execution of the sentence ineffective. Indeed, there remains another big pitfall which still allows States to resist and escape prosecution, this is Article 30 of the uniform act on debt recovery procedures. Under the terms of this article, "forced execution and precautionary measures are not applicable to persons who benefit from immunity from execution", however "the certain debts and companies concerned cannot be considered as certain within the meaning of this article only if they result from recognition by them of these debts or from a title having an enforceable character in the territory of the State where the said persons and companies are located. The problem posed is to know whether this article 30 is consistent with the possibility of compromising public figures. In our opinion, the answer is positive. However, the interpretation of this text by the judges proves the opposite as illustrated by the aforementioned judgments.

Consequently, it is unrealistic to believe that judges, despite the audacity of a minority which we have reported, will easily abandon the absolute application of the immunity from execution of public legal entities if they are not assisted by the Council of Ministers. Indeed, the latter is invested with normative power, that is to say, to create and adopt uniform acts which have the value of community law. So, in our opinion, three solutions are possible. The first could consist of amending Article 30 of the Uniform Act on recovery procedures and enforcement, for example, by removing the ban on enforcement against legal entities under public law, if they resort to arbitration. The second solution could consist of a circular from the ministers in charge of justice which requires prosecutors to ask the courts in which they are stationed to apply state immunities in a way compatible with the objective of security and development. Economic activities pursued by OHADA.

Finally, the last solution is the consequence of the first two. The Council of Ministers could draw inspiration from comparative law, for example from the United Nations convention on jurisdictional immunities of States and their property. This convention was open for signature by all States from January 17, 2005, then will enter into force on the "thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with of the Secretary-General of the United Nations".

Which leads us to study the contribution of comparative law in the restriction of state immunities.

5.1.2.1. As for the contribution of comparative law

International conventions constitute a considerable contribution to arbitration. As such, they deserve to be ratified by the member states of OHADA (5.1.2.1.1), then it is appropriate to question their scope (5.1.2.1.2).

5.1.2.1.1. Ratification of the United Nations Convention on Immunities from Execution

Generally speaking, the legislator was inspired by legal rules originating from international business practice. This is the case for the Uniform Act on Arbitration which recognized the New York Convention of 1958 relating to the recognition and enforcement of international arbitral awards. Likewise, the CCJA arbitration rules are essentially based on the rules of the International Chamber of Commerce[181].

This contribution of international arbitration law deserves to be further explored so that it is efficient. The restriction of immunities from execution has been the subject of work by the United Nations International Law Commission. Thus, this work gave rise to an agreement. The latter was also inspired by various legislative and jurisprudential currents. The convention in its article 5 provides: a State enjoys for itself and for its property immunity from jurisdiction before the courts of another State subject to the provisions of these articles. This convention took into account the new roles of States as economic actors.

[181] ROBIN, "the scope of execution immunities in international commercial transactions", R.D.A.I.

As such, it establishes the principle of separation and independence of the assets of the State and public companies to the detriment of the classic theory of State emanations[182]. This convention was largely inspired by arbitration case law. Indeed, in the judgment Société Eurodif v. Islamic Republic of Iran, the French Court of Cassation indicates: "the immunity from execution enjoyed by the foreign State is in principle", however, it specifies that exceptionally, this principle can be rejected, “when the seized property has been assigned to the economic or commercial activity falling under private law which gives rise to the legal claim”. Later, the Court of Cassation in its judgment of March 20, 1989, made an important clarification with serious consequences. It indicates: it does not matter whether this activity is directly carried out by the State or by one of its emanations. Subsequently, in the Creighton v. Qatar judgment, the Court affirmed “the commitment made by the State signatory to the arbitration clause to execute the award in the terms of Article 24 of the Regulations of arbitration of the International Chamber of Commerce implies waiver of this immunity by that State.

Overall, it must be remembered that international arbitral jurisprudence has contributed to the development of immunity from execution. Building on this jurisprudential trend, the United Nations convention established it. This convention deserves to be ratified by the OHADA States.

5.1.2.1.2. The scope of ratification of the Convention

The United Nations Convention of January 26, 2005, in its article 10 paragraph 3, makes a distinction between the State and its public enterprises. But the most important consequence is “that there can be no immunity to a state enterprise engaged in proceedings relating to a commercial transaction”. Article 19 of the convention perfectly reflects its spirit. Article 19 prejudges "neither the question of lifting the veil concealing the entity nor questions linked to a situation in which a State entity has deliberately disguised its financial situation or reduced its assets after the fact to avoid satisfy a request”[183].

[183] L.FRANC-MENGET, “the qualification of an entity as a State emanation: a solution rarely retained by the Court of Cassation”, in arbitration review,2007, No 3,pp.483-49.

This convention, if ratified by the OHADA States, would allow, in the absence of modification of Article 30, the execution of arbitral awards. The recurring non-enforcement of sentences handed down against public figures calls into question the objectives of OHADA. To overcome this situation, the United Nations convention protects State immunity but makes a distinction between property assigned to a sovereign activity and property linked to a private commercial operation. So this qualification allows us to lift the veil on the opacity and bad faith of States. In our opinion, the distinction between the purely sovereign functions of the State and those relating to private management are likely to ensure the execution of arbitral awards. The Court of Cassation, in the judgments of Société Nationale des Petroles du Congo v/Société AF-CAP Inc., considers since the Société Nationale des Petroles du Congo was not sufficiently functionally independent to benefit from autonomy in law and in fact with regard to and its heritage was confused with that of the State, it had to be considered as an emanation of the Republic of Congo.

In our opinion, this decision must inspire national courts and above all, the CCJA. This jurisprudential basis and the ratification of the convention will make arbitration more effective in the community space. However, in practice this distinction is not easy. The distinction between public and private service acts or goods seems simple in theory but in practice, the determination is delicate. Indeed, in the Noga[184] case, the Paris Court of Appeal considers that "the sentence of conviction of the Russian Federation could not be enforced on the accounts opened in the name of the embassy (...) and the commercial representation of Russia in France". In this case, it is up to the creditor to provide proof that the assets are used for management activities. However, the difficulty arises from the fact that most of these assets are today isolated in structures benefiting from a separate legal personality even if this is entirely owned by the State.

The purpose of immunity from execution is to provide all States with legal certainty. However, the latter, as we have emphasized, is not absolute. Furthermore, if the restriction

[184]J.MOURY, "The impact of the stipulation of an arbitration clause on the immunity from execution of the foreign state, 2001, Dalloz collection, p.2139.

of enforcement immunities contributes to the effectiveness of the arbitration agreement, other reasons may also work in its favor.

5.2. Reasons for strengthening the arbitration agreement

The principles intended to ensure the effectiveness of the convention are enshrined in Articles 23 of the Treaty and 4 of the uniform act. These are the autonomy of the arbitration agreement, the validity of the arbitration agreement and the principle of competence-competence. These two articles are inspired by the material rules of validity of the arbitration agreement. They use the terms of the Dalico case law. However, Article 4 of the uniform act places no limits on the arbitration agreement. The reasons for strengthening the autonomy of the arbitration agreement are explained by the numerous interferences of judges in the arbitration procedure and body. They often carry out a re-examination of the merits of the dispute, whereas under the arbitration agreement, the judges must not know either the facts or the merits of the dispute. Moreover, this exclusive competence of the arbitrators, unless expressly waived by the bets, results from the rule of competence-competence. This rule states that in the event of a dispute over the existence or validity of the arbitration agreement, it is up to the arbitrators to decide first[185]. Thus, this aforementioned rule aims to protect the autonomy of the arbitration agreement (5.2.1), however, in the event of the agreement being null and void, or a violation of public order, the judge may be seized.

However, this national and international public order is imprecise and in our opinion must be clarified (5.2.2).

5.2.1 Protection of the autonomy of the arbitration agreement

The autonomy of the arbitration agreement ensures the emancipation of arbitration from the judge (5.2.1.1) and to a certain extent, it guarantees the powers of the arbitrators (5.2.1.2).

[185] Under the terms of article 11 paragraph 1 of the uniform act “the arbitral tribunal rules on its own jurisdiction, including on all questions relating to the existence or validity of the arbitration agreement”.

5.2.1.1. The emancipation of arbitration

The principle of validity of the arbitration agreement ensures its autonomy with regard to any state law. This substantive rule of international arbitration law means that state courts are incompetent to hear any arbitration dispute unless it is void. This rule has as a corollary the principle of competence-competence[186]. This rule establishes the emancipation of the arbitrator vis-à-vis the judge. It allows the arbitrator whose competence is contested to continue his mission. It also develops a negative effect which is aimed at the judges.

These funds, in the event of referral and if the arbitration agreement is valid, must declare themselves incompetent. Despite the principle of competence-competence, in arbitration practice, the judges seized judge the merits of the dispute. In this case, in the case of SOW Yérim v. Ibrahim Souleymane Aka and Koffi Bergson, a share transfer agreement had been concluded between the parties. The arbitration agreement stipulated that: "the parties undertake to resolve their dispute arising from the application of these terms amicably. Otherwise, disputes are subject to arbitration by the OHADA Court of Justice and Arbitration"[187]. Despite this arbitration agreement, the Abidjan court seized by Koffi Bergson declared itself competent and by judgment, it canceled the assignment of debt. Subsequently, this judgment was confirmed by the Abidjan Court of Appeal on the grounds that: "the dispute related to the validity and therefore the very existence of the agreement and not to its application"[188]an appeal in cassation against the judgment of the Court of Appeal was brought by Mr. SOW to the CCJA.

The Community Court indicates "the principle of autonomy of the arbitration agreement (...) requires the arbitral judge, subject to a possible appeal against his future award, to exercise his full jurisdiction over all elements of the dispute, whether it concerns the existence, validity or execution of the agreement", for these reasons, "overrides judgment no. 552 rendered by the Court of Appeal of Abidjan; reverses judgment no. 1974 rendered on June 29, 2005 by the 3rd civil chamber of the Abidjan court of first instance."

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[186] Article 1.1 of A.U.A

[187] CCJA, judgment of April 24th, 2008, arbitration review 2010, No 3, p.586.

[188] CCJA, judgment of April 2008, arbitration review 2010, No 3, p.586.

Furthermore, in another case the Abidjan court confirmed by the Court of Appeal retained its jurisdiction by raising “the exception to the jurisdiction of the arbitrators, the nullity of the arbitration agreement”. However, the judges do not provide any evidence to justify the nullity of the arbitration agreement. It must be emphasized that this attitude of Ivorian judges is not only specific to them; in other countries, judges commit the same actions.

The analysis of these aforementioned judgments shows us the strong reluctance of national judges with regard to arbitration. Two explanations can justify this attitude. The first is to think that some judges are not yet familiar with the arbitration procedure and its consequences. If this is the case, we propose to integrate arbitration and other alternative methods of dispute resolution into university law programs. For example, unlike what is done in Senegal and other countries, alternative methods of conflict resolution must constitute a subject in their own right. This subject must be taught first in the national schools of administration and judiciary, then in the regional school of administration and judiciary.

The second explanation reveals strong reluctance among judges and lawyers towards arbitration. They fear losing their prerogatives to judge and for the lawyers their clients to the benefit of the CCJA. What should be done?

In our opinion, the C.C.J.A must carry out important work to promote arbitration but also to train and raise awareness among all the stakeholders concerned. Also, it is concretely a question of saying that the arbitrator and the national judge are complementary.

Ultimately, arbitration is the business of the parties. If they decide to submit their dispute to arbitrators, this wish must be respected. Likewise, beyond this, this emancipation of arbitrators from judges must strengthen the powers of arbitrators.

5.2.1.2. The extension of the arbitrator’s powers

This extension of the arbitrator’s powers results from the autonomy of the arbitration agreement. Even if the non-existence or lack of validity of the agreement is disputed, the arbitrator may hear the dispute. Thus, as Philippe FOUCHARD said: “the referee must be

a judge, at least long enough to judge that he cannot be"[189]. Concretely, this extension of the arbitrator's powers consists of giving the arbitrator priority of jurisdiction over the judge.

It also arises from the aforementioned principle of competence-competence. It must be emphasized that this principle makes it possible to guarantee the effectiveness of the arbitration agreement. This principle was recalled by the CCJA in the aforementioned judgment in these terms "given that under the terms of Articles 23 of the Treaty and 4 of the uniform act referred to above, any court of a State party seized of a dispute that the parties had agreed to submit to arbitration will declare itself incompetent if one of the parties so requests and will refer, where appropriate, to the arbitration procedure provided for in this Treaty. This decision by the Court was long overdue. Indeed, as we have pointed out, a wind of concern is beginning to blow in the OHADA arbitration.

Indeed, faced with the attitude of losing parties who often use dilatory appeals and the strong reluctance of judges, economic operators, especially foreign ones, are questioning the effectiveness of arbitration. These concerns reveal that economic operators expect efficiency, speed and security from arbitration. To achieve these objectives, delaying tactics, the real bane of arbitration, must be banned. On this subject, the case law of the Community Court must be consistent and dissuasive.

Furthermore, taking into account the evolution of international arbitration law, the arbitrator must be able to issue provisional, conservatory and evidentiary measures.

The emancipation of the referee and the extension of these powers are not without limits. In the event of nullity of the arbitration agreement or violation of national or international public order, the judge may be seized. But it turns out that this public order is subject to discussion and deserves to be clarified.

5.2.2. Measures intended to clarify public order

Public order is a vague rule, imprecise and therefore difficult to define. However, it constitutes an important rule in the regulation of arbitration because it is likely to give the

[189]Philippe FOUCHARD "French arbitration law."Lebryant, 2020, p.30.

award maximum effectiveness. But this notion of public order is difficult to understand, especially since it is not defined by the legislator. Furthermore, the question is delicate insofar as there are as many public orders as there are Member States. In this case, seventeen States, seventeen public orders and in addition, community public order. The Treaty and the CCJA arbitration rules speak of "contrary to international public order"[190] while the uniform act indicates "international public order of the signatory States of the Treaty"[191]. This public order raises another difficulty. Indeed, the uniform act applies to both domestic and international arbitration. The coexistence of this plurality of public orders does not ensure legal certainty and the effectiveness of arbitration. This study does not claim to resolve all the difficulties relating to public order. Its purpose is to suggest avenues for reflection.

Thus, our approach consists first of analyzing the case law of the CCJA on the interpretation of public order (5.2.2.1), then we suggest the clarification and limitation of public order (5.2.2.2).

5.1.2.1. Analysis of the case law applicable to public order

We have already mentioned the ambiguous and vague nature of this notion of international public order of the signatory States of the treaty. It is difficult to define public order. However, internal public order often concerns the essential interests of a State. So rules set by each State are easier to identify and sanction.

As for the international public order to which the texts refer, its interpretation proves more delicate. This difficulty is already illustrated in the preliminary draft of the uniform act[192] and in articles 26 paragraph 5 and 31 paragraph 4 of the uniform act. Consequently, only a decision of the Community Court is capable of interpreting and applying concept (5.2.2.1.1), then it allows us to understand the scope (5.2.2.2.2).

5.2.2.1.1. As for the interpretation of public order by the CCJA

[190] Article 25 paragrah 4-4 and article 29.2 and 30.6 of CCJA arbitration regulation.
[191] Article 26 paragraph5 of AUA.
[192] "the action for annulment is only admissible in the following cases "if the court has violated a rule of international public order of the signatory States of the Treaty"

In the case of the National Society for Agricultural Promotion (SONAPRA) v. Société des Huileries du Bénin (SHB), a cotton seed supply contract was concluded between the two companies. Under the terms of this contract, SONAPRA undertook to supply the SHB with cotton seeds. However, the latter complained of having suffered damage due to the insufficient seeds provided. Thus, in accordance with the arbitration clause, the dispute is brought before the C.C.J.A.

On September 26, 2006, the arbitral tribunal rendered a partial award. SONAPRA filed an appeal to challenge the validity. In this case, she criticizes the sentence for having "violated international public order".

The CCJA responds "given that under the terms of the arbitration clause under which SHB and SONAPRA were submitted to arbitration, the law applicable to the substance of the dispute is Beninese law; that the said dispute, which opposes two companies under Beninese law relating to internal trade, falls under internal arbitration; that therefore, it is wrong to invoke the violation of international public order as the annulment of the award rendered in such an arbitration and that it is necessary to reject the said means"[193].

This principled judgment rendered by the plenary assembly has been long awaited because doctrine is divided on the interpretation of public order. Indeed, what should be remembered from this decision is that the violation of international public order can only be invoked in the context of international arbitration and not in domestic arbitration. The Court considers that it is necessary to distinguish among the provisions of the uniform act those which apply indiscriminately to all arbitration and those which can only concern international arbitration.

In this case, we approve the position of the C.C.J.A. which has just resolved a doctrinal controversy. In this case, it is an internal dispute and public order can only be internal. The judgment mentioned above is limited to stating that the argument based on the violation of international public order of the OHADA States can hardly succeed in domestic arbitration. So in our opinion, it must be added that in the case of an internal arbitration, it should be

[193] Article.29 arbitration regulations CCJA "recognition and exequatur are refused if the award is manifestly contrary to a rule of international public order of the States parties".

able to hear the means of violation of internal public order. This decision of the Court is, in our opinion, justified and salutary. It serves as a reference for domestic courts and makes it possible to interpret public policy. It is therefore appropriate to question its scope (5.2.2.1.2).

5.2.2.1.2. As to the scope of the judgment

If the Court's judgment enlightens us on the application of international public order, in our opinion, implicitly, the internal public order of the seventeen States is preserved. There remains a reservation of internal public order when the arbitrator decides an internal dispute. Concretely, this means that the national judge will have to refer to the rules applicable to its public order, to cancel or refuse an exequatur. This survival of national public orders makes it possible, in another sense, to combat a possible fictitious internationality of the dispute.

Furthermore, beyond the question of public order, this decision reintroduces a distinction between internal and international arbitration. This distinction is necessary to deal with public order, the law applicable to the dispute. After analyzing this decision, we suggest measures likely to improve the interpretation and application of public order.

5.2.2.2.2.1. Improving the clarity of public order

We suggest three measures likely to improve the interpretation and application of public order. It should be emphasized that these are far from exhaustive. These measures are based on harmonization (5.2.2.2.2.1), deterrence (5.2.2.2.2.2) and limitation of public order (5.2.2.2.2.3).

5.2.2.2.2.1. Harmonization of public order

The first measure is on the basis of the organization for the harmonization of business law in Africa. Legal harmonization consists of bringing together, of bringing together the different laws of the States, in this case, between the provisions relating to public order and the law judged (the aforementioned CCJA decision), harmonization must tend to an evolution towards the latter. Indeed, the CCJA plays a role in harmonizing case law. In concrete terms, this involves drawing inspiration from the case law of the High Court. But

in our opinion, there is a prerequisite for this harmonization, we suggest, a rewriting of the provisions of Article 26 and 31 of the uniform act. Indeed, instead of "the international public order of the signatory States of the Treaty", we propose the rewriting of this text, in these terms "the action for annulment is open if the award is contrary to public order". In our opinion, the judge's control should not focus on the arbitrator's reasoning but on the compliance of the award with internal or international public order. In addition to the need to clarify and separate the respective areas of international and national public order, it is the frequency of the use of this means in arbitral litigation which is worrying. To compensate for the abusive and delaying use of this means, we suggest dissuasive measures.

5.2.2.2.2.2. As for deterrence

Deterrence is not contrary to the spirit of arbitration. It is not a question of sanctioning but of discouraging abusive or delaying appeals. In our opinion, the prohibition of suspensive appeal will discourage the losing party who is thinking of buying time. Indeed, it is often observed that the losing party seeks to gain time, with the aim of negotiating with the victorious party, in return for reducing the financial penalty. For example, in the State of Senegal v. MITTAL Arcelor case,the Paris Court of Arbitration ordered MITTAL to compensate the Senegalese party one hundred and fifty million dollars. MITTAL has used dilatory remedies for a long time, in our opinion, in order to negotiate with the State of Senegal. Ultimately, both sides negotiated. This negotiation was done to the detriment of the interests of the State of Senegal[194]. This prohibition of suspensive appeal, unless otherwise agreed, is in favor of the effectiveness of the arbitration agreement and especially the execution of the award. However, if the execution of the award risks harming the interests of the losing party, the judge may allow an appeal. In this case, we suggest precautionary or provisional measures, for example, sealing the movable or immovable property. Furthermore, the last proposal concerns the limitation of public order.

5.2.2.2.2.2.3. Limitation of public order

[194] F.LEJEAL, "the gray areas of the agreement between arcelor MITTAL and Dakar", in *La lettre du continent*, December 17th 2014.

The limitation of public order, especially international, is the logical continuation of the recommended measures. The CCJA despite the recurrent use of public order in cassation appeals resists as best it can. Thus, in one case[195], the author of the appeal argued: "the ship-owner cannot obtain from a third party compensation for damage suffered and caused by his ship" and concluded that this was a violation of international public order. This reasoning is irrelevant and has no connection with the subject of the dispute. The Court responds "this criticism does not fall within the scope of Article 30.6 of the same regulations, which exhaustively lists the complaints which may be raised against the award". Consequently, the Court dismisses the appeal. Indeed, the movement in favor of resorting to international arbitration is based on the idea that, prima facie, it is up to arbitrators to ensure respect for public order. Then, in the event of non-compliance of the award with public order, the judge will be able to review the award. In our opinion, excessive public order is likely to undermine arbitration. Thus, judicial cooperation from the seventeen states of the organization is essential. This cooperation will allow magistrates and arbitrators to exchange their assessments in areas that affect their internal public order. The proposed measures essentially concern the legal framework of arbitration. They are far from exhaustive.

CHAPTER SIX: GENERAL CONCLUSIONS AND RECOMMENDATIONS

6.1. General conclusion

Arbitration in the OHADA area is moving away from its objectives of peaceful resolution of contractual disputes. In practice, arbitration is characterized by pre-, peri- and post-arbitral disputes[196]. This jurisdictional and procedural deviation from arbitration is worrying even if it must be emphasized that OHADA law has the merit of relatively fighting against the legal and judicial insecurity which was rife in the community space. This right also made it possible to fill the legal void in States which did not have any rules

[195] CCJA,judgment No.29, july 19, 2007, arb.rev 2010,No 3,p 490.
[196] B.OPPETIT,"Philosophy of international commercial arbitration", J.D.I, 1993, pp.811-812.

in this area. However, our reflection shows that it did not meet its objectives quantitatively and qualitatively.

The arbitration of the Common Court of Justice and Arbitration saw, in its early days, numerous requests for arbitration. But since the 2010s, arbitration litigation has declined sharply[197]. This decline can be explained by the very tough competition between international arbitration courts, in particular those of Paris and Washington ICSID (International Center for Settlement of Investment Disputes). This decline is also explained by the hybrid nature of its composition. Indeed, the grouping of jurisdictional and arbitral functions in the same Court creates a suspicion of partiality. Finally, another more relevant reason, in our opinion, is that revealed by arbitral practice. Thus, we are witnessing a proliferation of disputes at all phases of the arbitral procedure.

These disputes come from the main players in arbitration, namely the parties, the arbitrators and the judges. Therefore, they have a heavy responsibility. First, the parties must understand that appeal is prohibited in arbitration. The action for annulment is the exception but it must be based on means which do not re-examine the merits of the dispute. However, two means of recourse are regularly used by the parties: "public order and non-compliance by the arbitrator with his mission". If internal public order falls under national law, international law is limited to community law. As for the second means, it is based on "the non-compliance by the arbitrator with his mission". This means, in our opinion, should be deleted because it is the subject of numerous interpretations.

Another actor particularly stands out in arbitral practice: the judge. Indeed, the analysis of the arbitration dispute reveals the sovereignist attitude of national judges. They believe that they have the exclusive monopoly of stating and rendering the law. Judges often view arbitration as justice reserved for the wealthy who want to escape their authority. Consequently, once they receive a request for exequatur or an action for annulment, they carry out an examination of the merits of the dispute. However, they should understand

[197] In his study, Mr Meyer presents the results of the various national and community arbitration centers. The result is a disappointing outcome.

that an arbitration agreement excludes their jurisdiction to hear the dispute unless the parties expressly waive their rights.

This principle is based on the rule of competence-competence. This is a material rule of international arbitration which is enshrined in OHADA arbitration. It should also be remembered that the judge must only support and assist the referees in their missions.

Therefore, how can we reconcile respect for the rights of the parties to legally challenge arbitral awards and ensure the effectiveness of the arbitration?

6.2. Recommendations

In our opinion, States must complete the preliminary work of bringing national law into conformity with harmonized law. Of course, it is a long and tedious task to identify national business law prior to harmonize law. Once this work has been carried out, national provisions must be repealed, except those not contrary to harmonized law. Some states such as Ivory Coast, Cameroon, the Democratic Republic of Congo and Senegal have done this work. Other States are slow to do this work of compliance.

The Council of Ministers and the permanent secretariat must remind member states of their obligations. In our opinion, it is the absence of this compliance which creates the distrust of the national judge towards harmonized law and in particular arbitration. To overcome the distrust and hostility of judges towards arbitration, we suggest training and raising awareness of students and judges about the law and practice of arbitration. This is work that is done primarily in law faculties. Then this work must be continued by the institutions of the organization (Council of Ministers, the regional training school for magistrates and the permanent secretariat) towards the numerous OHADA clubs and magistrates. In our opinion, this awareness-raising and training work for OHADA stakeholders will make it possible to establish “a culture of arbitration”.

In addition, it must be emphasized that paradoxically, one of the major players in arbitration is absent in the OHADA system. Indeed, there are no rules that define the rights and obligations of the arbitrator. However, arbitrators must have a statute which establishes their rights and obligations. This status is likely to guarantee their independence and impartiality. “The independence and impartiality of the arbitrator are universal

requirements of arbitration"[198]. Also the creation of an arbitrator contract would make it possible to avoid suspicion, corruption and conflicts of interest. Interest which begins to win arbitration. Finally, in our opinion, the creation of the status of arbitrator makes it possible to guarantee ethics in arbitration.

The problem of rapid execution of arbitral awards constitutes one of the main concerns of the parties. Moreover, foreign investors often conclude jurisdiction or arbitration clauses with international jurisdiction. It should be noted that the jurisdiction clause is subject to validity conditions[199]. These are the substantive and formal conditions. To avoid the more restrictive formalism of the jurisdiction clause, the parties prefer arbitration clauses.

The Community legislator must adapt arbitration law to legal and economic developments. First of all, it is about taking into account the new requirements of investment arbitration. To make up for their infrastructure gap, African states are signing public-private partnership contracts with foreign investors. The latter, looking for new markets, are very interested but require legal and financial guarantees in the event of a dispute. In response, States sign laws and bilateral or multilateral investment protection treaties. Thus, to materialize their agreements, the parties sign a public-private partnership contract. It is a form of public service delegation. In addition to its advantages, the public-private partnership contract has advantages because States lacking resources often resort to this type of contract. This is a legal and financial technique which is taken into account by arbitration. However, the OHADA arbitration texts do not provide for investment arbitration.

The legal void could have been filled by the States. But the States are devoid of clear texts which govern this process. The risk is the increase in public debt. Therefore, a revision of the texts is necessary.

Ultimately, arbitration in the Ohada area must also take into account other methods of dispute resolution. This involves conciliation and mediation which are adapted to disputes

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[198] MAFONGO KAMGA, "ethics in OHADA arbitration: study in the light of international practice", Penant, Quarterly Review of African Law.

[199] C.BLANCHIN, *the autonomy of the arbitration clause: a model for the jurisdiction clause?,* Paris,ed.LGDJ,1995,pp 53-57.

between individuals and small and medium-sized businesses. Post-arbitration mediation can help enforce arbitration awards.

As Paul Valéry[200] said so well: “what is not entirely completed does not yet exist”, thus an unexecuted arbitral award does not yet exist.

[200] P.VALERY, “selected pieces”,Gallimard editions, 1871-1945.

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