

# Enforcement of international arbitral awards in developing and developed countries
## A comparative study between the OHADA Regime and the United Kingdom

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# Enforcement of international arbitral awards in developing and developed countries:

# A comparative study between the OHADA Regime and the United Kingdom

**By**

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# Abstract

International arbitration has significantly developed and expanded over the years in light of the high volume of cross-border commercial contracts containing arbitration clauses. This has led to a substantial growth of arbitrations worldwide, specifically in Sub-Saharan Africa, which is recognized as one of the fastest-growing regions worldwide. This growth has led to commercial disputes and, consequently, the establishment of the Organization for the Harmonization of Business Law in Africa (hereinafter OHADA), as well as the need to resort to alternative dispute mechanisms such as arbitration.

This thesis aims to assess the enforceability of arbitral awards in developing and developed countries through a comparative study, with a special focus on the OHADA and the UK regime.

The study consisted of two phases: doctrinal and mixed-methods research, with the aim to critically examine what lessons the OHADA regime can draw on English law.

The first phase involves the use of secondary sources. Analysis of the findings helped establish a new theory to implement in the OHADA region: anti-suit injunctions. The findings revealed that incorporating the common law concept into the OHADA civil law system could potentially yield substantial benefits. This would help streamline the arbitration proceedings within the OHADA framework, thereby mitigating the risk of dilatory practices.

The second phase involves empirical methods through semi-structured interviews and survey questionnaires. The findings demonstrate that while the 2017 reform of the OHADA arbitration framework introduced commendable innovations, the OHADA legislator missed the opportunity to address unresolved issues and inconsistencies within the OHADA texts. Although the revised Uniform Act on Arbitration appears to meet international standards and best practices, it is submitted that certain provisions in the OHADA Treaty and the CCJA rules contradict substantial elements of the Act. These articles are analysed through a comparative perspective in the study. Thus, it is hoped that the legislator takes the necessary steps to amend the relevant provisions in a forthcoming reform so as to aspire to achieve the OHADA objectives of harmonization and further promote legal certainty in the realm of arbitration.

The main beneficiaries of this study are the Common Court of Justice and Arbitration, the OHADA institutions, practitioners, experts, academics and students.

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# List of Abbreviations

**AA 1996:** Arbitration Act 1996

**CCJA:** Common Court of Justice and Arbitration

**CCP:** Civil Code of Procedure

**CJEU:** Court of Justice of the European Union

**DAC:** Departmental Advisory Committee on Arbitration

**ECOWAS:** Economic Community of West African States

**ICC/ICA:** International Chamber of Commerce/International Court of Arbitration

**OHADA:** Organisation for the Harmonisation of business law in Africa

**UAA:** Uniform Act on Arbitration

**UEMOA:** West African Monetary and Economic Union

**UNCITRAL:** United Nations Commission on International Trade Law

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# CHAPTER I

# Introduction

## 1.1 Background

International arbitration remains the dispute resolution mechanism of choice for cross-border disputes.[1] In this respect, recent years have demonstrated a significant increase in the use of arbitration to resolve disputes involving African parties. This increasing globalization of trade has fueled the quest for harmonized arbitration practices worldwide, especially in Africa. The continent has witnessed a notable expansion in terms of foreign investments, as evidenced by data provided by the World Bank. The statistics reveal that most African Countries' GDP is related to international trade and investments.[2] Sub-Saharan Africa, in particular, has received approximately four percent of foreign direct investment[3] which is set to increase in the next decade. As the flow of investments continues to increase, and effectively addressing these disputes would require appropriate alternative dispute resolution mechanisms such as arbitration instead of relying solely on traditional domestic judicial systems. This preference for arbitration arises from a lack of trust in the traditional domestic jurisdictions, largely due to concerns surrounding the prevailing level of legal and judicial security within the region.

Dispute resolution in Sub-Saharan Africa appears complex insofar as there has been for many years a balkanisation of the laws. This balkanisation is mostly owed to a diversity of legal instruments deriving from different economic zones within the continent including the UEMOA,[4] CEMAC[5] and ECOWAS[6] among others, which are based on two prominent legal systems: civil and common law. Such diversity entails the issue of legal and judicial

[1] See 2021 International Arbitration Survey: Adapting arbitration to a changing world https://www.whitecase.com/publications/insight/2021-international-arbitration-survey (Last accessed 11 November 2021)
[2] Accessible at http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS (Last accessed 11 November 2021)
[3] See The African Investment Report 2016 https://www.camara.es/sites/default/files/publicaciones/the-africa-investment-report-2016.pdf (Last accessed 23 November 2021)
[4] UEMOA stands for The West African Monetary and Economic Union (WAMEU) made up of eight countries including Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo
[5] CEMAC stands for Central African Economic and Monetary Community and consists of six countries including Cameroon, the Republic of the Congo, Gabon, the Central African Republic, Chad and Equatorial Guinea
[6] ECOWAS stands for Economic Community of West African States and is composed of fifteen countries including Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

insecurity due to the overlapping nature of domestic laws and the variations in competent authorities from one member State to another. Additionally, the OHADA legislator delegates certain aspects of arbitral award enforcement to the exclusive jurisdiction of individual member States, which are encouraged to enact appropriate legislation in this regard. However, it should be noted that only a few jurisdictions have thus far implemented these recommendations. In view of the alarming economic situation of Sub-Saharan countries in the early 1920s, [7] the African Heads of State implemented their political will to respond to the development needs of their countries through legal and judicial tools. They considered the law as a key tool to implement appropriate strategies in order to restore trust with the investors while enhancing economic attractiveness. It is within this context that the Organization for the Harmonisation of business law in Africa (hereinafter OHADA) was created. The supranational organisation is the result of the will of the Sub-Saharan African Heads of State to harmonize their laws in a view to find appropriate solutions to the persistent economic sluggishness which has led to mass unemployment.[8] Originally, 14 States essentially of the franc zone,[9] and as of 2022, 17 States[10] signed on the 17th of October 1993 the OHADA treaty. The treaty is defined as a legal instrument for integration and development in Sub-Saharan Africa to guarantee legal and judicial insecurity in the region. The law deriving from the Treaty has resulted in different texts in an effort to constitute a point of attraction to foreign investors and contribute to the uniformization of business law initiated by the OHADA legislator. The original rationale behind the creation of this supranational organisation, deriving from the Napoleonic commercial code of 1807, was to modernize the law and develop a standardized and consistent pan-African business law so as to create a favourable investment climate for an economic development zone in Africa.

Benoit le Bars argues that arbitration is the first motive for the creation of OHADA to prevent legal and judicial security and promote its development throughout the continent.[11] Hence, this alternative dispute settlement occupies a key place in the OHADA system.

[7] Uwazie, E. 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 ACSS p. 38
[8] Ibid.
[9] The CFA franc zone concerns two currencies and consists of fourteen countries in sub-Saharan Africa affiliated with either the West African CFA franc used in eight countries or the Central African CFA franc used in six countries
[10] In order of ratification: Guinea-Bissau (1994), Senegal (1994), Central African Republic (1995), Mali (1995), Comoros (1995), Burkina Faso (1995), Benin (1995), Niger (1995), Côte d'Ivoire (1995), Cameroon (1995), Togo (1995), Chad (1996), Congo (1997), Gabon (1998), Equatorial Guinea (1999), and Guinea (2000), Democratic Republic of Congo (2012)
[11] Benoit le Bars, "*International Arbitration and Corporate Law: an OHADA Practice*" (Eleven International Publishing, 2014) p.40

OHADA arbitration framework provides the possibility to parties within the OHADA zone contracting with domestic or foreign investors to arbitrate under two separate regimes: the Uniform Act on Arbitration[12] (hereinafter UAA) or the Common Court of Justice and Arbitration rules[13] (hereinafter CCJA Rules).

Notwithstanding the positive effects of OHADA arbitration law on the legal framework in the zone especially in the States which did not have such a modern framework, it is noted that with over two decades of existence, the OHADA arbitration framework is faced with several issues in terms of implementation.[14] In this regard, the study aims at identifying the issues of implementation with respect to the conduct of the arbitration proceedings and the effectiveness of the arbitral awards. This would help suggest recommendations with a view to contributing to the improvement of the law and the arbitration practice. The attempt to harmonize the domestic laws is faced with legal gaps existing owing to the fact that OHADA provisions do not address all issues in the different areas of law. The OHADA legal framework aims to address these challenges by incorporating both the solutions of legal reform and effective implementation to achieve better harmonization of laws. As part of this effort, common rules on the law applicable to disputes submitted to arbitration were adopted within the OHADA framework. These rules seek to provide clarity and uniformity in determining the applicable law in arbitration proceedings, contributing to the overall goal of harmonization within the OHADA region.

In November 2017, three reforms were implemented by the Council of Ministers in order to reinforce the attractiveness of the OHADA zone as well as the effectiveness of its alternative dispute mechanisms: the revised Uniform Act on Arbitration, the Revised CCJA Rules and the new Uniform Act on Mediation. Feneon submitted that the new articles of the Uniform Act on Arbitration and the CCJA Rules incorporate an important part of the jurisprudence deriving from the previous texts.[15] These articles appear nevertheless innovative and avant-garde with respect to arbitration law. One of the innovations includes the silence-exequatur post-award which aims to ensure concrete enforcement of arbitral awards and avoid dilatory practices.[16] The reform aims to the renew of arbitration law in Africa and the affirmation of international arbitration's modern principles. In this respect,

[12] Adopted on the 11 March 1999, the new Uniform Act on Arbitration Law (UAA) constitutes the ordinary arbitration law applicable in all OHADA Member States.
[13] The Common court of Justice and Arbitration rules are the arbitration provisions governed by the CCJA
[14] Takem, E 'The Enforcement of Arbitral Awards in Harmonized Legal Systems: Challenges in the Application of the OHADA Uniform Act on Arbitration' (2018) 1 TDM p. 45
[15] Aka, N; Fénéon, A; Tchakoua, J "*The New OHADA Arbitration and Mediation framework*" (DA, 2nd ed. 2018) p. 33
[16] See art. 31 of the UAA

new provisions in the reform were added, although including purely technical measures. These provisions demonstrate theoretically a liberal, autonomous and flexible conception of OHADA arbitration. Nonetheless, the study assesses whether these innovations are effective in practice and comply with international standards and best practices as despite the existence of these innovations, it is noteworthy that a significant number of arbitrations are still conducted under the auspices of the International Chamber of Commerce (ICC). Therefore, this study shall attempt to bring attention to the CCJA Rules, examine their effectiveness, and contribute to the enhancement of the OHADA regime. The objective is to reduce the reliance on external rules and foreign institutions by promoting the development and utilization of the OHADA arbitration framework.

The research highlights the increasing interest and importance of international arbitration in Sub Saharan Africa as a preferred mechanism for dispute resolution owing to the increasing flow of investments in the region over the years. The uniqueness of the OHADA law is the place granted to arbitration in its different texts, primarily in the Preamble of the OHADA Treaty demonstrating the vision of the OHADA pioneers to promote the culture of alternative dispute resolutions. Arbitration plays a central role under OHADA provisions for the reboot of the economic activities in the region, and a more favourable business climate for foreign investors. The implementation of the Uniform Act on Arbitration (UAA) within the OHADA zone represents a significant step towards the harmonization and modernization of business law. It is crucial to highlight that the OHADA legal instruments, including the UAA, are binding on all member states. Consequently, they automatically replace any existing arbitration laws that were previously in place within the member states. This is particularly relevant as most member states had inexistent or very limited arbitration laws that primarily applied to domestic matters. By adopting the OHADA texts, Member States commit to adhering to the provisions outlined in these instruments. This commitment extends to replacing any existing laws or provisions that are inconsistent with the OHADA texts. The purpose of this approach is to ensure uniformity and consistency in the application of arbitration rules within the OHADA zone. The automatic replacement of existing laws is a critical feature of the OHADA framework. It establishes a clear and comprehensive legal framework for arbitration, providing certainty and predictability for parties involved in cross-border transactions. Hence, the UAA succeeded in filling in some of the legal vacuum in most States within the area where arbitration was inexistent. This unified approach seeks to promote legal stability and facilitate the resolution of disputes in a manner that aligns with international standards and best practices. By superseding

previous laws and eliminating contradictions, the OHADA texts aim to establish a cohesive and harmonised system of arbitration.

This legal framework appears to stand out from the legislation adopted by most Member States under the civil law regime. The relationship between the OHADA member states and the civil law regimes dates from colonization. During the 1990s, it became increasingly evident that the shared colonial heritage, primarily characterized by civil law systems, was inadequate in addressing the emerging challenges of the modern world. As a result, the implementation of this legal regime by the individual states failed to meet the evolving international standards. The traditional civil law systems, which were rooted in the historical context of colonialism, struggled to effectively respond to the complexities and demands of the contemporary legal landscape. Recognizing the need for a more dynamic and adaptable legal framework, efforts were made to reform and modernize the existing legal systems in order to align them with international best practices. Arbitration law in those States consisted of a nexus of regulations that varied from one State to another. The approach does not intend to criticise the French legal system heritage which significantly contributed to building OHADA legal framework. Rather, it aims to assess the enforcement of OHADA arbitral awards in the light of other legal instruments and jurisdictions so as to find out the appropriate approaches for the effectiveness of both domestic and foreign arbitral awards in the region. This would help contribute to the achievement of OHADA objectives to harmonize business laws, restore trust with foreign investors and create a new development pole in the region.

The thesis takes the position that notwithstanding the commendable initiatives of the OHADA founding members, and the innovations from the OHADA legislator seeking to enhance transparency, promptness and efficiency of arbitral proceedings, most Africa-related arbitrations are not conducted using OHADA arbitration provisions.[17] The potential rationale behind this reluctance remains the inherent flaws in OHADA arbitration framework through persistent conflicts of law and conflicts of jurisdictions. With regard to the conflicts of law, the research highlights the peculiarity of domestic laws resulting in two key issues.

The first issue concerns the concrete implementation of the provisions within the whole Member states which is still not effective. The second issue is related to public policy considerations which vary from one state to another and affect the grant of exequatur,

[17] Priority is given to international regulations from arbitration institutions including the ICC rules

essential to make the arbitral award enforceable. To this issue, the legislator remains silent and the CCJA is yet to rule on the matter to provide further guidance. Conflicts of jurisdictions concern the determination of the competent jurisdiction in each state, and the domestic courts' hostile approach vis-à-vis arbitration, especially at the enforcement stage. The research in this respect suggests a deliberate sluggishness and dilatory practices from the courts to grant exequatur. Suggestions have been made in the past, including the reform of key provisions in the existing texts and these suggestions will be closely examined. The study also considers whether the OHADA arbitration framework can draw upon any existing international rules, domestic jurisdictions or arbitration practices in a view to implement the findings in a forthcoming reform, such as the UK arbitral regime.

The research attempts to establish a bridge between the OHADA arbitration regime and English arbitration by conducting a comparative study. This comparative approach allows for a comprehensive exploration of the strengths and weaknesses of each system, thereby facilitating the identification of potential areas for improvement in the OHADA regime. Through this research, a deeper insight into OHADA arbitration can be gained, leading to the development of strategies to further enhance its effectiveness and alignment with international arbitration standards. This would help assess the practical effectiveness of the reform of 2017 and identify the inherent flaws and persistent legal gaps jeopardising effectiveness in the enforceability of arbitral awards, in a region that for many years faced a balkanization of the laws owing to the disparate legal systems of the States which led to legal and judicial insecurity.

## 1.2. Literature review

The essence of arbitration is well-depicted in Redfern and Hunter's statement:

"*Parties who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that, unless a settlement is reached along the way, the proceeding will end with an award. They also expect that subject to any right of appeal or recourse, the award will be final and binding upon them.*"[18]

The concept of finality is a pivotal aspect of arbitration, as it empowers the prevailing party to seek enforcement of the award in jurisdictions where the losing party holds assets. This feature distinguishes arbitration from other dispute resolution mechanisms and enhances its attractiveness for cross-border transactions. By providing a conclusive resolution to the dispute, the final award enables parties to move forward with certainty and enforce their rights. The significance of finality in arbitration, as expressed by Redfern and Hunter, resonates strongly in the context of arbitration practice in Sub-Saharan Africa. The region's growing prominence in international trade and investment has led to an increasing demand for efficient and effective dispute resolution mechanisms. While arbitration has gained recognition as a preferred method for resolving cross-border disputes, the implementation and awareness of arbitration practices in Sub-Saharan Africa remain limited. The current state of arbitration in Sub-Saharan Africa is influenced by a notable gap in accessing data and limited scholarly focus on the subject. This situation creates challenges in assessing the landscape of arbitration practice and identifying the prevailing trends in the region in terms of enforceability of arbitral awards. According to Kamga, this is especially significant considering the increasing importance of arbitration as a key tool in the business practices of many countries within the region. Sub-Saharan Africa has witnessed a significant influx of foreign investors, drawn to its potential for growth and development, and arbitration has emerged as a favored method for resolving commercial disputes arising from these foreign investments by providing a reliable and efficient means of resolving cross-border disputes and consequently becoming an essential component of the region's business landscape.[19] Kamga's argument highlights the factors that make Sub-Saharan Africa an attractive destination for businesses, including advantageous investment opportunities, diverse legal

[18] Redfern A; Hunter M; Blackaby N; Partasides C "*Redfern and Hunter on International Arbitration*", 6th ed., (OUP, 2015) at page 513

[19] Kamga, J "*The contribution of the OHADA law to the attractiveness of the foreign investors within the State parties"* (2012) RJSP at http://biblio.ohada.org/pmb/opac_css/index.php?lvl=notice_display&id=3046 (last accessed on the 20th September 2019)

systems, and abundant natural resources such as mining. These factors align with the criteria that businesses consider when seeking investment opportunities in the region.[20] The current state of legal insecurity in Sub-Saharan Africa is a significant concern that has hindered the region's economic development and discouraged foreign investment. Various factors contribute to this legal insecurity, including outdated or inadequate legal texts, delays in publishing adopted laws, and challenges in implementing legal decisions. One of the key issues is the obsolescence of existing legal texts, which may not adequately address the complexities of modern business law, making it difficult for businesses to navigate the legal landscape and plan their operations accordingly. Moreover, the delay or failure to publish adopted laws due to resource constraints further exacerbates the problem. This lack of transparency hampers business confidence and can discourage investments. Another significant issue is the judicial insecurity characterized by lengthy procedures, unpredictability of the courts, corruption within the judiciary, and difficulties in implementing legal decisions. Lengthy and unpredictable court proceedings can result in significant delays and increased costs for parties involved in disputes. Furthermore, corruption within the judiciary poses a significant challenge to the rule of law and erodes confidence in the legal system. Difficulties in implementing legal decisions also contribute to legal insecurity. Even in the case where a favorable decision is obtained through the legal system, challenges may arise in enforcing and executing the judgment. This can be due to administrative obstacles, lack of resources, or non-compliance by the losing party. The inefficiency in implementing legal decisions erodes the effectiveness of the judicial system and undermines the credibility of the legal framework. The combination of these factors has created serious suspicions among investors and has had a detrimental impact on the region's economic development. The lack of legal and judicial security has deterred investments, as businesses are hesitant to operate in an environment where their rights and interests may not be adequately protected.[21]

As such, recognizing the necessity to restore trust with foreign investors and address the prevailing legal and judicial insecurities in the region as stated by the General Secretary of the Common Court of Justice and Arbitration Narcisse Aka,[22] the Treaty on the Harmonization of Business Law in Africa was concluded on the 17th of October 1993 in Port-Louis. This regional treaty, commonly known as the OHADA Treaty, was established

[20] Ibid, at page 5
[21] Sangare, Y 'International arbitral awards and the attractiveness of the OHADA regime to foreign investors' CLJ (2019), 24(1), at page 30
[22] Aka, N; Fénéon, A; Tchakoua, J *'The New OHADA Arbitration and Mediation framework'* (DA, 2018) at page 19

with the aim of harmonizing business law in Africa. It encompasses the participation of 17 African states within its framework.[23]

Nonetheless, addressing these challenges requires comprehensive reforms aimed at modernizing legal frameworks, improving the efficiency and integrity of the judicial system, and enhancing the implementation of legal decisions. By establishing a transparent and predictable legal environment, Sub-Saharan Africa can attract more investments, promote economic growth, and foster sustainable development.

In this regard, the reform of 2017 adopted by the Council of Ministers of OHADA on the Uniform Act of Arbitration (UAA) includes innovative provisions.[24] It provides further clarification regarding the concept of public policy and enshrined two new concepts: the imposition of a time-limit for the grant of exequatur[25] and the attribution of a dual function to the CCJA. Indeed, the CCJA's authority was reinforced by the recent reform, and Feneon states in this regard that the new reform significantly improved the OHADA Arbitration framework.[26] While acknowledging the commendable nature of the reform initiatives, it is important to recognize that certain significant issues have not been adequately addressed, which are likely to have a negative impact on the proper conduct of arbitration proceedings. One such issue is the notion of public policy, which plays a crucial role in determining the enforceability of arbitral awards. The concept of public policy serves as a safeguard to ensure that awards that are contrary to fundamental principles of law and public morality are not enforced. However, within the context of the reform, the specific criteria and scope of public policy are not clearly defined, leading to uncertainty and potential challenges in its application. This ambiguity may create difficulties in assessing the validity and enforceability of arbitral awards, undermining the effectiveness of the reform. Furthermore, the introduction of new provisions within the reform has raised concerns due to their lack of clarity and precision. The ambiguity surrounding these provisions can create confusion and give rise to differing interpretations, potentially leading to disputes and challenges during arbitration proceedings. Mbow, in particular, highlights that despite the reform's positive intentions, it may not have achieved the desired

[23] Initially 14 signatories' states: Central African Republic, Benin, Côte d'Ivoire, Burkina Faso, Cameroon, Congo Brazzaville, Niger, Comoros, Gabon, Equatorial Guinea, Mali and Senegal. Other countries have since joined the regime namely Guinea Bissau, Guinea Conakry, and the Republic Democratic of Congo (RDC)
[24] Accessible at https://www.ohada.org/index.php/en/news/latest-news/2294-online-publication-of-the-new-ohada-laws-on-arbitration-and-mediation (last accessed 29/09/2019)
[25] See art. 31 of the revised CCJA rules
[26] Aka, N; Fénéon, A; Tchakoua, J '*The New OHADA Arbitration and Mediation framework*" 2nd ed. (DA, 2018) p.46

outcomes due to these concerns and uncertainties.[27] This can be explained by the fact that important issues affecting the enforcement process have still not been addressed.

*The revised OHADA arbitration framework*

OHADA attributes a special status to the CCJA cases which benefit from the *res judicata* and are enforceable within the whole OHADA area grouping the 17 member states.[28] The arbitral awards issued under the CCJA benefit on top of that from a "community exequatur" granted through a request addressed to the president of the CCJA who has fifteen days to grant the exequatur.[29] This attribution raised debate and was subject to criticism owing to the low rate of CCJA cases This rate can be attributed to several factors including suspicions from domestic users and foreign investors. These suspicions have led to the idea that the "Getma saga,"[30] a series of judgments that might have cast a dark cloud over OHADA arbitration, jeopardising the credibility of the CCJA's arbitral centre. This issue must be addressed with a view to improving the legal and judicial security in the region. This would increase OHADA's attractiveness as well as foreign investments. Indeed, statistics in 2012 demonstrated that the CCJA since its creation was seized 1172 times, adjudicated only on 563 disputes which of 485 cases and 78 orders. As a result, 51,96% of the disputes haven't been resolved.[31] Moreover, Sawadogo adds that the high expectations from the CCJA's arbitral activity resulted in a climate of suspicion[32] owing to a lack of credibility.[33]

*Exequatur or enforcement of arbitral awards*

The legal insecurity includes the lack of uniformity with respect to the proceedings among the OHADA Member States, specifically the non-uniformity of exequatur rendered under the UAA. The exequatur is a post-arbitral process granted by the competent judge of the State where the enforcement is sought. Exequatur makes the arbitral award enforceable through the affixing of an enforcement formula that triggers enforcement of the arbitral

[27] Mbow, D 'Transparency of the arbitral tribunal in the OHADA area' (2016) 3 IBLJ p.36
[28] See Art. 27 of the OHADA Treaty
[29] See also art. 25 of the OHADA Treaty ; arts 30 et 31 of the revised CCJA's rules
[30] *CCJA, RÉPUBLIQUE DE GUINÉE C/ GETMA INTERNATIONAL* [2015] 139
[31] See *Code pratique OHADA 2020-2021* (Code pratique Francis Lefebvre, 2021)
[32] Sawadogo, F '20 years of OHADA : overview and perspectives' (Penant, 2013) no 855; at page 16
[33] Statistics on the 30th June 2012 indicated that since the creation of the CCJA, the arbitral centre was seized only 49 times and 3 partial awards, 15 orders were rendered, and 18 ongoing arbitral proceedings.

award. The award is deemed enforceable in the territory where enforcement is sought unless the arbitral award goes against international public policy.[34] A term that has not been defined yet by the OHADA legislator and the CCJA is yet to rule on the matter, therefore left at the discretion of the domestic courts.[35] At this stage, the judge does not reconsider the substance of the matter but just proceeds to verifications related to the formal validity of the award[36] or the compliance of the arbitral award with international public policy by the judges. Nonetheless, it embodies some limitations and inconsistencies. In this regard, Dr. Tchotchoua and Ngwanza discussed the effectiveness of the CCJA rules on the enforceability of arbitral awards rendered in the OHADA area. The author[37] supports that in breaking with the tradition of the exequatur process which was exclusively granted by the national jurisdictions, the OHADA legislator conferred to the CCJA the authority to make the arbitral awards rendered under its auspices[38] enforceable,[39] The author further submits that this is what makes this institution an arbitration centre comparable to the *imperium* of national jurisdiction.[40] This statement was confirmed in *Plaza-Center C/ Sté de coordination et d'ordonnancement Afrique de l'ouest*[41] where the arbitral award rendered by the CCJA had *res judicata* effects and was legally binding in the territory where enforcement was sought. Indeed, it is noted that pursuant to article 27.1 of the CCJA Arbitration Rules, any arbitral award rendered in compliance with the Arbitration rules is mandatory for both parties and has *res judicata effects* within the territory of each member state. Therefore, the arbitral award shall be subject to enforcement within the territory of any of the member states.[42] Nonetheless, Ngwanza argues that this dual function as an arbitration centre and supreme court may significantly affect the transparency of the arbitration proceedings, and by ricochet cast doubt on the reliability of the CCJA.

On the flip side, Tchotchoua argues that the OHADA legislator aims through this reform to streamline the exequatur process within the CCJA but also harmonize the domestic jurisdictions, which is of the essence for expeditious enforcement of arbitral awards.

[34] See art 30 of the CCJA's arbitration rules
[35] *Case N° 104/2015: Etat du Bénin représenté par l'Agent Judiciaire du Trésor c/ Société Commune de Participation*
[36] See art. 25 of the OHADA Treaty
[37] Aka, N; Fénéon, A; Tchakoua, J '*The New OHADA Arbitration and Mediation framework*" 2nd ed. (DA, 2018) p. 39
[38] See Art. 30.1 of the CCJA's arbitration rules
[39] See Art. 30.2 of the CCJA's arbitration rules; see also order N°003/2009/CCJA 22/01/2009, case ECOBANK BURKINA SA C/ JOSSIRA INDUSTRIE SA, JURIDATA N° J003-01/2009
[40] See Art. 1.2 of the Arbitration rules of the CCJA
[41] *Plaza-Center C/ Sté de coordination et d'ordonnancement Afrique de l'ouest*, Ohadata J-05-346 [2004]
[42] Contrary to the exequatur granted through the CCJA, the exequatur granted by a domestic from one of the member states applies only to the territory where they have jurisdiction his country since public policies are different from one State to another; see *Atlantique telecom S.A C./ Planor Afrique S.A Case n° 389* 28/03/2013 (11-23.801)

Indeed, in light of the revised Uniform Act on Arbitration, the judges are now required to rule on the exequatur request within 15 days, which appears to be smart progress in the sense that it facilitates and expedites the exequatur process. Nonetheless, the article specifies that after that period and in the silence of the judge the arbitral award shall be deemed granted. Thus, what the author considers as huge progress can be detrimental for the judges of the exequatur considering that the time-limit provided by the revised Uniform Act on Arbitration to check the enforceability of the arbitral award and issue the ruling will put pressure on them, resulting in an overlooked and expeditious decision. Given that, the question remains as to the real effectiveness of this new mechanism from the OHADA legislator and its impact on the decisions of the domestic courts in the grant of exequatur.

*Arbitral awards rendered outside the scope of the UAA*

Another issue that the recent reform attempted to address concerns the enforcement of arbitral awards rendered outside the scope of the UAA, now enshrined in the Act pursuant to art. 34. which states that these arbitral awards are recognized within the State Parties as laid down by the relevant international conventions, or alternatively the provisions of the UAA apply. In this regard, Diedhiou argues that the OHADA legislator should have referred to the regime of arbitral awards within the OHADA area provided in Art. 1 of the Act without considering whether the awards were rendered within or outside the scope of the UAA, which is likely to create a positive conflict between article 1 and 34.[43] Indeed, the fact that the arbitral awards are rendered under the UAA rules or not is irrelevant on the matter. Regarding the arbitral awards rendered outside the OHADA scope and which the State is not a party to any international convention, art. 34 stipulates that the circulation of these awards is subject to UAA provisions, which contradicts Art. 1 of the same text. This unclear legislation is detrimental to the circulation of arbitral awards within the OHADA area. In that sense, Diédhiou suggests that the legislator should have made the distinction between the arbitral awards rendered in the OHADA area that shall be subject to articles 30 to 33, and those rendered outside the OHADA scope that shall be subject to article 34 of the UAA.

[43] Diédhiou, P "*Recognition and enforcement of arbitral awards under the Uniform Act on Arbitration*" (LexisNexis, 2013) p. 492

Thus, another issue to address is the uncertainty regarding the enforceability of arbitral awards rendered outside the OHADA scope. Ekani suggests in this regard that in a view to increase OHADA's attractiveness, the legislator may have attempted to establish a regime of circulation for the awards rendered under the UAA and another regime for those rendered outside the OHADA scope. This approach may seem reasonable in the sense that the arbitral awards rendered under the UAA provisions are automatically considered in conformity with procedural public policies,[44] unlike foreign arbitral awards. Nonetheless, there is an urgent need for the legislator to make clear the distinction between arts 30 to 33 and article 34 in the forthcoming reform as the provision implies that the UAA provisions shall not govern arbitral awards rendered outside the OHADA scope unless there is a lack of specific provisions.

Art. 31 of the same text adds that recognition and enforcement of any arbitral award rendered outside the OHADA area will be under the jurisdiction of the domestic court. Nonetheless, CCJA case law provides a strict approach to art. 34 as illustrated in *Vodacom International Limited c/ Congolese Wireless Network SARL*,[45] related to arbitral awards under the NY Convention and the ICC. In the case, the CCJA overturned the decision of the court which wrongfully denied exequatur of an arbitral award based on UAA provisions, while both parties are bound to the NY Convention. The Court held that any arbitral award rendered outside the OHADA area shall be ruled based on the appropriate international conventions. In another decision,[46] the CCJA held that the arbitral award rendered by the ICC and involving two Cameroonian parties is not governed by the Agreement on cooperation in justice matters between Cameroon and France, but rather by the NY Convention. The rationale was based on the fact that pursuant to art. 28.6 of the ICC Arbitration Rules, the Agreement on cooperation is not applicable to the dispute. Hence, the refusal to enforcement of such an arbitral award was a violation of art. 34 of the UAA and shall be dismissed. It is submitted that the current provisions lack clarity which may undermine the CCJA decisions, and consequently the enforcement of arbitral awards. It is then hoped that the legislator reviews the article so as to facilitate the enforcement of arbitral awards.

[44] See Art. 9 of the UAA
[45] N. 003/2017
[46] *Geodis Projects Cameroon v. Tenga* N° 166/2017

International public policy is a construct of jurisprudence.[47] In arbitration, compliance with international public policy is the *sine qua non* condition for the exequatur to be granted and make an arbitral award enforceable.[48] The various interpretations of public policy gave rise to conflicting views in the existing literature.[49] There is an urgent need for the CCJA to provide further clarification on the concept with a view to harmonising and regulating the circulation of arbitral awards. One of the solutions from the OHADA legislator area was to refer to one of the most preferred international conventions regulating foreign arbitral awards namely the New York Convention.

*Public policy*

Under OHADA law, the previous texts made the distinction between three terms: international public policy, OHADA member states' international public policy, and public policy of the Treaty's states parties. Following the reform, a common definition applies. This implies that both Art. 31 of the UAA on the circulation of arbitral awards and art. 30.5 of the CCJA rules[50] refer now to international public policy. In light of the reform, it is understood that the legislator aimed to dispel the lack of clarity triggered by the previous texts. Nevertheless, the reform has still not addressed the issue owing to the absence of a clear definition of international public policy in the OHADA provisions. However, this new provision would grant the domestic courts entire discretion to rule on the substance of international public policy.

*The inconsistent interpretation of public policy under the OHADA Framework and the New York Convention provisions*

12 out of 17 OHADA Member States are signatories of the NY Convention[51] In Okubote's view, the achievements of the New York Convention must be appraised in view of the massive flux of investments these past few years in Sub-Saharan Africa. Indeed, the New York Convention through its pro-enforcement purpose aims to ensure that arbitral awards are recognized and capable of enforcement in the different States' jurisdictions. In this regard, the NY Convention pursuant to Articles III and IV provide the requirements that each national court should recognize and enforce foreign arbitral awards under the uniform

[47] *Cass. Civ. 25 mai 1948, Lautour*
[48] See art. 30.5(d) of the CCJA's arbitration rules and art. 31.4 of the revised UAA
[49] See Anou, N "*OHADA framework and conflicts of law*" (BDP, 2013) p. 126
[50] See paragraph d.
[51] The OHADA Member States signatories to the New York Convention are: Senegal, Niger, Côte d'Ivoire, Central African Republic, Cameroon, Guinea, Gabon, Mali, Comoros, Republic of Congo, Benin, Burkina Faso

international rules, subject to specified exceptions[52] such as issues of jurisdiction or public policy.[53] Public policy is still undefined, leaving the domestic courts with the task of interpreting the texts. Although the NY Convention is recognized for its pro-enforcement purpose, the major concern rests on uniformity regarding the interpretation of the provisions. Indeed, public policy varies from one state to another, therefore can be contrary to the public policy of the state of the arbitral seat and non-contrary to the public policy of the state where enforcement is sought. As an illustration, the case *Société Nationale pour la Promotion Agricole (SONAPRA) c/ Société ADEOSSI et Fils*[54] demonstrated that conferring the right to set aside an arbitral award to the domestic courts is likely to be detrimental to the Convention in the sense that the finality of the provisions depends on the domestic courts' interpretation.[55] Okubote on this matter supports that seeking enforcement of an arbitral award in an OHADA State may be easier if that State is not a signatory to the New York Convention.[56] Indeed, the NY Convention provisions appear to be less strict than those of the UAA regarding the annulment of arbitral awards.[57]

The inconsistency and lack of uniform interpretation of the New York Convention provisions need to be addressed. In this regard, Moses[58] suggests that amendments would be welcome to point out the inconsistent writing requirement set in Article II of the Convention which appears incompatible with contemporary international business practices.

The New York Convention and the OHADA Treaty[59] attempt to facilitate the enforceability of international arbitral awards when parties agree to resort to arbitration for the resolution of their disputes. 5 out of the 17 OHADA member states have not ratified the New York Convention, which makes it difficult for the OHADA legislator to harmonize the process of enforcement since the Convention makes no provisions regarding the enforcement proceedings. As a result, an arbitral award may be refused to the winning party since enforcement depends on the domestic courts which have the discretion to decide on the interpretation of the texts. Okubote supports that the pro-enforcement approach sought

[52] See Art. II of the New York Convention
[53] See also art. V of the New York Convention
[54] Ohada-J08-176
[55] Van den Berg, A 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note, in 50 YEARS OF THE NEW YORK CONVENTION' (2009) AVDBE 649
[56] Okubote, A *"60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: Are we there yet in SubSaharan Africa?"* accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289444 (last accessed on the 28/08/2019)
[57] See arts 26 of the UAA and Article V of the New York Convention
[58] Moses, M 'New York Convention: Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958' (2015) 109(1) AJIL 242 p. 56
[59] See OHADA Treaty of the 17 October 1993

through the conventions has still not been adopted by the majority.[60] Thus, it appears that signing the Convention is not sufficient for an efficient procedure. The judicial interpretation of the concept of public policy creates undue delays in the enforcement proceedings, likely to undermine the pro-enforcement purpose sought by the Contracting States.

Furthermore, an issue arises when it comes to the application of article I(3) of the Convention. The provision allows the Contracting States to restrict the applicability of the Convention through reservations.[61] This provision presents a challenge for the OHADA legislator in the sense that 5 out of 12 OHADA Member States have not ratified the Convention. The fact that some states limit the applicability of the New York Convention is detrimental to the achievement of OHADA objectives.

Inglot supports that in order to preserve the benefits of arbitration, domestic courts must take a restrictive approach to public policy when it comes to procedural irregularities.[62] Thus, considering the narrow interpretation of public policy and its restricted application imply to support the distinction between procedural defences and public policy both contained in Article V of the NY Convention.

*Reform of the Arbitration Act 1996*

Despite the incompleteness of the Arbitration Act 1996 provisions, a study from the Singapore Academy of Law demonstrated that in cross-border transactions English law remains the favourite governing law.[63] As such, London remains favoured as an arbitration seat, owing to the strong reputation built by the English framework and the English judiciary over the years as illustrated in *Carpatsky Petroleum Corporation v. PJSC Ukrnafta*[64] confirmed the English courts' pro-enforcement stance. Moreover, the Court reiterated the principle of issue estoppel likely to affect the parties' ability to enforce an arbitral award or resist enforcement before the courts. In this case, it was held that an arbitration agreement may be made after the dispute arises considering the parties' conduct and involvement in

[60] See also Okubote, A *"60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: Are we there yet in SubSaharan Africa?"* accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289444 (last accessed on the 28/08/2019)
[61] See Art. 1(3) of the New York Convention
[62] Iglot, M 'Separability of or overlap between public policy and procedural grounds for refusal of enforcement of foreign arbitral awards under the New York Convention' (2015) 4(1) PRIEL at page 36
[63] https://www.sal.org.sg/sites/default/files/PDF%20Files/Newsroom/News_Release_PSL%20Survey_2019_Appendix_A.pdf
[64] [2020] EWHC 769 (Comm)

the arbitration proceedings. Hence, the Court confirmed the validity of arbitration agreements drafted after a dispute arises.

Regarding English law, most scholars are unanimous that the Arbitration Act 1996 (hereinafter AA 1996) structure provides one of the best benchmarks for modern arbitration provisions. Veeder states in this regard:

"The 1996 Act is the most extensive statutory reform of English arbitration law, its scope exceeding any previous English statue on arbitration. It restates, with important modifications, the law and the practice of English arbitration, both common law and statute, running chronologically through each stage of an arbitration, from the arbitration agreement, the appointment of the arbitration tribunal, the conduct of the arbitration, the award, to the Court's recognition and enforcement of the award"[65]

In *Halliburton Company v Chubb Bermuda Insurance Ltd,*[66] the Court held that the Act deliberately steered away from codifying all of the English law on arbitration on these terms:

"The 1996 Act is not a complete code of the law of arbitration but allows the judges to develop the common law in areas which the Act does not address."[67]

This statement demonstrates the flexible approach adopted by the courts in a view to allowing the courts to interpret the Act on a case-by-case basis. This approach may be regarded as a strength or a weakness, nonetheless, one of the grounds not to amend the Act was familiarity with the Act and the way it works in practice. The English Law Commission in a view to preserving the UK's long-standing status as a major hub for international disputes, proposed a review of the Arbitration Act 1996.[68] Nonetheless, it is submitted that the English system is widely regarded as a model in the field of arbitration and has gained recognition for its well-established legal framework, pro-arbitration approach, and expertise of its judiciary.[69]

[65] Veeder,V. 'National Report on England' (1997) IHCA p. 23
[66] [2020] UKSC 48
[67] Ibid.
[68] Accessible at www.lawcom.gov.uk/14th-programme-kite-flying-document/ (Last accessed 29 September 2022)
[69] Veeder,V. 'National Report on England' (1997) IHCA p. 21

## 1.3. Research originality and importance

This thesis explores the effectiveness of the enforcement of arbitral awards from a comparative perspective and an analytical approach. The study assesses the enforcement proceedings in developing and developed countries specifically the UK and the OHADA member states so as to evaluate what lessons can be drawn from the English arbitration framework in order to fill in the legal gaps existing under OHADA law. Indeed, over the years these gaps are jeopardising the effectiveness of arbitral awards within the OHADA zone. The rationale behind the choice of the UK is the natural tendency of the English courts to adopt an arbitration-friendly and non-interventionist approach. This approach aligns with the principles that promote the good conduct of the arbitration process. The impact of the English arbitration system on the OHADA arbitration practice can be significant. Through the adoption of relevant attributes such as a clear and comprehensive legal framework, a pro-arbitration culture, and the development of expertise among arbitrators and judges, OHADA can improve its enforcement mechanisms, streamline procedures, and gain the confidence of parties involved in arbitration proceedings.

What makes this research original is the lack of literature and publications in OHADA arbitration, specifically publications in English which are practically inexistent. The study aims to promote OHADA arbitration outside the francophone community. Issues encountered before the reform include judicial intervention, the public policy exception, the shallow control of arbitral awards, the determination of the competent jurisdiction, and the sluggishness of the exequatur process. Thus, the study assesses the practical effectiveness of the reform of 2017 to address these issues. Recommendations are provided in chapter VI with a view to suggesting recommendations to tackle the persistent flaws preventing the effectiveness of the arbitration proceedings in the region. To this end, the thesis analyses the texts governing the OHADA arbitration framework, namely the NY Convention, the OHADA Treaty, the UAA, and the CCJA rules. It also examines the Arbitration Act 1996 on a comparative basis.

Furthermore, the primary objective of this study is to assess the concrete effectiveness of arbitral awards and their enforceability in the light of the English arbitration system and the OHADA Arbitration practice through the UAA which governs arbitration proceedings within the OHADA area. To this end, this research This will help provide insights into how OHADA can benefit from the implementation of best practices from the English arbitration system. This thesis is the first in-depth research on the enforcement of arbitral awards in the

OHADA region in English and through a comparative study with a common law jurisdiction, hence it seeks to fill the gaps in the literature and increase knowledge of international commercial arbitration specifically OHADA arbitration framework.

In order to address the issues inherent to the OHADA arbitration framework undermining its effective implementation in the region, participants from the semi-structured interviews conducted during this research have suggested various reforms to the OHADA system. One proposition suggested the creation of an African Court of Arbitration. The rationale behind the creation of such a Court is to achieve the OHADA objectives of harmonizing the domestic laws through the establishment of favourable climate for investments and the creation of a new pole of development. In this regard, this study encompasses two primary objectives. First, it involves a comparative analysis between both arbitration systems. This will provide a valuable framework for identifying potential areas of improvement within the OHADA arbitration regime. Secondly, this research aims to assess the legal gaps that pose challenges to the harmonization objectives of OHADA. Through a critical examination of the existing OHADA legal framework, including the UAA and other relevant OHADA texts, the research shall identify the areas where the current provisions may be inadequate or inconsistent.

Another suggestion along the same line is to harmonize the law but with a more drastic approach to remove the exequatur requirement before enforcement. This would ensure the free circulation of judgments and awards. This research examines these suggestions in-depth while concluding that improvement, time, and consistency are needed for arbitration to truly be effective.

A structured and clear approach is missing from OHADA's existing literature and in this regard, this comparative study aims to contribute to the evolution and awareness of OHADA law.

## 1.4. Research questions

Through the research questions, the thesis seeks to propose a formalistic approach to the sources of law and the increasing regulation of arbitral proceedings so as to meet the international standards of best practices which are shaping and shedding some light on the OHADA arbitration system. In this regard, this thesis will analyse and respond to fundamental questions:

1. To what extent are the disparate legal systems and jurisdictions in the OHADA region likely to lead to a conflict of laws and jurisdictions hence affecting the enforceability and enforcement of arbitral awards?
2. Is the OHADA arbitration system in line with the NY provisions, hence comply with the international standards of best practices?
3. Public policy being a complex concept which varies from one state to another, how should be addressed the myriad of interpretations with regard to the enforceability of foreign arbitral awards owing to the lack of definition from the legislator?
4. With the aim of raising awareness of OHADA arbitration and contributing to the achievement of the objectives of harmonization, what major changes and significant improvements have been made in OHADA law in the attempt to rebuild trust with foreign investors and achieve OHADA objectives 27 years after its creation?

## 1.5. Aims and objectives

The study aims to assess the enforceability of arbitral awards in developing and developed countries through a comparative study, with a special focus on the OHADA and the UK regime. Inherent to this study are the identification of the persistent flaws and legal gaps jeopardising the enforcement proceedings in the OHADA region.

In this regard, the project critically examines issues raised through the proceedings, the obstacles encountered in the current arbitration practice, and most important the gaps existing in the existing literature, as indeed OHADA cases law and doctrine are either insufficient, inconsistent or difficult to access regardless of the lack of jurisdiction.

In order to achieve the aims of this study, a set of objectives are inherent to its completion:

- Examine the issue of balkanization of the legal systems within the OHADA Member States and how it affects the enforcement of arbitral awards in the region
- Analyse the impact of the various interpretations of the concept of public policy on the enforcement of arbitral awards within the OHADA area and in the UK
- Evaluate the impact of the NY Convention provisions in the arbitration framework of both regimes specifically the judicial interpretation criticized as inconsistent, the arbitral enforcement regarding the undue delay in enforcement proceedings and the reservations made by some States to limit the applicability of the NY Convention in their States
- Assess the potential impact of Brexit on the English arbitration framework including the agreements between the UK and the EU, and the potential outcomes of a future reform
- Identify the contribution of OHADA arbitration in the achievement of OHADA objectives to increase the investment flows, re-establish trust with the investors and create a new development pole

## 1.6 Thesis structure

The thesis seeks to achieve its aims and objectives through seven chapters sourced from journal articles, books, surveys, and interviews. It explores secondary sources with a view to achieving a balance between materials from common law academics and practitioners and those from the civil law systems. In this regard, it is submitted that the legal and cultural background of the scholars and practitioners may have an impact on their position regarding the enforceability of arbitral awards and the court involvement in their jurisdictions. The research questions are focused on international arbitration. To this end, the study conducts comparative and interdisciplinary legal research on concepts, jurisdictional issues and sources of law among others.

Chapter two discusses the definition of international arbitration, its key features and characteristics and develops on its advantages conferring the status of the most preferred dispute resolution in international commercial disputes. This chapter assesses to what extent the choice of arbitration rules, as well as the procedural law, may influence the parties to choose the type of arbitration procedure to adopt based on civil and common law jurisdictions with a focus on English and OHADA historical developments and current arbitration framework.

Chapter three moves on to explore whether the OHADA regime complies with the provisions of the NY provisions regarding enforcement of foreign arbitral awards in the OHADA region in order to ensure it meets the international standards of best practices. The thesis examines any existing domestic or international dispute settlement mechanisms which to draw for future reforms.

Chapter four explores the complexity of the arbitrability and public policy defences often raised during the arbitration proceedings to resist enforcement or challenge an arbitral award. The chapter assesses both defences in the light of competition law and then examines the judicial interpretations of public policy under domestic courts.

Chapter five proceeds with an analytical and comparative study between both jurisdictions with regard to the recognition and enforcement of foreign arbitral awards, by identifying the challenges arising at the enforcement stage in both regimes. It examines the powers of the arbitral tribunal as well as its limits throughout the arbitration proceedings, and the powers of the domestic court in support of arbitration. Domestic courts may intervene during arbitration proceedings upon specific requirements and at four stages: prior to the

establishment of the arbitral tribunal, at the commencement of arbitration proceedings, during the arbitration process, and for recognition and enforcement of the arbitral awards. Hence, depending on the dispute and the status of the procedure, judicial intervention may be welcome or considered an interference in the proceedings. Then, it assesses the extent to which a court may be permitted to intervene during and after the proceedings and highlights the limited grounds enabling the domestic court to intervene. The chapter moves on to discuss the concrete effects of the OHADA reform of 2017 and whether it has contributed to the achievement of OHADA objectives to harmonize the laws and promote economic attractiveness. It examines the concrete impact of Brexit in the long term on the English arbitration framework and discusses whether a new reform of the Arbitration Act 1996 shall be welcome to improve the law.

The final chapter suggests recommendations to address the gaps identified in both regimes in the light of the scholars' view, the doctrine, case law and practitioners' responses. In this regard where negative implications are identified, an attempt shall be made to identify the causes and suggest solutions, if attainable.

## 1.7 Chapter methodology

Notwithstanding the fact that this thesis aims to assess the effectiveness of arbitral awards within an international context, such analysis shall not be conducted on an abstract and hypothetical framework. Hence, the thesis undertakes comparative legal research based on a critical analysis of the arbitration framework of the UK and the OHADA regimes which respectively operate under the common law and civil law systems. This research methodology provides an overview of the methods used to achieve the aims and objectives of the study. A comparative study conducted using primary and secondary data may lead to a more rational and concrete approach to assessing both regimes. Due to the nature of the study which is conducted through a comparative perspective, doctrinal and mixed-methods shall be used to achieve the study's aims and objectives. Then, the study adopts doctrinal research (secondary and primary research methodology) and mixed methods research (qualitative and quantitative research) in an effort to improve OHADA arbitration practice from the English approach.

The rationale is that they are geared to explore and analyse primary data from semi-structured interviews, online surveys, statutory provisions, international treaties and cases law, and secondary data through books and journal articles. The research methodology adopts a two-stage approach so as to appropriately address the research questions raised in the thesis. The first approach requires the use of doctrinal research.

### 1.7.1 Doctrinal research

The rationale behind the choice of doctrinal research is that this method helped refer to previous studies that discussed the issues of enforcement under OHADA law and identify accordingly the relevant provisions under OHADA and English law through comparative legal research. The comparative legal research methodology employed in this study involves a systematic and comprehensive analysis of both systems and is designed to identify and compare the key elements, principles, and practices of each system,[70] with the aim of drawing meaningful insights and lessons that can inform the improvement of OHADA arbitration practice. The proposed methodology provided a broad picture of both

[70] Onireti, A. 'Reflections on Conducting Comparative Legal Research' (2022) IJCLLP' 4(1) p. 109

legislations for a more critical approach[71] on the grounds to challenge arbitral awards with regard to both regimes as discussed in Chapter IV. It involves the identification and analysis of relevant legal sources such as the Arbitration Act 1996 and the Uniform Act on Arbitration 2017 as examined in a comparative perspective in Chapter III, including legislation, case law, scholarly articles, and institutional rules. Indeed, a comparative framework is developed to systematically compare key elements such as legal principles, arbitration laws, institutional frameworks, court intervention, enforcement mechanisms, and procedural rules. The data collected shall then be analyzed to evaluate the effectiveness and efficiency of both systems, identifying similarities, differences, strengths, and weaknesses. Best practices and lessons learned from the UK system are identified in Chapter VI and used to formulate recommendations for improving the OHADA arbitration system. The study concludes by summarizing the findings and their implications for enhancing OHADA arbitration practice, aiming to align it with international standards and best practices in the field.

The research seeks to identify valuable lessons that can be transplanted into the OHADA arbitration practice. A legal transplant[72] offers the potential for OHADA to learn from the experiences of the English system and implement best practices that can enhance the effectiveness of its own arbitration framework. By examining the attributes of the English arbitration system and understanding its effectiveness in enforcing arbitral awards, the OHADA arbitration practice can identify valuable lessons that can be transplanted into its own framework. This process involves adapting and adopting relevant aspects of the English system that are compatible with the OHADA legal and cultural context. Assessing and implementing best practices through legal transplant, the OHADA arbitration practice can enhance its effectiveness in enforcing arbitral awards. This process offers an opportunity for the OHADA practice to learn from the experiences of other jurisdictions and strengthen its arbitration framework, ultimately contributing to the growth and development of arbitration in the region. It is important to note that legal transplants should be approached with caution and tailored to the specific needs and characteristics of the OHADA legal framework. While drawing inspiration from the English system, careful consideration should be given to adapting the transplanted elements in a manner that aligns with the OHADA objectives of harmonization and the unique legal and cultural context of the region. Through the process of legal transplant, the OHADA arbitration

[71] Collins, H. 'Methods and Aims of Comparative Contract Law' (1991) OJLS 11(3) p. 401
[72] Tay-Cheng, M. 'Legal Transplant, Legal Origin, and Antitrust Effectiveness' (2013) JCLE 9(1) p. 71

practice can selectively adopt and adapt the attributes of the English arbitration system that are most relevant and suitable to its own context. By incorporating best practices from the English system, the OHADA practice can enhance its enforcement mechanisms, streamline its procedures, and ultimately improve its effectiveness in resolving cross-border disputes.

It is noted that common law systems, unlike civil law focus on solutions based on commercial cases. Hence, common law jurisdictions appear to be more pragmatic regarding problem-solving and case law barriers. By contrast, civil law systems have more of a systemic approach which makes less use of case law compared to common law. In this regard, this study would contribute to the existing literature and consequently to the harmonization of the laws in the OHADA region through the recommendations provided in chapter VI of the thesis. These recommendations would be valuable in the sense that OHADA is an evolving system of business laws and implementing institutions in Sub-Saharan Africa which nonetheless encounters important inconsistencies and gaps under its sets of rules. In this regard, doctrinal research is essentially desk-based as it is a theoretical study focusing on primary data such as existing statutes, legal provisions and cases law. The study makes use of international conventions and treaties, domestic provisions, journal articles, and doctrine among others. It helped collect relevant materials and views on the different research questions raised, and find out the legal gaps so as to draw out recommendations and conclusions. The approach aims to establish a logical link between the provisions examined and the gaps existing in the concerned state's arbitration practice in order to provide an answer to each of the research questions and hypotheses raised in the study.[73] It requires consulting statutory provisions, international treaties and cases law with a view to providing a full analysis of the texts and obtaining a critical understanding of the issues raised and linked to the research questions. Moreover, the research needs to consider any update of the sources and provisions related to the study in order to preserve the consistency of each argument raised. Despite the efforts to find a significant number of decisions and awards, limitations arise. First, there is the issue of confidentiality of the arbitral decisions. Second and most frequent in the OHADA region is the lack of publications and difficulty in gaining access to the decisions and statistics conducted by the arbitration institutions. Owing to these limitations, the second approach is employed.

[73] Peter, C. & Herbert, K. "*The Oxford Handbook of Empirical Legal Research"* (OUP, 2012) p. 12

### 1.7.2 Mixed-method research

Empirical data represents the main part of the study as data collection helped in finding answers to the research questions, testing the hypothesis, and assessing the outcomes in view of the nature of questions raised in this study.[74] The choice between both quantitative and qualitative methods depends on the area of research and the nature of the research aims and objectives. The study aims to be critical, practical, and analytical. Owing to the complexity of the issues raised in this study, mixed methods research is used. To this end, qualitative research through semi-structured interviews and quantitative research through survey questionnaires supplement the study due to a severe lack of case law, literature, and doctrine in OHADA arbitration, especially in English.

Indeed, jurisdictional issues are likely to reflect the sovereignty of the States and the Courts' powers. This paves a path for further analysis and suggestions to address judicial interference and the challenges to enforcing arbitral awards due to public policy considerations. This would help contribute to the promotion of arbitration over litigation while providing suggestions on how to limit judicial intervention in the proceedings. In this regard, the non-interventionist approach of the UK is of relevance in this comparative approach in assessing the issue under the OHADA law so as to draw out suggestions to implement in the region.

Regarding the rationale behind the choice of semi-structured interviews, this method is valuable to target specific experts and practitioners in a view to obtaining relevant information from practitioners. These data enable to provide of relevant answers to the research questions which do not require a large set of data. To this respect, semi-structured interviews were conducted remotely via Skype, Zoom and Microsoft Teams in view of the current health crisis which precluded travel. The study conducted remote semi-structured interviews with ten participants including lawyers, arbitrators, magistrates, academics and the former president of the Bar association in Abidjan, where is located the CCJA. The interviews aim at providing a consistent analysis without limiting the scope of the research.[75] In this regard, the interviewees are selected on the basis of their knowledge and expertise. Consequently, a list of experts and practitioners in OHADA Arbitration has been drafted. The use of semi-structured interviews played a crucial role in addressing the

[74] Creswell, JW and Creswell, JD, "*Research design: Qualitative, quantitative, and mixed methods approaches*" (Sage publications, 2017) p. 30
[75] Drever, E. "*Using Semi-Structured Interviews in Small-Scale Research. A Teacher's Guide*." (ERIC, 1995) p. 13

challenges associated with limited available data and resources regarding OHADA Arbitration. Given the scarcity of statistics and updated literature specific to OHADA Arbitration, the interviews provided an invaluable opportunity to gather first-hand information and insights from knowledgeable participants.

Through the semi-structured interviews, the participants, including arbitrators appointed by the CCJA, the secretary general of the CCJA, and the former president of the bar of Côte d'Ivoire, offered their expertise and experiences, enriching the research process. Their perspectives and opinions shed light on the current trends and practices in OHADA Arbitration, filling the gaps in the existing literature. Furthermore, the interviews allowed for a deeper exploration of specific issues and challenges faced in OHADA Arbitration. Participants were able to provide nuanced insights into the effectiveness of the harmonization efforts and the resolution of conflicts of law. This in-depth understanding of the subject matter enabled a comprehensive analysis of the OHADA regime and its alignment with international arbitration standards. The interviews also provided a platform for participants to express their views on the legal framework, identify areas that require further improvement, and propose potential solutions. These valuable contributions enhanced the depth and breadth of the research, allowing for a more comprehensive assessment of the OHADA Arbitration system. Thus, the semi-structured interviews served as a critical tool for data collection, analysis, and validation in the research process. They not only provided accurate and up-to-date information but also facilitated a deeper understanding of OHADA Arbitration, its challenges, and its potential for growth and development.

Interviews provide a highly focused and systematic methodology for collecting comprehensive and nuanced data, thereby offering a direct and straightforward means of obtaining detailed and rich information,[76] plus can be tailored to the research questions. Nonetheless, limitations may arise due to the confidentiality aspect when presenting the findings used to support the recommendations and conclusion. This includes disclosure of the name of the participants or confidential data. Additionally, semi-structured interviews are unlike quantitative methods such as survey questionnaires, time-consuming. Nevertheless, it helps in collecting accurate elements likely to have a deeper insight into the problem study relevant to this project. For instance, the limitation of the doctrinal research is addressed with the interviews in the sense that the practitioners and academics provide practical and accurate data. This includes statistics on the CCJA's arbitral activity

[76] Maxwell, JA. 'Qualitative research design: An interactive approach' (2013) SAGE p. 14

that are not accessible through doctrinal research. These data help assess the practical effectiveness of the reform of 2017 and its impact on the enforcement proceedings. Consequently, positive outcomes are likely to impact the domestic court's approach following the implementation of the revised CCJA rules of 2017 in the forthcoming decisions.

Therefore, the information collected shall be reliable so that data-driven decisions can be accurate and contribute to the completion of the project. All participants, for ethical considerations, are subject to a written and signed acceptance letter aiming at reassuring the interviewees that their participation in the research is voluntary, therefore they are free to withdraw from it at any time. Confidentiality shall be upheld, and the answers gathered are only used for research purposes.

Survey questionnaires are the most common quantitative research technique for collecting data.[77] Owing to the pandemic, both researchers and industries are adopting online questionnaires for quantitative research. Indeed, this method is conducted in various disciplines using different methodologies, and the main advantage is that it enables to direct upload the results of the research for further analysis or to include them directly in the thesis. For instance, closed questions are easily collected and analysed through statistical data, while semi-structured interviews explore the findings further. Consequently, it is submitted that this method appears less time-consuming than interviewing participants individually. This requires more time to analyse in depth the findings, while the advantage of survey questionnaires is that all respondents are required to answer the same straightforward questions, which makes the data analysis easier. Quantitative research is most helpful to measure a specific sample size and assess quantifiable findings. In this regard, a survey questionnaire allows researchers to reach the target audience across a wider geographical range with the advantage to be conducted remotely. Nonetheless, some limitations might arise. Indeed, although this method is known as effective and speedy in gathering data,[78] there is no guarantee that the statistics collected are completely accurate and reflect the opinion of the majority. Furthermore, the drafting of the questionnaire shall be meticulous so as not to mislead the respondents in their answers. The rationale is that an incorrect interpretation of the texts may significantly affect the findings as there is no possibility to rephrase, replace in the context or explain

[77] Creswell, JW & Creswell JD, '*Research design: Qualitative, quantitative, and mixed methods approaches*' (Sage publications, 2017) p. 8
[78] Creswell, JW, Plano C. 'Designing and conducting mixed methods research. 2' (2011) SAGE p. 23

the questions. Hence, it is essential to meticulously draft the survey questions and pilot tests.

Finally, it is noted that the empirical method refers to a mixed method of qualitative and quantitative data. Indeed, mixed methods research is a methodology that consists of collecting, analysing and integrating quantitative and qualitative research in order to get an overall picture and a better understanding of the research questions.[79] The approach aims to provide a depth of understanding using the advantages of both methods, allowing to clarify or corroborate results obtained from previous methods. It offers different perspectives regarding the research questions and enables to explain potential contradictions.[80]

Additionally, the rationale behind the combination of both quantitative and qualitative research is that both methods complement each other. This can be explained by the fact that on the one hand, the qualitative method is suitable to build theory since consisting of open-ended information gathered. On the other hand, quantitative research provides a method of testing these theories through close-ended information. For instance, the concept of public policy requires significant data owing to the complexity of the concept, discussed in depth in chapter V. Regarding the question of the most preferred alternative dispute resolution worldwide as discussed in Chapter III, a quantitative method through close-ended information appears more appropriate.

Unlike the qualitative method, there is a risk that the data from the quantitative approach is weak in terms of reliable information, while qualitative research may also appear weak due to potentially biased interpretations. The mixed method provides a more elaborated understanding of the research problems than quantitative or qualitative methods individually. The issue with this method is the time and resources to plan and implement this type of research. Mixed-method research involves a combination of numerical results and in-depth findings that significantly help in collecting reliable, substantial and relevant data. This helps provide a complete and accurate data analysis, decisive for the chapter discussions.

[79] Bryman A. 'Integrating quantitative and qualitative research: how is it done?' (2006) 6(97) QR p. 36
[80] Ibid

# Chapter II

# International arbitration: is it the most preferred dispute resolution?

## Introduction

International trade is constantly growing and evolving at the global level. This steady growth requires an effective dispute mechanism to address international disputes and respond effectively to the practical needs of international commerce. This thesis primarily focuses on international arbitration. It assesses different jurisdictions and legal systems with the aim to address the research questions raised above and by ricochet contribute to the existing literature. In this respect, the first chapter first provides a general background of international arbitration.

First, it presents the key features of arbitration, and the different types of arbitration proposed to users and discusses what confers an international character to the mechanism. Then, it examines the arbitration framework of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention of 1958 (hereinafter NY Convention). Finally, it assesses the current state of international arbitration and what makes this mechanism the most preferred alternative dispute resolution.

There are various methods of dispute settlement including mediation, conciliation, or negotiation. Arbitration sets itself apart as it has increasingly become an unrivaled method for dispute resolution in international transactions and business trade. This is supported by the White&Case survey 2021 which indicated that international arbitration was ranked as the preferred method of resolving cross-border disputes for 90% of respondents.[81] This demonstrates the prevalence of arbitration over other dispute resolution mechanisms worldwide. Although there is no universal legislated definition of arbitration as some States do not draw a distinction between domestic and international arbitration, arbitration can be

[81] See 2021 International Arbitration Survey: Adapting arbitration to a changing world; accessible at https://www.whitecase.com/insight-our-thinking/current-choices-and-future-adaptations#:~:text=International%20arbitration%20is%20the%20preferred,conjunction%20with%20ADR%20(59%25). (Last accessed 20 August 2022)

defined as a method used to resolve a contractual dispute between parties through private justice. The arbitral tribunal issues a decision in a form of an arbitral award which shall be final and binding, nonetheless needs to be made a rule of the court to be enforced.[82] In this respect, it is understood that arbitration is an independent legal order from the courts.

Landau argues that:

"*Although there are many reasons why parties might prefer international arbitration to national courts as a system of dispute resolution, the truth is that in many areas of international commercial activity, international arbitration is the only viable option, or as once famously put, "the only game in town*".[83]

This emphasises that arbitration remains an unrivalled alternative dispute mechanism worldwide owing to the reluctance of some domestic courts.[84] Domestic courts may be considered for certain parties inexperienced, unreliable, inefficient, partial, amenable to pressure, or simply hostile. The larger and more significant the transaction in question, the less appropriate a domestic court may be. To this view, it has been stated:

"where a third country's courts cannot be agreed upon, international arbitration becomes an essential mechanism actively to avoid a particular national court."[85]

This statement is supported by corporate counsels through a survey of PricewaterhouseCoopers and Queen Mary University revealing that 52% of the companies surveyed stated that arbitration was their preferred method of dispute resolution.[86] Indeed, if legal recourse represents the standard way of conflict resolution, there are alternatives offered to the litigants which are now rapidly developing including arbitration. In order to unclog the courts and streamline the judicial process while offering a more expeditious alternative, alternative dispute resolution mechanisms aim to increasingly limit judicial remedies. In this regard, arbitration consists in resolving disputes through private justice. What makes arbitration the most used alternative dispute resolution is that parties may obtain a final and binding decision without reference to a court, except in the case where the losing party does not voluntarily comply with the decision. In such cases, the arbitral

[82] See s. 58(1) of the English arbitration act 1996
[83] Landau, T. "*Arbitral lifelines: The protection of jurisdiction by arbitrators" International arbitration 2006: Back to Basics?*" (Kluwer Law International, 2007), pp 282-287
[84] Blackaby, N; Partasides, C; Redfern A and Hunter M "*Redfern and Hunter on International Arbitration*" (6th ed OUP, 2015) p. 30
[85] Sangare, Y 'International arbitral awards and the attractiveness of the OHADA regime to foreign investors' CLJ (2019), 24(1), at p. 33
[86] See Corporate choices in international arbitration: Industry perspectives, 2013. Available at http://www.arbitration.qmul.ac.uk/research/2013/index.html. (Last accessed on the 10th December 2021)

awards shall be enforced by the competent jurisdictions. Furthermore, arbitration promotes party autonomy allowing parties to tailor the procedure to their needs such as the composition of the arbitral tribunal, the disclosure of documents, or the hearing process.[87] The next section discusses first the rationale behind the reliance of parties on arbitration over domestic courts. Then, it assesses the current state of arbitration as the most preferred method for the resolution of international disputes. These will be further detailed in the next section.

## 2.1. Features of arbitration

### 2.1.1 Types of arbitration

*Lex arbitri* provides the legal basis for the seat of arbitration. Depending on the choices of the parties, arbitration proceedings may be pursued *ad hoc* or through an arbitral institution. Parties' autonomy entitles the litigants to choose the form of arbitration that they deem appropriate depending on their dispute. Thus, they may elect between *ad hoc* arbitration where parties have entire discretion on the procedure such as the appointment of arbitrators and the choice of the applicable rules, and institutional arbitration where the parties choose to rely on a specialized institution that administers the arbitral process as provided by the rules of the institution.[88] Although both types of arbitration have pros and cons, the choice of arbitration shall be guided by a thorough assessment of the needs and circumstances of the case. This section first discusses the *ad hoc* arbitration proceeding, then assesses the merits and demerits of institutional arbitration.

*Ad hoc arbitration*

The UNCITRAL Model Law on International Commercial Arbitration (1985) (hereinafter Model Law) draws a distinction between both arbitration proceedings and provides pursuant to art. 2(a) that *ad hoc* arbitration is a procedure that is not administrated by an institution. Indeed, *ad hoc* arbitration provides among others flexibility to the parties in the composition of the arbitral tribunal, and the applicable arbitration rules but is also more

[87] Art. 25(6) of the ICC Rules; 42(1)(c) of the Swiss Rules
[88] Blackaby N, Partrasides C, "*Redfern A and Hunter M Redfern and Hunter on International Arbitration*" (6th ed. OUP 2015) p. 33

cost-effective than institutional arbitrations. This can be explained by the fact that there are no additional institutional costs, and the parties are free to negotiate the arbitrator's fees.

The main advantage of *ad hoc* arbitration is that parties tailor the procedure to their needs and will, hence they are offered the flexibility to create their own rules without any external control. For instance, in *The American Independent Oil Company v. The Government of the State of Kuwait case,*[89] the parties agree to exclude the right to restitution in favour of an arbitral award of damages. In this case, it is understood that the company Aminoil had no right to claim the oilfield taken over by the Kuwait government, as parties agree to the 1973 Draft Agreement amending the Concession Agreement which resulted in the increase of the Kuwait government's take. Although the agreement was ratified by the Kuwaiti parliament, it was considered ratified in a separate letter drafted and agreed upon by the parties. Aminoil subsequently refused to consent to the Government's request' to increase its take under the Abu Dhabi formula, but the Kuwait government nonetheless nationalized the concession with an envisaged payment of 'fair' compensation. The Court considered valid both the agreement and the formula, hence ruled that the nationalization was not contrary to the stabilization clause.

The next section assesses the functioning of institutional arbitrations. Although the term "institutional arbitration" may imply that these institutions arbitrate the disputes, they rather administer the proceedings which are conducted by selected and qualified arbitrators under the institution's rules.

*Institutional arbitration*

This type of arbitration is administered by arbitral institutions such as the ICC and the LCIA, providing their own rules under which the arbitration shall proceed. The common rules first reflect either civil law or common law depending on the arbitral institution. Second, these rules are also incorporated into the contract through the arbitration clause. Statistics demonstrate that parties are more inclined to resolve their disputes through an arbitral institution as 86% of arbitral awards are rendered from these institutions.[90] It is noted that parties may prefer institutional arbitration owing to the safety it provides throughout the proceedings, the experience of the appointed arbitrators, or the arbitration rules that are

[89] *The American Independent Oil Company v. The Government of the State of Kuwait* [1982] 21 ILM 976
[90] For further discussion, see Corporate Attitudes and Practices 2008, Queen Mary university of London http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf (Last accessed 16 December 2021)

published that appear to comply with international practices. Regarding the costs, notwithstanding the fact that it appears more costly compared to *ad hoc* arbitration, institutional arbitration costs may seem more steady and predictable. The proceedings are streamlined as the institution provides concrete time limits for each stage of the procedure.[91] Nonetheless, institutional arbitration may reveal significant disadvantages including additional fees which are likely to increase depending on the value of the case and the stakes.

There are numerous arbitral institutions, the most renowned being the International Court of Arbitration (hereinafter ICC) and the London Court of International Arbitration (hereinafter LCIA). Both institutions have their own distinct sets of arbitration rules and procedures. The LCIA Rules provide detailed provisions on aspects such as arbitrator appointment, proceedings conduct, and award rendering. Similarly, the ICC Rules cover similar aspects but may differ in certain procedural details. Nonetheless, it is submitted that The LCIA has a stronger presence in Europe and is often preferred for disputes involving parties from the region, while the ICC has a more global reach and is commonly selected for disputes of an international nature, regardless of the parties' geographic location.

The ICC based in Paris is a major arbitral institution worldwide that has a special feature at the enforcement stage of the proceedings. Indeed, the ICC rules[92] provide that all arbitral awards issued by an arbitral tribunal shall be submitted to the ICC for approval before the arbitral awards become final and binding.
The LCIA is another major arbitral institution based in London, with the special feature to have most of its members located outside the UK. The LCIA is most renowned for resolving commercial disputes including international trade.

In this respect, the advantage of institutional arbitration is that under ICC Rules, for instance, the institution reviews the award of the arbitral tribunal in order to ensure the quality of the arbitral award and also to control its conformity.[93] The institution does not control the substance of the arbitral award but only ensures that the award covers all relevant matters. This control has been criticized by Kirby who argues that the ICC voluntarily or not tends to delay the issue of the arbitral award[94] It is understood that

[91] See Blackaby, N.; Partasides, C.; Redfern, A.; Hunter, M.; "*Redfern and Hunter on International Arbitration*" (OUP, 2015), p. 23
[92] See art. 1(2) of the ICC 2021 Arbitration Rules
[93] See Blackaby, N; Partasides, C; "*Redfern and Hunter on International Arbitration*" (OUP, 2015) p.87
[94] Kirby, B. 'What is an award, anyway?' (2014) 31(4) JIA, p. 38

although the ICC strives to provide an expeditious service by imposing a time limit for the arbitral tribunal to issue the arbitral award, issues may arise in practice to render the final arbitral award within the time. In this regard, the ICC Commission in a report stated that although ICC Arbitration Rules prompt the arbitral tribunal to issue arbitral awards with celerity, it remains very difficult in practice to establish a timetable that would enable the issuance of final arbitral awards within six months regarding the agreed terms. Especially with regard to disputes of "above-average complexity",[95] the six-month time limit appears to be insufficient. Nonetheless, this control could be of real assistance to the parties.

In the case where a third party is involved, arbitral institutions such as the LCIA provides solutions to address potential issues. Indeed, the LCIA pursuant to art. 22(1)(viii) provides as follows:

"The Arbitral Tribunal shall have the power, upon the application of any party or upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")."

This provision appears more restrictive than other arbitration rules including the ICC Rules which under art. 7 allows a third party at any time of the procedure upon agreement of all parties. This demonstrates that parties shall wisely select institutional arbitration by considering the circumstances of their case. Nevertheless, although opting out for *ad hoc* arbitration appears advantageous, in some cases resorting to institutional arbitrations might appear to be a better option. For instance, there is a risk of selecting arbitrators who do not have the required experience or expertise for the dispute. In some cases, the arbitrator may adjudicate with the sole aim to demonstrate that they are impartial.[96] Additionally, the *ad hoc* procedure if applicable may need the intervention of an external expert unlike institutional arbitration, which could result in more expenses.

To conclude this section, it is submitted that parties have powers in arbitration proceedings in the sense that they may tailor the procedure to their needs owing to party autonomy

[95] For further discussion see ICC Commission Report on Controlling Time and Costs in Arbitration https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf (Last accessed 16 December 2021)
[96] See Guandalini, B. "*Economic Analysis of the Arbitrator's Function*" (KLI, 2020), p 98.

conferred through the arbitration agreement. Yet, this statement is not applicable to institutional arbitration where there is a transfer of most powers from the parties to the institution which may appear to be against the essence of arbitration. Although one may also argue that the parties agreed to this transfer of powers by requesting the institution. *Ad hoc* arbitration may in this regard seem to be the appropriate choice. It is noted that in view of globalization and the increasing complexity of commercial disputes, *ad hoc* arbitration seems to fit disputes involving smaller claims and parties. On the flip side, institutional arbitrations appear to fit better complex international commercial disputes involving important claims with influential parties. The rationale behind this is that although being strict and more costly, the process followed by institutional arbitrations is more supervised and governed by an up-to-date arbitration rule. Consequently, the quality of the process provides more value and credibility to the arbitral awards. Hence, it is submitted that the determination of the type of arbitration is on a case-by-case basis, depending on the needs of the parties but most important the nature and value of the dispute.

### 2.1.2. Characteristics of international arbitration

Arbitration is the essence of a mix of various domestic regulations, including the law of the arbitration seat and the law of the territory where enforcement is sought. In this regard, state parties to international treaties are bound to assist arbitral proceedings, and in return exercise some control over the proceedings conducted within the territory. The domestic courts are involved in the enforcement of any arbitral award requested to be enforced in the territory of that State, to ensure that the proceedings meet the State's standards of justice. This is supported by Kerr who states:

"There was virtually no tribunal, authority, or individual whose acts or decisions give rise to binding or legal consequences for others, but who are altogether immune from judicial review in the event of improper conduct, breaches of the principles of natural justice, or decisions which clearly transcend any standard of objective reasonableness."[97]

This statement highlights the obligation of states to uphold minimum standards of justice in the context of arbitration. These standards encompass crucial aspects such as due process, arbitrability of substantive matters, and conformity with public policy. By ensuring these fundamental principles, states contribute to the fairness and integrity of arbitration proceedings. An international arbitration procedure takes into consideration several

[97] See Kerr, 'Arbitration and the courts: The UNCITRAL Model Law' (1984) 34(1) TICLQ, p. 48

systems of laws: the law governing the international recognition and enforcement of the agreement to arbitrate; the *lex arbitri*, the law of the seat of arbitration governing the proceedings; the applicable law; the law governing the recognition and enforcement of the arbitral awards. In some arbitration proceedings, issues may arise when it comes to the determination of the applicable law. In this regard, the *lex arbitri* may be chosen by the parties or the arbitral tribunal as the applicable law. The complexity and attractiveness of arbitration reside in the determination regarding the implementation of the different laws and how they succeed to align with the good conduct of the proceedings. To illustrate, an arbitration procedure having for arbitration seat may be governed by Swiss law as the law of the arbitration seat and apply the law of France as the applicable law pursuant to the Swiss Rules.[98] In the case where an arbitration proceeding pursuant to the arbitration agreement takes place in the UK and the seat of arbitration is London, the mandatory provisions of English law apply to the proceedings. Consequently, the procedure results in the issuance of an English arbitral award. Furthermore, states with either separate legal arbitral regimes or the most important arbitration seats such as France or Switzerland have adopted the UNCITRAL Model Law[99] which is recognized to be designed for international commercial arbitrations. In this regard, the Model law serves as a guide to assist and design arbitration laws worldwide.

With regard to the different rules stated above, it is submitted that the international character of an arbitration procedure depends on the nature of the dispute, the nationality of the parties, and the Model law provisions.

The next section discusses the concept of the nature of the dispute in order to assess when can disputes be considered international and what the key elements differentiate international disputes from domestic disputes.

[98] See art. 1(1) and art. 33(1) of the Swiss Rules
[99] See art. 1(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

*Nature of the dispute*

The term "nature of the dispute" was established by the ICC in order to provide for the settlement of disputes that were described as "business disputes of an international character."[100] In this respect, the nature of the dispute became a criterion to decide on the international character of arbitration. International arbitration covers disputes with a foreign element, and this element appears to be the essence of making the dispute international. In this regard, the ICC provides that:

"The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can extend beyond national borders."[101]

An international contract may concern two local companies from the same country performing in another country, or one State and one subsidiary from a foreign company. For instance, the French civil code of procedure provides that arbitration is considered international when the nature of the business is international regardless of the nationalities of the parties who may have the same nationalities.[102]

*Nationalities of the parties*

This feature involves reviewing the nationality, the place of residence, and the place of business, an approach adopted and enshrined in the European Convention of 1961.[103] The convention defined the agreements concerned to which it applies as:

"Agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having their habitual place of residence of their seat in the different Contracting States".[104]

In this respect, under Swiss law, arbitration is international if at the time when the arbitration agreement was concluded, at least one of the parties was not domiciled or habitually resident in Switzerland.[105]

[100] See art. 1(1) of the ICC Arbitration Rules 1998; replaced by the new rules which entered into effect in 2012
[101] See International Chamber of Commerce "*The international solution to international business disputes: ICC Arbitration*", ICC Publication No. 301 (ICC, 1977), at p. 19
[102] See art. 1504 of the French Civil Code of Procedure
[103] The European Convention on International Commercial Arbitration was signed in Geneva in 1961
[104] See Art. I(1)a of the European Convention
[105] See Chapter 12 of the Swiss Private International Law Act of 1987

The next section assesses the scope of international arbitration through international instruments such as the UNCITRAL Model Law and its close relationship with the New York Convention for harmonized international arbitration proceedings.

*The UNCITRAL Model Law provisions*

It is submitted that issues arise when there is a lack of an agreed definition of international arbitration since each state has its own definition or method to define it. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter NY Convention), discussed further in the next sections, is deemed to be the quintessential international arbitration instrument. It considers an arbitral award to be foreign when first it is made in a state other than the one where recognition and enforcement are sought. It also adds that the foreign character of an arbitral award may be assessed when the arbitral award is not considered a domestic arbitral award in the State where enforcement is sought.[106]

The UNCITRAL Model Law in the same vein is deemed to be a reference in international arbitration as it aims to improve the States' laws on arbitration proceedings at all stages in order for the jurisdictions to meet the international standards of best arbitration practice worldwide, continuing the work of the NY Convention. Hence, designed for international arbitration law, it defines what constitutes international arbitration.[107] The Model Law enshrines under its art. 1.3 the internationality of the dispute.[108] It also covers the internationality of the parties[109] and allows parties to freely agree whether the substantive matter is international.[110] Referring to what makes an arbitration "international", while the NY Convention limits its application to non-domestic and foreign awards without providing a clear definition of what international arbitration is, the Model law instead provides as follows:

"An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

[106] Art. 1(1) of the NY Convention
[107] See art. 1(3) of the UNCITRAL Model law
[108] See art. 1(3)(b)(i) of the UNCITRAL Model law
[109] See also art. 1(3)a
[110] See also art. 1(3)c

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country"[111]

Indeed, the Model law interpretation is the most commonly adopted,[112] an arbitration becomes international when it involves parties of different nationalities; when it takes place in a foreign and neutral country; or when it involves an international dispute. Nonetheless, the definition remains at the discretion of the relevant domestic laws as such arbitration might not be recognized universally as international.

The commercial character of arbitration remains relevant in some countries where only disputes arising out of commercial contracts shall be submitted to arbitration. For instance, arbitrations under the Argentine civil and commercial code of procedure can only be submitted for matters relating to commercial transactions.[113] The legal implication is the limitation of domestic and foreign arbitration proceedings and by ricochet limitation of the recognition and enforcement of arbitral awards. This can be explained by the fact that according to the NY Convention,[114] the Panama Convention,[115] and the Argentine International Commercial Arbitration Law[116] No 27.449 recognition and enforcement of foreign arbitral awards may be denied if the arbitration agreement is invalid under Argentinian law.

Additionally, China acceded in 1987 to the NY Convention which according to Darwazeh and Yeoh[117] became its primary legal instrument for the enforcement of foreign arbitral awards. In this regard, China is among the states that have opted for both the commercial and reciprocity reservations when ratifying the NY Convention under its art. 1, extending

[111] See art. 1(3) of the UNCITRAL Model Law
[112] See s.3 of the Spanish arbitration act 2003.
[113] See art. 737 of the Argentine Civil and Commercial Code of Procedure http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16547/texact.htm (Last accessed on 4 April 2021)
[114] See art. V
[115] See art. 5
[116] See arts 98 and 104
[117] Darwazeh, N.; Yeoh, F. 'Recognition and Enforcement of Awards under the New York Convention - China and Hong Kong Perspectives', (2008) 25(6) JIA at p. 38

the implementation to Hong Kong and Macau upon the resumption of sovereignty. This implies that first, under Chinese law recognition and enforcement of foreign arbitral awards before Chinese courts involve arbitral awards made in another Member State. Through these reservations, it is submitted that only arbitral awards resulting from contractual and non-contractual legal relationships considered commercial can be enforced, excluding investor-State disputes.[118] Secondly, the New York Convention does not apply to arbitral awards made in Hong Kong, Macau, and Taiwan since those regions are part of China,[119] although enforcement of Hong Kong, Macau, and Taiwan arbitral awards are subject to separate regimes. Respectively under the SPC Arrangement in respect of Mutual Enforcement of Arbitral Awards by the Mainland and the Hong Kong Special Administrative Region;[120] the SPC Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region;[121] the SPC Arrangement in respect of Mutual Acknowledgement and Enforcement of Arbitral Awards by the Mainland and the Macau Special Administrative Region;[122] and the SPC Directives in respect of Acknowledgment and Enforcement of Arbitral Awards Rendered in Taiwan Region.[123] The commercial reservation enshrined in the Geneva Protocol of 1923 is one of the most important treaties in international arbitration made the distinction between commercial matters and any other matters capable of settlement by arbitration,[124] and the states are free to limit their obligations to contracts that are considered as commercial under national law, which was reiterated under the NY Convention.[125]

The next section discusses the key features of an international arbitration proceeding in order to gauge their effects on the outcome of arbitral awards. To this end, will be analysed the two main international instruments governing international arbitration namely the UNCITRAL Model Law and the NY Convention.

[118] Ibid.
[119] Ibid.
[120] Effective on 1st February 2000
[121] Effective on 27th November 2020
[122] Effective on 1st January 2008
[123] Effective on 1st July 2015, which replaced the old SPC directives on the same subject matter that came into effect respectively in 1998 and 2009.
[124] See art. 1
[125] See art. I(3)

### 2.1.3. Key features of international arbitration

This section discusses the essential features of international arbitration with regard to the characteristics of this mechanism as well as their relevance in the issuance of arbitral awards. International arbitration is a consensual procedure that includes requirements for effectiveness and enforcement in the relevant States where enforcement is sought. These essential components which appear decisive for the recognition and enforcement of an arbitral award include the agreement to arbitrate, the separability of the arbitration agreement, the arbitrability of the dispute, and the enforcement of the arbitral award. The arbitrability of the disputes governed by the NY Convention[126] is discussed in more detail in Chapter IV.

*The agreement to arbitrate*

The agreement to arbitrate is usually expressed in an arbitration clause and implicitly implies the parties' consent to submit any disputes to arbitration. This principle is recognized by domestic laws and conventions such as the NY Convention[127] and the Model Law[128] which provide that may be denied any arbitral award involving parties under incapacity or an award whose arbitration agreement was not valid under the law which governed it.[129] One type of agreement to arbitrate made once the dispute arose is called a submission agreement. The submission agreement looks to the past and submits existing disputes while the arbitration clause looks to the future, submitting future disputes to the arbitration proceeding.[130]

The NY Convention enshrines four mandatory requirements[131] for an arbitration agreement to be valid including the arbitration agreement in writing; the fact that the arbitration agreement shall deal with existing or future disputes; the dispute shall arise out of a legal relationship and the matter of the dispute shall be arbitrable, also provided under the Model law.[132]

[126] See arts II(1) and V(2)a
[127] See art. II of the NY Convention
[128] See art. 35 of the UNCITRAL Model law
[129] See art. V(1)(a) of the NY Convention; Art. 36(1)(a)(i) of the UNCITRAL Model law
[130] See Blackaby, N; Partasides, C; "*Redfern and Hunter on International Arbitration*" (OUP, 2015), p. 101
[131] See art. II(1)
[132] See art. 7, 34(2)(b) and 36(b)(i)

Regarding the impact of a proper agreement to arbitrate, the NY Convention pursuant to art. V(1)(a) provides as follows:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:
(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"

This provision highlights inherent conditions including the legal capacity of the parties to arbitrate as well as the validity of the arbitration agreement under the *lex arbitri*. Although the term incapacity is not defined under the New York Convention, it may be interpreted as an inability to contract and may concern an entity or a person.[133] In this respect, Nacimiento refers to this concept as "subjective arbitrability." [134]

Subsequently, the arbitration agreement must not be "null and void, inoperative or incapable of being performed."[135] This provision derives from a generally applicable principle of contract law which as Born states, also applies to arbitration agreements.[136] This implies that such agreement is subject to the validity criterion applied to any type of contract. The arbitration agreement must express the free and mutual consent of the parties to resolve their dispute through arbitration exclusively. This mutual consent is the backbone of arbitration. Finally, an issue that is not arbitrable may also constitute a ground for the agreement to be void.[137] The provision is illustrated in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors*[138] where the Supreme Court of Queensland considered the circumstances in which an arbitration agreement is "incapable of being performed." It held that first there must be an irreversible obstacle even in cases where the parties are willing and able to perform as per the agreement. Second, any superintendents shall be considered as parties to the arbitration agreement by reference to the case *Rinehart v Hancock Prospecting,*[139] as "they would be claiming through or under a party to the

[133] Art. I(1) New York Convention is generally deemed as including public entities entering into commercial contracts with private parties (*acta de iure gestionis*).
[134] See Nacimiento, P., Kronke, H., Otto, D., Port, N.C., "*Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*", KLI (2010), p. 128; see art. V(1)(a)
[135] See art. II(3) of the NY Convention
[136] Born, G "*International Arbitration: Law and Practice*" (KLI, 2015) p. 68
[137] See arts II(1), V.2(a)
[138] *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors* [2019] QSC 173
[139] [2019] HCA 13

arbitration agreement." It is understood through this decision that, claims against superintendents simultaneously with the arbitration proceeding do not result in the arbitration agreement being incapable of being performed.

The writing requirement is enshrined in art. II(1) of the NY Convention which states that arbitration agreements should be in writing, specifying under art. IV that enforcement of arbitral awards requires the winning party to produce at least a certified copy of the agreement. In contrast, the revised UNCITRAL Model Law allows arbitration agreements to be made orally as parties are given two options: to adhere to the writing requirement or not. Nonetheless, it is noted that oral arbitration agreements may result in the denial of the arbitral award under the NY Convention.[140] Additionally, it is submitted that the writing requirement is subjective, depending on the arbitration and the *lex arbitri*. Landau argues that there is a tendency from domestic courts to observe a certain nonchalance with regard to the writing requirement[141] as the NY Convention provides that the arbitration agreement in writing should include an arbitration clause in a contract signed by the parties.[142] In practice, it is observed that the general view is that the signature is not mandatory.[143] Consequently, issues arise. In *Kanematsu USA Inc. v. ATS-Advanced Telecommunications Systems do Brasil Ltd,*[144] the Supreme Court held that:

"*A signature is required where a party seeks to incorporate into a contract an arbitration clause contained in a set of standard terms and conditions.*"

This decision is consistent with the UNCITRAL to nuance such a requirement. Indeed, in 2006 the Model law recommended that the list in art. II.2 of the NY Convention shall not be interpreted as exhaustive. In this respect, art. 7 of the Model law was amended in order to review the writing requirement proving a more modernized approach.[145] The provision considers as a writing agreement any agreement included in a:

"…document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another."

[140] See arts II(2), IV and V(I)(a)
[141] Landau, T., Moollan, S. "*Article II and the Requirement of Form / Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention Practice*", (CML, 2008) p. 133
[142] See art. II.2
[143] *Miserocchi v. Agnesi, Judgment No. 3620 Corte di Cassazione* [1971]
[144] *Kanematsu USA Inc. v. ATS-Advanced Telecommunications Systems do Brasil Ltda* SEC 185 [2012]
[145] The amendments were adopted on the 4 December 2006 through the General assembly resolution 61/33 (GA A/RES/61/33)

As an illustration, in *Jianxi Provencial Metal and Minerals import and export corporation v. Sulanser Co. Ltd*[146] the Court held that constitutes a valid arbitration agreement in writing the exchange of communications between a party to the contract and a third party copied to the other party. Is also valid, although not recommended, an exchange of telexes containing the terms "English law-arbitration, if any, London" according to ICC Rules.[147]

Furthermore, s. 5.5 of the AA 1996 recognizes the notion and scope of implied consent enshrined under the Model law. Indeed, in *Heifer International v. Christiansen*[148] the Court held that an arbitration agreement concluded by reference to a written arbitration clause contained in another contract is valid. The Model Law Option 1 recognizes the validity of an arbitration agreement constituted through the record in any form of the content of the arbitration agreement. Hence, an oral agreement is valid and considered as being in writing if made by reference to terms that are in writing or in the case where it is recorded by one of the parties or a third party. It is noted that the approach of recent case law is that the substance prevails over the form, in the sense that is valid any written evidence of an arbitration agreement to arbitrate. Model law option 2, adopted in Scotland, Belgium, and France[149] provide that demonstrating the agreement by the parties to submit to arbitration all or certain disputes is sufficient. Nonetheless, domestic courts may in some cases deny the enforcement of such arbitration agreements.[150] In 2012, the American Court followed this approach but considered that emails between the parties comply with the NY Convention standards.[151] It is important to point out that an arbitration agreement regarded as valid in one State might not be valid in another State where enforcement is sought. The Norwegian Court of Appeal denied the enforcement of an arbitral award on the grounds that although English law, which is the law of the *lex arbitri*, as well as the NY Convention pursuant to its art. II.2 recognizes electronic exchanges such as emails as valid, the validity shall be independently assessed. Hence, the validity of the arbitral award shall not be considered valid according to the place of arbitration only.[152] Any relevant domestic law must be examined in order to ensure there won't be any issue regarding the validity of the arbitration agreement regarding its form under the legislation.

[146] 2 HKC 373 [1995]
[147] *Arab African Energy Corporation Ltd v. Olieprodukten Nederland BV* [1983] 2 Lloyd4s Rep 419
[148] *Heifer International v. Christiansen* [2007] EWHC 3015
[149] See art. 1507 of the Civil Code of Procedure
[150] *Kahl Lucas Lancaster inc. V. Lark International Ltd 186* [1999]
[151] *Glencore Ltd v. Degussa Engineered Carbons LP 848* [2012]
[152] *Halogaland Court of Appeal* [2002] XXVII YBCA

*Separability of the arbitration agreement*

The separability of the arbitration agreement or the autonomy of the arbitration clause represents one of the most important features of arbitration. It implies that the arbitration clause is separate from the main contract, hence is still valid following the termination of the contract where the clause would be most needed especially in the case of a breach of contract. The English Court held in this sense that:

"*The arbitration clause survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.*"[153]

This decision is a helpful reminder that an arbitration agreement shall be considered fully separate and independent from the underlying contract in which it is contained. This legal doctrine helps address issues related to the enforceability of the underlying agreement. The key principle of separability was enshrined in s. 7 of the AA 1996 following the case *Harbour Assurance v Kansa General International Insurance.*[154] It is also enshrined under the UNCITRAL Rules,[155] followed by the Model law[156] which provides that an arbitration clause forming part of a contract shall be treated independently of the other terms of the contract. Thus, the nullity of the contract shall not entail *ipso jure* the invalidity of the arbitration clause.

The French court broadly illustrated the principle and considered that in international arbitration, the arbitration agreement shall be deemed exceptional and autonomous in law. To this view, it shall exclude the possibility of it being affected by the potential invalidity of the main contract.[157] Following this decision, the US Court also admitted the separability of the arbitration agreement,[158] and under Swiss arbitration law, the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid.[159]

The arbitration clause may also be valid if the main contract is proven to be null and void,[160] provided that it is not void *ab initio* or depending on whether the reason for which it is void

[153] *Heyman v. Darwins Ltd* [1942] AC 356
[154] [1993] 1 Lloyd's Rep 455
[155] See art. 23(1) of the UNCITRAL Rules
[156] See art. 16(1)
[157] Cass. civ. 1, 7 mai 1963, Gosset c/ Carapelli, Bull. civ. I. n° 246
[158] *Prima Paint Co. v. Flood Conklin Manufacturing Corporation* 388 US 395, 402 [1967]
[159] See s. 178(3) of the Swiss PIL
[160] See art. 23(1) of the UNCITRAL Rules and art. 16(1) of the Model Law

does not affect the agreement. S.7 of the AA 1996 recognizes the doctrine of separability, which was not admitted before 1993 following the case *Harbour Assurance Co. Ltd v. Kansa General International Insurance Co. Ltd Harbour* case.[161] The article states that an arbitration agreement contained in another agreement shall not be regarded as invalid, non-existent, or ineffective because that other agreement did not come into existence. This was confirmed in *Fiona Trust holding corporation v Yuri Privalov*[162] where the House of Lords held that the arbitral tribunal should determine whether the underlying contract was void for illegality unless the illegality was directed at the arbitration clause in particular.[163]

*Arbitrability of disputes*

This section discusses the arbitrability of disputes, a key feature that is discussed in depth in Chapter IV.

Prior determination of the validity criterion of an agreement to arbitrate, the dispute shall be "capable of settlement by arbitration" as expressed in the NY Convention.[164] It implies that the arbitral tribunal shall not go beyond its prerogatives pursuant to the NY Convention[165] and the Model Law[166] which provides as follows:

"…may be refused enforcement or an arbitral award may be set aside in the case where the arbitral award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration."

The arbitrable claims fall within three categories:[167] contractual claims; claims in tort; statutory claims including securities or antitrust laws. In this respect, it is to determine whether the claim relates to the contract containing the arbitration agreement. In this context, the Austrian supreme court held that:

[161] [1993] 1 Lloyd4s Rep 455
[162] *Fiona Trust holding corporation v Yuri Privalov* [2007] UKHL 40
[163] See Altras, 'Bribery and separability: Who decides, the tribunal or the courts? *Fiona trust Holding Corp v Yuri Privalov*' [2007] 73 Arb. 2, p. 234.
[164] See art. 1
[165] See art. V(1)(c)
[166] Arts 34(2)(iii)
[167] See Blackaby, N; Partasides, C; "*Redfern and Hunter on International Arbitration*" (OUP, 2015), p. 35.

"*Disputes resulting from the agreement do not cover non-contractual claims under competition law that are connected to the contract in no more than a functionally illustrative way*."[168]

In statutory claims, the arbitral tribunal shall examine the claims as per the arbitration agreement so as to ensure a connection between the claim and the underlying contract.[169] It is therefore important for the arbitral tribunal to draft the arbitration agreement with the appropriate terms so as to fully express the intention and choices of the parties. Parties resorting to arbitration for the resolution of their disputes implicitly make the procedure mandatory. In this respect, the arbitration agreement shall be drafted accordingly to avoid issues during the proceedings. As an illustration, Indian case law used to make optional the fact that an arbitration clause shall include that parties may refer their disputes to arbitration and instead required to reiterate their choice via a submission agreement before referring any dispute to arbitration.[170]

In some cases, the term "arbitrability" may be misinterpreted. As a matter of fact, it may be mixed with the non-arbitrability character of the dispute, as well as the case where the dispute may fall outside the scope of the arbitral tribunal. For instance, in *Howsan v. Dean Witter Reynolds*[171] the US Court of Appeal held that the dispute was not arbitrable on the ground that the reference to arbitration has not been made within the time limit. Hence, the dispute was indeed arbitrable but there was an issue regarding the timing.[172]

Unlike court judgments, the parties resort to arbitration so as not to be bound by a foreign country's law and procedure, as the parties are granted powers to decide on the composition of the arbitral award, the arbitration seat, or the applicable law among others. In the context of the harmonisation of this mechanism, various international conventions and treaties have been established, including the New York Convention considered the cornerstone of international arbitration.

[168] *Oberster Gerichtshof, No. 4 Ob. 80/08f* [2008]
[169] See Blackaby, N; Partasides, C; "*Redfern and Hunter on International Arbitration*" (OUP, 2015), p. 98
[170] *Wellington associates Ltd v. Mr Kirit Mehta* [2000] 4 SCC 272
[171] 537 U.S. 79 (2002)
[172] Shore, L. 'Defining arbitrality: The United States v. The rest of the world', NYLJ (2009) p. 401

## 2.2. Recognition and enforcement of arbitral awards under the NY Convention

What parties seek when resorting to arbitration is the celerity and effectiveness of the proceedings which shall result in a final and binding decision in a form of an arbitral award. This award enables the winning party to seek enforcement in the territories where the losing party has assets.[173] In the case where the losing party does not voluntarily perform the arbitral award, the winning party may exert pressure such as commercial or diplomatic pressures in order to get the arbitral awards carried out or invoke the relevant jurisdictions in order to obtain the relevant assets of the losing party.[174] Recognition and enforcement of international arbitral awards are mostly governed by the NY Convention, which each Contracting state must comply with. A distinction must be made between recognition and enforcement, both procedures are intrinsically linked yet different in the sense that one may exist only by the existence of the other.

### 2.2.1. Recognition and enforcement of arbitral awards

Recognition consists of an acknowledgment from the courts to pronounce the arbitral award valid and binding on the parties, after ensuring that all issues are raised. This aims to prevent a new proceeding to be commenced by the losing party regarding a dispute that has already been subject to an arbitral procedure.[175] In this respect, the domestic court shall put an end to the new proceedings under the *res judicata* principle. This implies that a matter between parties must not be relitigated as, subject to any challenge, the arbitral award shall be final and binding between the parties. It is also known as the triple-identity criteria: the parties involved, the subject matter, and the legal grounds.[176] The award will be deemed as res judicata regarding any subsequent proceeding the losing party may commence related to the subject party. French law refers to the doctrine as the “autorité de la chose jugée, which implies that no recourse is available against such a decision.[177] In Contrast, English courts have different approaches with regard to the *res judicata*

[173] Sangare, Y ‘International arbitral awards and the attractiveness of the OHADA regime to foreign investors’ (2019), 24(1) CLJ p. 34
[174] Ibid.
[175] Born, G “*International Arbitration: Law and Practice*” (KLI, 2015) p. 32
[176] See ‘Interpretation of Judgments Nos. 7 and 8 (*Factory at Chorzów*), Dissenting Opinion by M. Anzilotti, 16 December 1927)’ 13 PCIJ p. 23.
[177] See art. 1355 of the French Civil Code of Procedure

principle including the issue estoppel,[178] the plea of cause of action estoppel,[179] and the abuse of process[180] among others.

In contrast, enforcement implies that the domestic jurisdiction shall both recognize the arbitral award and ensure that the award is performed through appropriate orders. Therefore, both go along as recognition allows to resist any potential proceedings likely to be commenced by the losing party to raise issues that have already been determined before.[181] The rationale is that enforcement seeks to compel the losing party to perform the arbitral award through various legal sanctions such as the seizure of assets or forfeiture of bank accounts among others. The New York Convention, preceded by the Geneva Convention of 1927, draw a clear distinction between recognition and enforcement of arbitral awards. A principle applied under the AA 1996 to differentiate two terms enshrined in ss 101(1) and 101(2) of the NY Convention:

"A New York Convention award shall be recognized as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

Indeed, an arbitral award in order to be enforced shall be recognized by the court. In contrast, the arbitral award may be recognized without being enforced. In *Dallal v. Bank Mellat,*[182] the English judge held that the arbitral award was not enforceable under the NY Convention, nonetheless, could be recognized as a valid judgment.

Recognition shall be made by the court of the place of arbitration, while the choice of where to enforce the arbitral award is left to the winning party.[183] To this, the selection of the territories where enforcement shall be sought requires an assessment of the States where the losing party has available assets. The investigation is required in the case where alleged assets are found inexistent or bank accounts turned out to be overdrawn. Following an investigation, the winning party has the right to undertake "forum shopping," consisting of the party seeking enforcement in the territories of its choosing.[184]

[178] *Thoday v Thoday* [1964] P 181
[179] *Zurich v Hayward* [2017] AC 142
[180] *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313
[181] See s. 101(1) of the Arbitration Act 1996
[182] [1986] QB 441
[183] Blackaby, N Redfern And Hunter "*International Commercial Arbitration*" 5th ed. (OUP, 2009) p. 56
[184] See *Koehler v. Bank of Bermuda Ltd* 12 NY.3d 533 (2009)

As discussed in the previous section, the NY Convention under art. V sets out a formal writing requirement providing that recognition and enforcement shall be granted only if are submitted both the duly authenticated original award or a certified copy, and the original agreement referred to in article II or a duly certified copy. Yet, in practice, some jurisdictions demonstrated a flexible and liberal approach. For instance, the Swiss courts recognized valid a Chinese arbitral award that has not been translated into French on the grounds that the main purpose of the NY Convention is to facilitate the recognition and enforcement of an arbitral award. Therefore, "the burden of proof in respect of any questions relating to the authenticity of the arbitration agreement or the arbitral award lies on the party opposing recognition."[185] This decision disregarded art. IV(2) requiring that the submission of any documents shall be produced in the official language of the State where enforcement is sought. In another decision *Hewlett-Packard Inc. v. Berg,*[186] the original copy of the arbitration agreement has not been provided. The US Court held that Berg's motion had already confirmed the existence of an arbitral award issued in its favor, thus confirming the existence of the arbitration agreement. The striking fact is that the parties have not contested the validity of the documents. Finally, the Spanish court decision disregarded the absence of a written arbitration clause and considered that the fact that the claimant participated in the arbitration proceedings was sufficient to establish its consent to bring the dispute to arbitration.[187]

A final and binding arbitral award ends the arbitral proceeding, and in this respect, it should be made sure that all requirements are met. The required form of the arbitral award is provided under art. 20 of the UAA which provides as follows:

"The arbitral award shall contain the following particulars:

… a summary of the respective claims and defences of the parties, their submissions as well as the stages of the proceedings. The arbitral award shall state the reasons upon which it is based."

The last statement of the provision implies that the decision shall be substantiated by the arbitral tribunal and in case of any error or omission, the arbitral tribunal shall be seized within 30 days following notification of the arbitral award for correction of material errors and omissions in the arbitral award. The decision may also be challenged before the

[185] *R SA v. A Ltd* (2001) XXVI YBCA 863
[186] 867 F.Supp. 1126 (1994)
[187] *Shaanxi Provincial Medical Health products I/E Corporation v. Olpesa, SA* Tribunal Supremo, Case No. 112/2002, (2005) XXX YBCA 617

competent jurisdiction of the Member State, and its ruling can only be appealed before the CCJA.[188]

On the domestic level, arbitration provisions mostly set out substantial requirements to set aside, amend, recognize, or enforce foreign awards. Since enforcement is left to the discretion of the domestic courts, this implies that parties are required to resort to domestic courts in the event the arbitral award is not voluntarily performed.
In the event that the losing party fails to perform the arbitral award, a domestic jurisdiction is entitled to enforce the arbitral award owing to the final and binding effect of arbitral awards. It is noted in this regard that although this power is inherently granted to domestic courts, the arbitral tribunal should insert it in the arbitration agreement through an "entry of judgment clause"[189] so as to avoid the losing party invoking the omission of the indication of the court's power to interfere in the proceedings in the arbitration agreement. Following the court judgment, the NY Convention allows the losing party to contest the arbitral award under limited grounds. Enforcement of the arbitral award may be denied where enforcement is sought at the losing party's request. Yet, the success rate depending on the jurisdictions is relatively low owing to the restricted grounds to challenge arbitral awards. These grounds are discussed in the next section.

### 2.2.2 Grounds for refusal of enforcement of arbitral awards

Challenging an arbitral award implies contesting the arbitral award before the relevant authority so as to have it set aside. The limited grounds listed under art. V for the challenges of arbitral awards are exhaustive, hence represent the only grounds likely to be invoked by the parties. Van den Berg indicated in this regard that internationally, 98% of arbitral awards in arbitration proceedings are successfully enforced while domestically only less than 5% of arbitral awards are refused by domestic courts.[190]
These statistics demonstrate that the NY Convention remains one of the most effective instruments for the effectiveness of international arbitral awards enforced worldwide. The statement by Van den Berg highlights the disparity in the success rates of enforcing arbitral awards between international and domestic settings. It suggests that the international

[188] See art. 25.4 of CCJA rules
[189] Blackaby N, Partrasides C, Redfern A and Hunter M "*Redfern and Hunter on International Arbitration*" (6th ed. OUP 2015) p. 126
[190] Blessing, M., Gerold, H. "The New Yor Convention of 1958: Its intended effects, its interpretation, salient problem areas, *The New York Convention of 1958: A collection of reports and materials delivered as the ASA conference held in Zurich" (ASA, 1996)* p.53

arbitral framework provides a more favorable environment for the enforcement of awards compared to domestic jurisdictions. This distinction underscores the importance of considering the international context and the advantages it offers in terms of enforcement when analyzing and evaluating the arbitration practice within Sub-Saharan Africa under the OHADA regime. Although it may appear outdated in the sense that some provisions including formal requirements are not necessarily applied by the states, the Model law represents a modernised version of the Convention. The NY Convention remains a staple in international disputes as it may be argued that part of the success of arbitration owes to the NY Convention that facilitates enforcement of arbitral awards worldwide, establishing in the same vein a uniform international framework applied in several countries as of today. This section discusses the exclusive grounds on which recognition and enforcement may be denied under the NY Convention.

*Invalidity of arbitration agreements*

Art. V(1)(a) of the NY Convention provides as follows:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:
(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

This provision provides two grounds on which litigants may rely in order to resist recognition or enforcement of an arbitral award.
First, the incapacity of the parties and the invalidity of the arbitration agreement as discussed in the previous sections. The second ground implies that the relevant arbitration agreement is not valid under the relevant law to which the parties are subject or the law of the State to which the award has been made. This is well illustrated in *Fougerolle SA v. Ministry of defence of the Syrian Arab Republic*[191] where the Damascus court refused enforcement of two arbitral awards pursuant to ICC Rules and held that the arbitration agreements shall be deemed inexistent on the grounds that no preliminary advice on the

[191] (1990) XV, YCBA 515

referral of the dispute to arbitration, which is within the jurisdiction of the committee of the State Council, has been made. Moreover, in *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [192] discussed earlier and governed by ICC Rules, the English court refused the enforcement of the arbitral award rendered in Paris reversing the arbitral tribunal's own view of jurisdiction, on the grounds that the Pakistani government was not a party to the arbitration agreement but instead was a government-owned trust which ceased to exist. The Court ruled in this regard that:

"*The tribunal's own view of its jurisdiction has no legal or evidential value when the issue is whether the tribunal had any legitimate authority in relation to the government at all.*"

The court's ruling emphasized that the arbitral tribunal's own interpretation of its jurisdiction held no legal or evidential significance when determining whether the tribunal had legitimate authority over the government. In other words, the tribunal's perspective on its jurisdiction did not impact the court's assessment of whether the tribunal had proper authority to hear the case concerning the government. This case illustrates the significance of properly establishing the parties to an arbitration agreement and ensuring their consent and participation throughout the arbitration process. It highlights that the court's evaluation of jurisdiction is not bound by the tribunal's own understanding, and it underscores the importance of accurately identifying and involving the relevant parties in arbitration proceedings to avoid potential challenges to the enforcement of arbitral awards.

By contrast, the Austrian Court in *O Ltd v. S GmhbH*[193] rejected a defence where the defendant claimed the absence of written evidence of the attorney's power to conclude an arbitration agreement and consequently claimed the non-enforcement of the arbitral award. The rationale behind the Court's ruling was that while the writing requirement is effective under Austrian law, the NY Convention does not provide such a requirement. This demonstrates the flexibility of the NY Convention which gives exclusive discretion to the enforcement court which is in charge of assessing independently and on a discretionary basis the validity of the arbitration clause.

[192] [2010] UKSC 46
[193] (1997) XXXII YCBA

*Lack of due process*

This defence ensures the proper conduct of the arbitration proceedings. It includes adequate notice and procedural fairness, a very subjective concept left to the discretion of the forum courts to determine what shall be considered a fair hearing. In this context, the role of the court is not to conduct a thorough control but instead to indicate whether or not there has been a denial of due process. This implies that the procedure shall be conducted with equal rights and treatments, including the right for the parties to present their case. Failure to allow the party to present its case, the arbitral award cannot be enforced in any state. Indeed, the NY Convention is clear on this condition, providing as follows:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that the parties to the agreement referred to in article II was, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[194]

As an illustration, the French court in *Overseas Mining Investments Ltd (OMI) v Commercial Caribbean Niquel SA (CCN)* reversed the arbitral tribunal's decision upon failure of the tribunal to hear the views of the parties regarding the grounds concerned, decisive for the conduct of a fair hearing. In this respect, the Court considered that the arbitral tribunal violated the adversarial principle.[195]
In the same context, the English court denied enforcement of an arbitral award on the grounds that one party who could not attend the hearing due to serious illness had not been provided with its right to present its case, which according to the Court is a flagrant situation of injustice.[196]

It is noted that there are more cases of unsuccessful cases for due process grounds. For instance, the English court in a restrictive approach denied the defence on the ground that the respondent declined to ask for the disclosure of evidence and discuss it while it had the opportunity, a decision followed by several jurisdictions including German courts.[197] This demonstrates the strict approach of the courts to interpret due process defences. It is noted that through this approach, the domestic courts indicate that one party failing to take

[194] See art. V(1)(b) of the NY Convention
[195] *Overseas Mining Investments Ltd (OMI) v Commercial Caribbean Niquel SA (CCN)* (2010) Case No. 08-23901
[196] *Kanoria and ors v. Guinness* [2006] EWCA Civ 222
[197] Decision of the Bremen court of appeal (2001) 4 Intl ALR N-26

advantage of the opportunities and rights attached to it is not entitled to claim this defence.[198]

The next ground under the NY Convention relates to jurisdictional defects in the case where the arbitral tribunal has exceeded its mandate or where the arbitral award decides on matters beyond the scope of the submission to arbitration.

*Jurisdictional issues*

Art. V(1)(c) states as follows:

"The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced".

This defence is mostly used as a ground to challenge an arbitral award Owing to the failure of parties to raise the issue timely or to claim the invalidity of the arbitration agreement in which case art. V(1)(a) of the Convention applies. *The Arab Republic of Egypt v. Southern pacific propertie*[199] is the most illustrative case on this ground. In this case under the ICC Rules, the Court set aside the arbitral award on the ground that the Egyptian government was not a party to the agreement, hence was not bound by the arbitration clause.[200] This ground incorporates different situations, including for instance the arbitral tribunal's excess of authority also called *ultra petita* or the arbitral tribunal's partial excess of jurisdiction during the proceedings. Regarding the *ultra petita* defence, this ground is mostly rejected by the courts. Indeed, in *Lybian American oil Co. v. Socialist people's lybian arab yamahirya*[201] the party claimed that the arbitral tribunal awarded numerous damages for consequential loss while pursuant to the contract signed by the parties this head of damage was excluded. The US Court of Appeal held that it could not be determined without a thorough examination of the law governing the contract whether a clause excluding consequential damages could be abrogated based on a breach of contract. The US courts take a narrow approach when it comes to reviews of arbitral awards, and by adopting the

[198] See *Jorf Lafar Energy Co. SCA v. AMCI Export Corporation* (2007) XXXII YCBA 713
[199] (1984) 23 ILM 1048
[200] Ibid.
[201] (1982) VII YCBA 382

approach of the leading case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*[202] in *Lybian American oil Co. v. Socialist people's lybian arab yamahirya,*[203] the Court indicated that "the Convention did not sanction 'second-guessing the arbitrators' construction of the parties' agreement, nor would it be proper for the court to usurp the arbitrators' role.[204]" Regarding cases invoking alleged excess of jurisdictions in some aspects of the proceedings from the arbitral tribunal, the arbitral award is likely to be enforced based on the part of the arbitral award that has been properly submitted. For instance, in *General organization of commerce and industrialization of cereals of the arab republic of Syria v. SpA SIMER*[205], the Italian court granted a partial arbitral award.

The next ground under the NY Convention discussed in this section is in line with the consensual nature of the arbitral procedure. It deals with cases where the composition of the arbitral tribunal or the proceedings were not in accordance with the parties' agreement of the parties. It also includes cases where there was no agreement with the parties, or the agreement did not comply with the law of the arbitration seat.

*Composition of the arbitral tribunal or procedure not in accordance with the arbitration agreement or the relevant law*:

Art. V(1)(d) provides as follows:

"The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

This defence includes two requirements which are on the one hand the proper composition of the arbitral tribunal and the proper conduct of the arbitral proceeding and on the other hand the compliance with the law of the arbitration seat. This double requirement enshrined under the Geneva Convention of 1927 was included in the NY Convention with different levels of importance, in the sense that compliance with the arbitration agreement prevails over compliance with the law of the place of arbitration. This reasoning aligns with the case *Encyclopaedia Universalis SA v. Encyclopaedia Britannica Inc.*[206] In this case, the US Court denied enforcement of the arbitral award on the grounds that parties from

[202] 508 F.2d 969 (2nd Circ. 1974)
[203] (1982) VII YCBA 382
[204] Ibid.
[205] (1993) VIII YCBA 386
[206] (2005) XXX YCBA 1136

the outset had agreed that the two arbitrators appointed would select the third arbitrator to compose the arbitral tribunal. Failure to do so, the task shall rest on the English Commercial Court. However, the appellant prematurely requested the Commercial court to appoint a third arbitrator. The Court held in this context that the NY Convention confirmed the importance of the composition of the arbitral tribunal and stated:

"*The English Court's premature appointment of the third arbitrator irremediably spoiled the arbitration process…the issue of how the third arbitrator was to be appointed is more than a trivial matter of form.*"[207]

In a more restrictive approach, the Chinese court denied enforcement of an arbitral award on the grounds that owing to the failure of the respondent to appoint an arbitral tribunal within the time limit, the arbitral institution proceeded with the appointment of an arbitrator on behalf of the respondent. The Court held that notwithstanding the compliance of this action with the arbitration rules, enforcement shall be denied based on the arbitration institution's failure to consult the respondent before the appointment.[208] In contrast, there are cases where enforcement was granted for instance on the basis that the party contesting the enforcement of the arbitral award participated in the arbitration proceedings having knowledge that the arbitrators were not selected from the appropriate list. In this respect and pursuant to the doctrine of estoppel, the party could not invoke this mistake with the aim to take advantage of it. The Court with regard to the NY Convention held that:

"*It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then two years after the award, attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen, from the wrong CIETAC list.*"[209]

[207] Ibid.
[208] See *Bunge Agribuss v. Guangdong Fengyuan* [2006] Min Si Ta Zi No. 41
[209] *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd* [1994]

*Set aside arbitral awards*

Art. V(1)(e) of the NY Convention states that enforcement may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought proof that:

"*The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*."

This is the most controversial defence owing to its subjectivity, especially with regard to the term "binding". It is understood by this approach that domestic courts consider binding arbitral awards that can no longer be appealed on the merits. *A contrario*, some jurisdictions consider that the applicable law shall be assessed in order to determine whether the arbitral award is binding under that law. In *Antilles cement corporation v. Transficem,*[210] the Court rightly held that the determination of the binding effect of an arbitral award shall not be assessed based on the law of the place of arbitration.

Additionally, the NY Convention, as opposed to the Model law,[211] does not provide grounds to set aside arbitral awards which are left to the discretion of the relevant domestic jurisdictions which are likely to apply their domestic requirements. Paulsson argues in this regard that such local standard annulments should be given only local effect and should be disregarded internationally.[212] The solution to this issue with this ground might be to find the right balance regarding judicial control exercised by the courts of the arbitration seat.

It is noted that as an arbitral award can be denied at the place of arbitration and be granted enforcement in another state, several jurisdictions including France, the US, or Belgium may enforce arbitral awards that have been set aside.[213] For instance, pursuant to art. 1526 of the French Civil Code of Procedure, an application for setting aside an arbitral award does not stay the proceedings to enforce the arbitral award. This complies with the NY Convention provisions which specify that the enforcing courts may refuse enforcement, although not mandatory. This is added to the fact that pursuant to art. VII(1) of the Convention, it is indicated that:

[210] *Antilles cement corporation v. Transficem* (2006) XXXI YBCA 846
[211] See art. 36 listing the limited grounds for setting aside arbitral awards
[212] See Paulsson, J. 'The case for disregarding local standard annulments under the New York Convention' (1996) 7 ARIA 99
[213] See Gharavi, 'The international effectiveness of the annulment of an arbitral award' (KLI, 2002) p.54

"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

This confirms that domestic laws may be more favourable than the Convention itself to valid and grant an arbitral award. To illustrate, the French with a less restrictive approach enforced an arbitral award that was set aside by the Swiss courts, stating that its enforcement was not contrary to international public policy.[214] In another case, the French Court enforced an arbitral award set aside in England on the grounds that the arbitral award is an international justice not related to any legal system. Hence, enforcement must be assessed with regard to the state where enforcement is sought.[215] In contrast, the US court refused enforcement of an arbitral award set aside by the Colombian court on the ground that the date of the arbitral award did not expressly enable the use of ICC procedural rules included in the arbitration clause by the parties.[216]
It is understood through these decisions that owing to the inconsistency of interpretation, this defence remains controversial and varies from one jurisdiction to another.

The next ground to challenge arbitral awards under the NY Convention is the arbitrability of the dispute. This ground implies assessing whether a specific dispute can be submitted to arbitration. The issue may arise at different stages of the arbitration proceedings and in this regard will be discussed in depth in chapter V.

*Arbitrability*

The concept of arbitrability is enshrined in the NY Convention as follows:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country"[217]

[214] *Hilmarton Ltd v. Omnium de Traitement et de Valorisation* (1994) RA 327
[215] See *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices* [2007]
[216] *TermoRio SA ESP v. Electrificadora Del Atlantico* (2006) SA ESP 421 F.Supp.2d 87
[217] See art. V(2)(a)

This ground enables the domestic court to deny enforcement of arbitral awards in cases where the subject matter is not capable of settlement through arbitration. The concept of arbitrability varies from one state to another and is intrinsically linked to public policy considerations. To illustrate this ground, in a decision, the Court held immaterial the law governing the main contract on the ground that the concerned issue was arbitrable, and questions related to arbitrability as a ground to deny enforcement of an arbitral award was to be assessed by the Singaporean jurisdictions.[218] This can be explained by the fact that the ground raises national interest, and raised very few cases in this regard. In this context, this ground will be extensively addressed in Chapter IV within the context of competition law disputes.

The last ground, public policy, is one of the most complex and controversial defence under the NY Convention as it has raised conflicting views among scholars owing to its nature.

*Public policy*

The concept of public policy is enshrined under Article V of the NY Convention as follows:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

This ground is deemed to be the most controversial defence under the Conventio[n] owing to the fact that interpretation of the public policy exception is left to the exclusive jurisdiction of the domestic courts, which are likely to adjudicate depending on the morality and principles of their states. Inglot argues in this regard that "public policy is used as a defence against introducing into the legal system of state decisions which offend it."[219] Pursuant to art. V(2)(b), the arbitral award shall not be contrary to international public policy. In this context, the pro-enforcement bias enshrined in the NY Convention is well illustrated in *Parsons Whittemore Overseas Co. Inc v. Société Générale de l'industrie du Papier (RAKTA)* [220] where the Court held that:

[218] *Aloe vera of America, Inc. v. Asianic food Pte Ltd and anor* (2007) XXXII YCBA 489
[219] Iglot, M 'Separability of or overlap between public policy and procedural grounds for refusal of enforcement of foreign arbitral awards under the New York Convention' (2015) 4(1) PRIEL p. 11
[220] *Parsons Whittemore Overseas Co. Inc v. Société Générale de l'industrie du Papier (RAKTA)* 508 F.2d 969 (1974)

"*Public policy defence should be construed narrowly, and enforcement of foreign arbitral awards should be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.*"[221]

Yet, public policy remains extremely subjective to the extent that under Chinese law, public policy is referred to as "social and public interests" which may be raised by the Court itself and appears to be broader to the extent that it includes according to Fei "traditional and societal sentiment."[222] In the United Arab Emirates (Hereinafter UAE), matters of acquisition and termination of ownership rights over property fall into public policy considerations, hence real estate disputes-related are not arbitrable.[223]

The International Law Association (hereinafter ILA) attempting to provide a unilateral definition of international public policy stated that it was:

"Part of the public policy of a state which, if violated, would prevent a party from involving a foreign law or foreign award."[224]

Domestic courts have discretion on issues regarding the scope of arbitration while it is noted that a uniform regime for enforcement of arbitral awards might be needed. Indeed, regardless of the sovereignty of the different states, concerns are raised regarding the myriad interpretation of the convention as domestic courts appear to have different approaches. For instance, while art. II of the Convention may provide a strict writing requirement, but domestic courts may interpret it differently depending on their understanding and realities, owing to the fact that the provisions are drafted in a way that might lead to different interpretations.[225]

Furthermore, diverse interpretations of enforceability might be explained by the fact that the provisions regarding the grounds for refusal are not narrow. Consequently, it leaves room for various interpretations. Indications, potential limitations, or further clarity must be clearly defined. It is in this vein that Van den Berg argues that the Convention needs to be reformed on the basis that it is short, and incomplete hence does not necessarily fit into the current development of arbitration.[226] To this view, it is noted that a longer text might

[221] Ibid.
[222] Fei, L. 'Public policy as a bar to enforcement of international arbitral awards: a review of the Chinese approach' (2010) 26 AI 301 p. 42
[223] *Baiti real estate development v. Dinasty Zarooni Inc., No. 14* (2012)
[224] See ILA, 'Final report of the Committee on international commercial arbitration on public policy' (2004) 1 TDM p.93
[225] *Kanematsu USA Inc. v. ATS-Advanced Telecommunications Systems do Brasil Ltda*, SEC 185 [2012]; *R SA v. A Ltd* (2001) XXVI YBCA 863
[226] Van Der Berg, A "*50 years of the New York Convention: ICCA International arbitration conference*" (KLI, 2009) p. 58

be less accessible to users. Additionally, the willingness to cover or amend every provision requiring legal or judicial interpretation could transform the Convention into a rigid and off-putting instrument likely to raise more issues of implementation. Hence, the current issues might be addressed using appropriate judicial interpretations as it would appear utopic to consider public policy exception as a universal and harmonized concept binding all the Contracting States since public policy varies from one state to another and is a trait of the sovereignty of the jurisdictions. A unique interpretation would jeopardize the States' sovereignty and consequently prevent them to implement their constitutional rights and principles enshrined in their legislation.

Moses suggests that in light of the shortcomings deriving from the implementation of the convention provisions, some amendments will be welcome.[227] First, the inconsistent writing requirement set in Article II of the Convention which according to the scholar is incompatible with contemporary international business practices, and most important the controversial concept of public policy.[228]

Two additional solutions emerged from those concerns of interpretation. First, Teresa Cheng suggests the establishment of a "judicial direction" through an international institution that would, under the Convention provisions, collect the judgments from the whole contracting states' jurisdictions. This institution would be in charge of analysing those interpretations and providing recommendations on interpreting the Convention. [229]

Second, this judicial direction could step into a judicial authority so that any Contracting State that agreed would leave it to the institution to interpret the provisions of the Convention. It is noted that this suggestion may appear more utopic than pragmatic in the sense that the establishment of an institution analysing each interpretation from the domestic courts' decisions of the 169 State parties to the Convention would be time-consuming and might not achieve the aim of uniformity sought by its creation. Nonetheless, this suggestion could be used more pragmatically and address the lack of uniformity prevailing within the Contracting states.

Overall, it is noted that surveys demonstrate the prevalence of international arbitration over other dispute resolution mechanisms, as international arbitration was ranked according to

[227] Moses, M 'New York Convention: Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958' (2015) 109(1) AJIL 242 at p. 56
[228] Ibid.
[229] Cheng, T "*Celebrating the Fiftieth Anniversary of the New York Convention: in 50 Years of the New York Convention: ICCA International Arbitration Conference*" (KLI, 2009) 643 p. 156

the White&Case Survey 2021 as the preferred method of resolving cross-border disputes. The use of international arbitration has considerably increased, allowing users worldwide from different territories and backgrounds to resort to arbitration with the aim of a final and binding decision. This enables to some extent the parties to escape their jurisdictions' procedural regulations.

169 States have signed the NY Convention, considered a backbone of international arbitration. This implies that arbitral awards may be enforced almost throughout the globe which represents huge progress for international arbitration. Parties may resort to arbitration in a view to bring an arbitrable dispute to the arbitral tribunal. A term varying from one state to another, similar to the public exception which interpretation is left to the domestic courts.

To this respect, the subsequent chapter assesses the arbitration framework of two legal systems which are signatories States of the Convention, hence implementing the provisions to meet the international standards and best practices. The chapter assesses the English and OHADA arbitration framework from a comparative perspective to determine what lessons can be learned from English law so as to implement it in the OHADA legislative framework. This is to ensure better effectiveness regarding the enforcement of arbitral awards in the region.

# Chapter III

# Arbitration framework in developed and developing countries from the OHADA and the UK perspectives

## Introduction

This chapter delves into the arbitration frameworks of two distinct legal systems: the English system and the OHADA system. The choice of both systems is driven by the objective of examining the enforcement stage from an international perspective, while adopting a comparative approach between developed and developing jurisdictions. The inclusion of the UK system is justified by its robust legal foundation, longstanding reputation, and historical support for arbitration through favorable legislation. Meanwhile, the OHADA Regime, representing a pioneering force in arbitration and business law within the francophone regions of Sub-Saharan Africa, is poised to draw insights from the English arbitration system in order to address existing legal gaps within the OHADA arbitration law. By drawing a comparison between OHADA arbitration law and English arbitration law, the study demonstrates how OHADA arbitration law, as a unified framework, incorporates principles and practices that bear similarities to those found in established national arbitration laws, such as English arbitration law. the Uniform Act on Arbitration, which was implemented by OHADA member states, represented the first comprehensive legislation specifically regulating arbitration within the OHADA regime. Unlike some other jurisdictions that may have separate domestic arbitration laws, OHADA countries have chosen to adopt a unified approach to arbitration through the Uniform Act.

### 3.1. English arbitration framework

This section examines the historical evolution of arbitration in England, tracing its early foundations to the current status of London as one of the most sought-after seats of arbitration.

### 3.1.1. Historical developments of English arbitration and English arbitral institutions

Kerr argues that "the growth of arbitration, as an alternative to litigation, reflects its ability to escape from the limitations of the courts."[230] Indeed, the advantages of arbitration include speed and the possibility to select the composition of the arbitral tribunal. This, added to the possibility to elude the time-consuming court proceedings may explain the great success of arbitration in international commercial disputes. In this context, Mistellis states that "international arbitration has become the established method of determining international commercial disputes."[231]

According to Tweeddale, arbitration has existed for as long as the common law in England. As courts struggled to develop their jurisdiction at a rate consistent with the number and complexity of trade disputes in the rapidly growing sphere of international commerce, arbitration quickly became the dispute resolution mechanism of choice.[232] Well-known as a major hub in commercial transactions and shipping, London becomes unsurprisingly a place for dispute resolution. It is also noted among others the arbitration-friendly character of English law and jurisdictions, the effectiveness of the legal system, the non-interventionist approach of English courts, as well as a state-of-the-art arbitration infrastructure for more efficient hearing facilities such as the International Arbitration Centre in the City of London put London as a favorite place for businesses worldwide. Regarding the development of English arbitration law, arbitration provisions were made through the Common Law Procedure Act of 1854 before the Arbitration Act of 1889. The Act was revised over time, received numerous criticisms, especially with regard to the Arbitration Act of 1950, and ended with the Arbitration Act of 1996.

Commentators argue that the Act of 1950, following the enactment of the Model law which highlighted several flaws contained in the act, was inconsistent and lacked clarity.[233] For instance, no provision was governing arbitration proceedings and party autonomy. The most controversial decision regarding the deficiency of the provisions is *Coppee-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*[234] regarding an arbitration procedure under the ICC rules where one party argued that the English courts had no jurisdiction to

[230] Kerr, M. "*Handbook of arbitration practice*" (Sweet and Maxwell, 1987) p. 156
[231] Blackaby N, Partrasides C, Redfern A and Hunter M "*Redfern and Hunter on International Arbitration*" (6th ed. OUP 2015) p. 63
[232] Tweeddale, K. and Tweeddale, A. *'A Practical Approach to Arbitration Law'* (Blackstone Press, 1999), p. 95
[233] Rutherford, M.; Sims, J. "*Arbitration Act 1996: A Practical Guide*" (Sweet and Maxwell, 1996), p. 87
[234] *Coppee-Lavalin NV v Ken-Ren Chemicals and Fertilizers* Ltd [1995] 1 AC 38

intervene. The House of Lords held that although it had no jurisdiction to make summon the respondent to provide security, exceptional circumstances allowed it pursuant to s. 21 of the Arbitration Act of 1950 which provides that an arbitrator shall state any question of law arising in the form of a special case left to the discretion of the High Court. This case among others resulted in the establishment of various international arbitration centres in other countries attempting to take full advantage of the inconsistencies related to the English arbitration framework. Following the enactment of the Model Law, the Departmental Advisory Committee (hereinafter DAC) was to decide whether the UK should adopt the Model Law provisions, and the Committee answered negatively.[235] The rationale was that the international character of the Model Law could be detrimental to English arbitration, in the sense that English arbitration draws a clear distinction between domestic and international arbitration law. Another rationale includes the potential influence of the Model law that could affect the English court's ability to intervene in potential errors of law. Following a review of the pros and cons, the DAC concluded that unfavourable provisions should not be disregarded. Thus, the Committee rejected the proposal of the government to adopt the Model law as a legal framework. Following the rejection of the Model Law, the aim to restore London's status as a major hub while reforming the law governing arbitration gave rise to the AA 1996.[236] Nevertheless, the DAC report states that: 'At every stage in preparing a new draft bill, very close regard was paid to the Model law, and it will be seen that both the structure and the content of the July draft bill, and the final bill owes much of this model.'[237] This demonstrates the inherent impact of the Model Law on the English arbitration framework.

### 3.1.2. Arbitration proceedings under English law

As of today, although English law has not adopted the Model Law, the English Arbitration Act of 1996 contains several provisions inspired by the Model Law. Commentators have described the Arbitration Act as "the most radical piece of legislation in the history of English arbitration law"[238] mostly due to its specificity. The impact of the Model Law on the Arbitration Act on the style, structure, and content has led commentators to state that although the Act was intended only to add some of the provisions of the Model Law, the

[235] See "*Departmental Advisory Committee on Arbitration Law, A Report on the UNCITRAL Model Law on International Commercial Arbitration*" (HMSO, 1989)
[236] See Lord, R and Salzedo, S. "*A Guide to the Arbitration Act 1996*" (Cavendish Publishing Ltd, 2001), p. 133
[237] "*Report on the Arbitration Bill"* (HMSO, 1996) para. 4
[238] See Tweeddale, K. and Tweeddale, A. *"A Practical Approach to Arbitration Law"* (Blackstone Press, 1999), p. 157.

general language and spirit of the Act reflects the Model Law including the validity criterion regarding the agreement to arbitrate.[239]

Arbitrations conducted in England and Wales are regulated by the AA 1996.[240] The spirit of the AA 1996, mainly influenced by the Model law brought a fresh start to English arbitration through a modernised and pro-arbitration approach. The provisions of the Act do not cover all aspects of arbitration law including confidentiality and privacy of the arbitration proceedings. Hence, both the Arbitration Act and case law go together when assessing the status of the law, as domestic courts adjudicate and develop the areas not codified in the Arbitration Act.[241]

The Act is divided into three main principles enshrined in s. 1 which are the principle of fairness,[242] party autonomy,[243] and judicial intervention during arbitration proceedings.[244] These principles are extensively discussed in Chapter VI.

The principle of fairness requires both parties to do their utmost for the proper conduct of the proceedings while requiring the arbitral tribunal to act with impartiality[245] and adopt fair and appropriate proceedings to limit unnecessary costs or delays.[246]

Party autonomy is enshrined in s. 4 of the Act through non-mandatory provisions. It implies that parties are not bound by them. In this respect, they may agree to opt out. Nonetheless, the importance of this principle has been emphasized in several decisions. In *Jivraj v. Hashwani,*[247] the Court of Appeal held that the arbitration clause goes against the EU discrimination regulations[248] for requiring the arbitrators to be from a specific religious belief, hence was found null and void. The Supreme Court quashed the ruling and confirmed the validity of an arbitration clause, a decision in accordance with the ICC's statement in this regard:

"*The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (e.g., because neither party will submit to the courts or their counterpart; or because the available courts are considered*

[239] Ibid.
[240] See s. 2(1)
[241] *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 WLR 314
[242] See s. 1(a) of the Arbitration Act 1996
[243] See s. 1(b) of the Arbitration Act 1996
[244] See s. 1(c) of the Arbitration Act 1996
[245] See s. 40 of the Arbitration Act
[246] See s. 33(1) of the Arbitration Act 1996
[247] [2011] UKSC 40
[248] See Employment Equality (Religion or Belief) Regulations (2003)

*insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives)*."[249]

Unlike the domestic courts which are only required to intervene in an arbitration proceeding in limited cases such as the appointment of arbitrators in the case where no agreement was made between the parties in this regard,[250] the arbitral tribunal is granted limited powers throughout the entire proceedings. Judicial intervention may in some cases occur throughout the entire proceedings, especially at the enforcement stage. In this regard, the Act provides a restricted list of grounds to challenge an arbitral award *inter alia* the lack of substantive jurisdiction,[251] a serious irregularity resulting in a substantial injustice,[252] or an appeal on a point of law.[253] The rationale behind these restrictions is to limit judicial intervention and support the arbitration proceedings.[254] This is owed to the fact that domestic courts tend to exceed their powers and be very restrictive when parties seek to set aside arbitral awards.[255]

On the flip side, Sub-Saharan countries are in their early developments of arbitration and face in this regard several issues affecting the effectiveness of the arbitration proceedings. This is mostly owed to the inconsistencies of the texts and the interference of the domestic courts. The next session discusses the stakes of the OHADA Treaty which led to the establishment of such a supranational organisation that strives to harmonise business law in Sub-Saharan Africa.

### 3.2. OHADA arbitration legal framework

This section aims to better grasp the functioning of OHADA in a view to assess its shortcomings. To this respect, mention must be made of its main set of rules. To this respect, the section discusses the historical challenges which gave rise to the OHADA Treaty and the creation of the supranational organisation. It also examines the different sources constituting the OHADA arbitration framework to get an overview of the general practice of arbitration in Sub-Saharan Africa.

[249] Ibid.
[250] See s. 18 of the Arbitration Act 1996
[251] See s. 67 of the Arbitration Act 1996
[252] See s. 68 of the Arbitration Act 1996
[253] See s. 69 of the Arbitration Act 1996
[254] *Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996
[255] *Bandwidth Shipping Corporation Intaari (the 'Magdalena Oldendorff')* [2007] EWCA Civ 998

### 3.2.1 Introduction

There is a growing importance of arbitration in the business practice of many Sub-Saharan African countries. This interest is intrinsically linked to the economic development of the region through the creation of a new pole of development, which gave rise to the Organization for Harmonization of business law in Africa.
OHADA aims at addressing the legal and judicial insecurities prevailing in the region. As previous studies focus on developed countries, the study seeks to focus on the noticeable progress made by these developing countries in the OHADA region.

The rationale behind the choice of OHADA is that this supranational organisation is an evolving system of business laws and implementing institutions in Sub-Saharan Africa which regrettably contains significant flaws under its set of rules, namely the Uniform Act of Arbitration (UAA) and the Common Court of Justice and Arbitration rules (CCJA Rules). These flaws are likely to prevent OHADA from achieving its objectives of harmonization and economic integration in Africa.

The study aims at identifying the gaps likely to obstruct the good practice of arbitration in this region specifically at the enforcement stage. This would contribute to the existing literature and consequently promote the expansion of arbitration as the best alternative for dispute resolution in developing countries, with a special focus on Sub-Saharan Africa where awareness needs to be raised. To this end, this section examines the state of the arbitration practice within the OHADA regime. It first analyses the OHADA arbitration framework through an empirical study using both semi-structured interviews and a questionnaire that involved experts, practitioners, and academics. This section also makes use of legislation, case law, and doctrine.

### 3.2.2 The business thrust for receptivity of arbitration in Africa

The growing interest in arbitration over the years is owed to the increased flow of foreign investments in Sub-Saharan Africa, considered one of the growing sectors worldwide. Sub-Saharan Africa is replete with advantageous investment opportunities including natural resources such as mining, currencies, and diversity in terms of legal systems. Those were primarily what made Sub-Saharan Africa attractive to foreign investors.[256]

[256] Tall, S. ''*Droit du contentieux international africain Jurisprudences et théorie générale des différends africains*'' (L'harmattan, 2018) p. 8

Years afterward, legal insecurity arose owing to the obsolescence of the legal texts, the legal gaps, the delay or failure to publish adopted laws for lack of means, but also the judicial insecurity increasing lengthy procedures, the unpredictability of the courts, the corruption within the judiciary, issues in the implementation of the laws among others. This led to serious suspicions from the investors and consequently a sluggishness of investments affecting Sub-Saharan Africa's economic development.

With the growth of international trade, the need to rebuild trust with foreign investors increased the interest in arbitration in Sub-Saharan Africa. In this respect, a treaty was signed by 14 African states in Port-Louis on 17 October 1993 known as the "Organisation for the Harmonization of Business Law in Africa" (OHADA). Initially signed by fourteen African countries, the OHADA is as of today made up of 17 member states[257] and was revised on 17 October 2008 in Quebec. These states have seized the initiative to regulate their business laws by laying down simple, modern, and appropriate common regulations, most of which are French-speaking.[258] The treaty, open to all states, remains one of the leading texts aiming at regulating and promoting an efficient and organized business environment in Sub-Saharan Africa. The main aim of OHADA is to harmonize the State parties' business law through appropriate regulations and boost the regional economy through alternative dispute mechanisms such as arbitration. This would help establish a secured legal and business environment for investments. In this regard, OHADA considered this matter a tool promoting the economic attractiveness of its member states, and OHADA arbitration aims to emerge as a favourite dispute resolution method for Africa-related disputes. This long-term objective would be for OHADA to become a cornerstone of dispute resolution in Africa.

While it is true that the OHADA legislator emphasized the term "harmonization" to describe the main objectives of the Treaty, it is of relevance to raise some practical aspects in order to assess their implications in the achievement of OHADA objectives. It is noted that the term "harmonization" included in the name of the organization and the OHADA Treaty raised debate. Scholars including Fénéon[259] and Douajni[260] highlighted that the supranational organization attempts instead to "unify" the laws through its uniform acts. This statement implies that the rationale behind OHADA objectives was not to harmonize

[257] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Republic of the Congo, Senegal and Togo

[258] Aka, N; Fénéon, A; Tchakoua, J '*The New OHADA Arbitration and Mediation framework*" (DA, 2nd ed. 2018) p. 55

[259] See Fénéon, A. 'L'arbitrage OHADA après la réforme du 23 novembre 2017' (2018) N°4 RA p.26

[260] Douajni, K. "*L'arbitrage OHADA*" (PUPPA, 2014) p.83

but instead to replace the existing domestic laws with modern common rules so as to observe a unique framework, as enshrined in Art. 10 of the OHADA treaty which provides as follows:

"Uniform Acts shall be directly applicable and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the domestic law."[261]

This provision implies that the OHADA system is meant to be a more radical approach to unifying the legal system. The OHADA pioneers aimed to establish a body of legislation whereby all the differences between the national legislation are removed and substituted by a unique text applicable to the relevant states. In this context, the Treaty creates a dual system where national laws coexist with the business legislation instituted by OHADA, superseding national laws covering the same subject matter as illustrated in *Yovo v Societe Togo Telecom.*[262] The implication is that the uniform acts prevail over domestic law in cases where the area is already covered by the OHADA provisions.

The importance of arbitration is enshrined in the Preamble of the OHADA Treaty as follows:

"*Desirous of promoting arbitration as an instrument for the settlement of contractual disputes.*"

OHADA operates a uniform law regime which upon adoption becomes automatically applicable in all its member states and the CCJA within the jurisdiction has final jurisdiction on matters pertaining to OHADA Uniform Acts. In this respect, the enactment of the Uniform Act on Arbitration and the Common Court of Justice and Arbitration rules are assessed in the subsequent section. Commentators including Feneon[263] and Bühler[264] confirmed that OHADA has fulfilled its promises to implement an alternative dispute resolution in order to reassure foreign investors as OHADA was subject to many criticisms from scholars[265] regarding its effectiveness. For instance, Ekani argues that the circulation of decisions within the region shall be simplified. He further states that to address this issue, the exequatur shall be removed so as to streamline the arbitration proceedings and by ricochet the enforcement of arbitral awards. This would contribute to the creation of the new development pole expressed by the OHADA pioneers.[266]

[261] See art. 10 of the OHADA Treaty
[262] N. 043/2005
[263] See Fénéon, A. 'L'arbitrage OHADA après la réforme du 23 novembre 2017' (2018) 4 RA, p.44
[264] Bühler, M. 'Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform' (2018) JIA 35(5) p. 530
[265] Ekani, S. 'Intégration, exequatur et sécurité juridique dans l'espace OHADA. Bilan et perspective d'une avancée contrastée' (2017) RIDE 3 p. 55
[266] See the Preamble of the OHADA Treaty

OHADA has made tremendous progress by establishing a modern arbitration framework composed of a dual system which is further discussed in the next section.

### 3.2.3 Sources of OHADA Arbitration

Arbitration is rarely included in most of the law school curricula or briefly in the business law module, while mention must be made of the growing importance of arbitration in the business practice of many African countries for their expansion.[267]

Six years following the signing of the Treaty, on 11 March 1999, the Uniform Act on Arbitration (herein after UAA) and the Common Court of Justice and Arbitration rules (CCJA rules) were implemented with a view to contributing to the development and reinforcement of the legal framework. OHADA Arbitration consists of a dual system composed of generally applicable rules governed by the UAA, and an institutional arbitration through the CCJA a supranational Court acting both as an arbitration institution and a Supreme Court.

Through the adoption of the UAA and CCJA Arbitration rules, the OHADA legislator aimed at addressing the existing gaps for streamlined enforcement of arbitral awards. The inherent aim of the OHADA leaders is to establish an effective arbitral institution in Sub-Saharan Africa so that most African dispute-related arbitrations are seated in the region and involve African institutions, rather than resorting to leading Western arbitration institutions such as the LCIA and the ICC.

The semi-structured interviews provided further information related to the sources of the OHADA arbitration framework. Most participants confirmed that OHADA sources have drawn upon French law in the sense that OHADA rules are a pale copy of the French civil code of procedure. For instance, the Uniform Acts especially in commercial law have been inspired by French law, confirmed by Gatsi[268] et Leboulanger.[269] Yet, one participant argued that although the first texts were influenced by French law, the recent reforms demonstrate an influence of the common law to such an extent that the participant refers to OHADA provisions as “a mixed law.” He further submits that reference to a blend of different laws includes civil law and a noticeable influence of common law. Indeed, OHADA

[267] Sangare, Y ‘International arbitral awards and the attractiveness of the OHADA regime to foreign investors’ (2019) CLJ 24(1), p. 30
[268] Gatsi, J ‘Case law, source of OHADA law’ (2012) RIDC p.156
[269] Leboulanger, P. “Arbitration and harmonization of law in Africa’’ (Rev. arb., 1999)

is primarily and predominantly inspired by civil law as historically the supranational organization was created in collaboration with French partners including main pioneers Keba Mbaye,[270] Martin Kirsh[271] among others, and this influence is still prevailing. Nonetheless, the participant states that certain uniform acts were inspired by common law:

"In arbitration, it is possible to conduct a cross-examination[272] although the parties do not systematically resort to this option. Additionally, common law terms have been included such as "privileges and immunities" in civil proceedings. Finally, the Arbitration Act of 1996 has also significantly inspired the legislator in the reform of the law on security rights, insolvency proceedings, and arbitration."

This mixed approach seeks to improve OHADA legislation for greater effectiveness. Therefore, it is understood that OHADA is becoming a unique law.

### *A. Internal sources of OHADA Arbitration*

Parties have the option to arbitrate under two separate regimes: the Common Court of Justice and Arbitration Rules (Hereinafter CCJA Rules) and the Uniform Act on Arbitration (Hereinafter UAA) provisions. Both provisions aim to embrace international standards, and to this aim incorporate fundamental principles of international arbitration such as party autonomy, the competence-competence principle, the separability of the arbitration agreement, and the independence and impartiality of the arbitral tribunal among others.

#### The *Common Court of Justice and Arbitration Rules* (CCJA)

The credibility of an arbitration centre shall be measured by the reliability it inspires in litigants through the quality of the set of rules and decisions rendered. The rationale behind the creation of the CCJA was the uniformization regarding the interpretation and implementation of OHADA law. The CCJA supersedes domestic courts on matters governed by OHADA, grants exequatur of CCJA arbitrations, and set aside arbitral awards. [273] Alongside this judicial competence, the Treaty enshrines in section IV the establishment

[270] Mbayé, K 'Foreword on OHADA', 827, (1998) RP p. 128
[271] Kirsch, M 'The history of OHADA', 827, (1998) RP p. 88
[272] See art. 22 of the UAA
[273] See art. 25 of the OHADA Treaty and art. 29 of the CJA Rules

of an arbitration institution within the CCJA to administer arbitration proceedings. This attribution is stated in Art. 21 of the OHADA Treaty:

"The Common Court of Justice and Arbitration shall not itself settle such a dispute. It shall appoint or confirm arbitrators who shall keep the court informed of the progress of the proceedings and submit the draft award to the court for its approval in conformity with article 24 below."[274]

The CCJA Rules are similar to the ICC Arbitration Rules. Under its provisions, parties may commence an institutional arbitration administered by the CCJA under the CCJA Rules subject to conditions:

"The mandate of the Court shall be the administration, in accordance with these Rules, of arbitral proceedings when a contractual dispute, pursuant to an arbitration agreement, is referred to it by any party to a contract, either where one of the parties is a resident or has its usual place of residence in the territory of one or more of the Member States, or where the contract is performed or to be performed, in whole or in part, in the territory of one or more Member States."

Therefore, whether the dispute includes an arbitration agreement or a submission agreement, the sole requirement for parties to bring any disputes to the CCJA is that either one party resides in one of the Member States, or the territory where the contract is performed is located in the region.[275]

The duality of the CCJA raised debate. Ngwanza et Kam expressed concerns regarding this dual role which according to the authors is likely to endanger transparency concerning CCJA arbitration proceedings and the control of CCJA arbitral awards.[276] To collect more data to examine in depth the scope of the dual role of the CCJA, participants from the semi-structured interviews were asked the question as to their views on this reform. Most participants agreed that this new initiative from the legislator was commendable. One participant welcomed the initiative to confer authority to the CCJA to grant exequatur applicable within the whole member states under CCJA arbitrations, describing this innovation as unprecedented progress. Nevertheless, it is submitted that the CCJA faced severe criticism from practitioners as statistics revealed that the CCJA case law constituted

[274] See also art. 2 of the CCJA rules
[275] Amoussou-Guenou, R. *''L'arbitrage dans le Traité relatif à l'harmonisation du droit des affaires en Afrique*'' (RDAI, 1996) p.29
[276] Leboulanger, P. 'L'arbitrage et l'harmonisation du droit des affaires en Afrique' (1999) 3 RA 541 p.63

a small percentage of the disputes brought to the CCJA.[277] Kwadwo argues in this regard that the unstable business environment in the region as well as the impact of the Getma saga[278] significantly affected OHADA arbitration, and consequently resulted in the low rate of CCJA's arbitral activity.[279] The Getma saga is a series of judgments that significantly affected the credibility of the CCJA.[280]

### *Getma v Republic of Guinea*[281]

The *Getma* saga has drawn much discussion and speculation in the arbitration community. It highlighted various aspects of international arbitration including party autonomy, the arbitral tribunal fees, and the enforcement of annulled arbitral awards. This saga sheds light on some challenges that the CCJA and arbitration proceedings in Africa may face in the future.

In this case, a dispute arose between the French company Getma International and the Republic of Guinea. The CCJA set aside the arbitral award on the grounds that the arbitral tribunal was in breach of its mandate by entering into a separate fee agreement with the parties to increase the fees regardless of the fees set out by the CCJA, which was regarded as a breach of the CCJA Rules. This decision raised two issues. First, the annulment of the arbitral award owing to the negotiation of fees resulted in the arbitrators being paid higher fees than the fees fixed by the CCJA. Second, this caused controversy as the arbitrators responded to the annulment decision by taking the unusual step of publishing an open letter to the arbitration community, heavily criticizing the CCJA's decision. They considered that the CCJA rules were rigid in terms of fees. Consequently, the CCJA proceeded with a revision of its rules and provided that any fee arrangement without prior approval of the CCJA is null and void, though it shall not be considered as ground to set aside an arbitral award.[282]

This raised concerns as to whether the CCJA will be able to attract in the future. There is no doubt that OHADA demonstrates huge potential for the growth of investment arbitration in Africa, nonetheless, this decision attracted attention to the extent that the CCJA's attractiveness has been impacted. has raised additional concerns regarding the ability of

[277] Gatsi, J 'Case law, source of OHADA law' (2012) RIDC p.37
[278] *CCJA, RÉPUBLIQUE DE GUINÉE C/ GETMA INTERNATIONAL* [2015] 139
[279] Kwadwo, S. Otoo, J. 'Getma v Republic of Guinea- Implications for African arbitration' (2017) 33(1) AI
[280] Ibid.
[281] CCJA, *RÉPUBLIQUE DE GUINÉE C/ GETMA INTERNATIONAL* [2015] 139
[282] Ibid.

the Common Court of Justice and Arbitration (CCJA) to attract highly qualified arbitrators. This concern stems from the discrepancy in average fees between the CCJA and other international arbitration institutions, such as the ICC, where fees tend to be higher. Consequently, there is a need for the CCJA to reassess the fees offered to arbitrators in order to incentivize the participation of experienced and qualified practitioners, particularly from the African continent. By addressing this issue, the CCJA can enhance its appeal and credibility as a forum for arbitration, fostering the development of a robust and diverse pool of African arbitrators. The case also refers to the treatment of annulled awards by US courts. Indeed, the claimant sought enforcement of the arbitral award before a US court. The Court confirmed that the fee arrangement was in breach of the CCJA Rules, recognized the annulment decision, and held that it would not uphold and enforce the arbitral award. The US Court relied on the Federal Arbitration Act provisions to adjudicate which provides that a court:

"…*shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention*"[283]

One of the grounds for refusal of enforcement of an award is that such award has been set aside or suspended by a competent authority of the country in which, or under the laws of which that award was made. Thus, the US court rightfully denied enforcement of the annulled arbitral awards.

These decisions led to the idea that the “Getma saga” might have cast doubts on the reliability of the CCJA and OHADA arbitration as a whole. Participants from the online survey and the semi-structured interviews were to address the question.

The survey did not provide concrete answers as 50% responded in the affirmative while 50% of the respondents considered that the Getma saga did not affect the CCJA’s arbitral activity. In contrast, the interviews provided more data to discuss the issue. For most participants, the CCJA’s arbitral activity has significantly improved over the years and the Getma saga had a limited impact on the CCJA's credibility. One participant stated in this regard:

“The Getma saga is an isolated case that arose in 27 years of existence of the OHADA. The reasons behind the CCJA’s law arbitral activity are numerous. The first issue concerns the decentralization of the CCJA within the OHADA territories. The CCJA is located in

[283] See s. 7 of the Federal Arbitration Act

Abidjan, Côte d'Ivoire. Consequently, after the exhaustion of all available remedies, the parties must travel to Abidjan to seize the CCJA. There is the option of seizure electronically, however, the implementation is not very effective. It would then be wise to think of the decentralisation of the CCJA." The participant pointed out a relevant aspect which is the centralization of the institutions. This may explain the CCJA's low results over the years. It will be interesting that the OHADA leaders to proceed with the decentralisation of the institutions so as to streamline the proceedings within the region. This would increase the CCJA's performance in terms of proceedings.

Another participant raised two issues: the impact of the African culture in the resolution of disputes and the procedural costs which may affect the CCJA's arbitral activity performance:

"It is rare to seize the judge owing to the fact that it is common to resolve a dispute by mutual agreement. Also, in some cases, the lack of financial resources may deter parties to resort to arbitration."

One interview, member of the CCJA and former president of the Abidjan Bar confirms that the statistics confirming the CCJA's low arbitral activity are not updated as the tendency has made considerable progress which appears extremely significant:

"From the 1st to the 30th of October, the settlement rate is 86%. In the beginning, the CCJA was criticized owing to the sluggishness of the proceedings. As a matter of fact, there were only seven judges at the Supreme Court, which increased to 14. There is also the fact that the uniform acts were not correctly implemented by the domestic courts, consequently, two-thirds of the cases were not conclusive. Several factors resulted in a low rate in the CCJA's arbitral activity including the small number of judges, nonetheless, there is noticeable progress as up to 90% of the cases are ongoing, added to the fact that there were 300 appeals brought before the Court in 2019."

The issue is that it is quite difficult to get accurate statistics. The low rate is part of the symptomatic issues in Africa as some participants state that there is a lack of qualified judges and structures. In addition, the reluctance vis-à-vis African lawyers result in parties relying on foreign lawyers and experts. This is owed to the predominance of French experts in the drafting of OHADA uniform acts and the CCJA list of arbitrators. This gives fewer opportunities for African experts and lawyers to be involved in the proceedings and renowned. To this view, it is hoped that the OHADA institutions promote the local

arbitrators and reinforce the training of the legal practitioners. Finally, one participant argued:

“There has been a huge improvement regarding recent decisions and the training of the judges these past three years. The Getma saga has somewhat tarnished the reputation of the CCJA. Nonetheless, those who remain objective and read the texts may acknowledge that this is not the main issue affecting OHADA arbitration’s effectiveness and attractiveness. The number of cases has increased, unfortunately, the affixing of the enforcement formula by the clerk to make the arbitral award enforceable is rarely done. Therefore, delays affect reliability on OHADA arbitration and the CCJA.”

Indeed, the issue related to the affixing of the enforcement formula may significantly impact the CCJA’s arbitral activity in the sense that the enforcement formula following the grant of exequatur by the Court shall automatically trigger enforcement in the territories where enforcement is sought. Delays to provide such documents may be a huge obstacle to OHADA arbitration’s attractiveness. This issue is discussed in depth in Chapter V.

### *The Uniform Act on Arbitration (UAA)*

OHADA Arbitration is governed by the Uniform Act on Arbitration (UAA), influenced by the French civil code of procedure and the UNCITRAL Model Law. The UAA governs *ad hoc* arbitrations under the aegis of the CCJA. The Uniform Act on arbitration law pursuant to Art. 10 repeals and replaces the previous and subsequent provisions, both lawful and in breach of the law. It lays down the rules of the arbitral proceedings alongside the CCJA Arbitration rules and case law. The most important feature is that it ensures the arbitral tribunal's powers to adjudicate without any interference from the domestic court.

The Act covers different aspects including the scope of *ratione loci* and *ratione materiae*. Regarding the scope of *ratione loci*, the UAA applies to any arbitral proceeding in which the seat of arbitration is located in one of the Member States.[284] In this regard, Ngwanza argues that the seat of arbitration is the connecting and exclusive element allowing the implementation of the Uniform Act into the arbitration agreement. Nevertheless, it is

[284] See art. 1 of the UAA

submitted that the concept of seat of arbitration is controversial in the sense that it might refer to the geographic location where the arbitral operations are performed or the legal environment agreed upon by the parties for the arbitration. In this regard, art. 14 of the same act complements and provides further specifications to Art. 1, stating that:

“This Uniform Act shall apply to any arbitration when the seat of the arbitral tribunal is located in one of the Member States.”

The UAA is therefore directly applicable in all OHADA Member States and shall serve as the arbitration law governing the arbitrations of the 17 OHADA Member States which shall comply with the provisions.[285]

The scope of *ratione materiae* is enshrined in Art. 2 which provides as follows:

"Any natural or legal person may resort to arbitration with respect to any right that may be freely disposed of. States and other local governments, as well as State-owned entities, may also be parties to arbitration without being able to rely on their national laws to contest the arbitrability of the dispute, their capacity to be parties to the arbitration or the validity of the arbitration agreement."

It is understood any public legal entity may now resort to OHADA arbitration, such as the state and all its public dismemberments. Indeed, the UAA is consistent with the new art. 2061 of the French Civil procedure offers indirectly the possibility to bring non-commercial disputes to arbitration. Thus, it is noted that all sectors falling within the scope of harmonization can be included in business law including labour law. This can be explained by the fact that the OHADA legislators aimed at ensuring consistency and facilitating the investors' access to arbitration. The ability of public entities, be they domestic or international, to consent to arbitration constitutes a small evolution in OHADA arbitration owing to the fact that in international disputes, the UAA is used to limit this possibility to local authorities and public institutions.

Overall, the UAA aims at addressing the existing gaps and most important to regulate the implementation of arbitral awards. It is noted that there are very few criticisms regarding the UAA provisions which appear to comply with the international standards, especially following the reform of 2017. Nonetheless, it is yet to assess whether the provisions will effectively contribute to the OHADA objectives of harmonization.

[285] article 35.1 of the UAA

### *B. External sources of OHADA Arbitration*

12 OHADA Member States out of 17 have implemented the New York Convention provisions.[286] In this context, Okubote[287] highlights the impact and relevance of the NY provisions in the Sub-Saharan Africa region, stating that the various legal systems may have been and still are an obstacle to OHADA's objectives of harmonization of the laws as well as the promotion of arbitration. The reasoning behind this statement is that owing to the different approaches and specificities of the domestic laws constituting the OHADA regime, it might be challenging to effectively implement the NY provisions. Nonetheless, it is noted that the courts through the Convention provisions and with the aim to meet the international standards and best practices tend to progressively adopt a pro-arbitration approach.

The NY Convention and the OHADA Treaty attempt to facilitate the enforceability of international arbitral awards when parties agree to resort to arbitration for the resolution of their disputes within the OHADA area. Nonetheless, it is noted some discrepancies arise mostly when it comes to the interpretation of the public policy exception and the approach of the domestic courts at the enforcement stage. Indeed, the fact that 5 out of the 17 OHADA member states have not ratified the New York Convention made some commentators such as Okubote reach the conclusion that it would be more difficult for the OHADA legislator to harmonize the process of enforcement since the Convention makes no provisions regarding the enforcement proceedings which are left to the discretion of the domestic courts. Consequently, enforcement may be denied to the winning party if the competent jurisdiction where enforcement is sought decides based on its own interpretation of the texts. It is in this context that Okubote supports that the pro-enforcement approach sought through international treaties has still not been adopted by the majority.[288] Thus, it appears that ratifying the Convention may not be sufficient in the sense that a correct implementation of the provisions is of importance for the harmonization of the laws in the area. On this matter, it is of relevance that the domestic jurisdictions effectively implement the provisions. Notwithstanding the fact that the

[286] 12 OHADA member states are signatories to the New York Convention leaving the States to decide the best way to implement it into domestic laws: Benin, Burkina Faso, Central African Republic, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Guinea, Mali, Niger and Senegal.
[287] See also Okubote, A *"60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: Are we there yet in SubSaharan Africa?"* accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289444 (last accessed on the 15/11/2021)
[288] See also Okubote, A *"60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: Are we there yet in SubSaharan Africa?"* accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289444 (last accessed on the 15/11/2021)

domestic courts may wrongfully apply the provisions, it is submitted that the inconsistent interpretation of the NY provisions relies mostly on the judicial interpretation of the concept of public policy given the fact that the convention has not provided a clear definition of the concept, leaving it to the exclusive jurisdiction of the domestic courts. This flexibility creates undue delays in the enforcement proceedings likely to undermine the pro-enforcement purpose sought by the Contracting States. According to Buchanan, "public policy agrees or coerces, allows or prohibits when statutes are silent".[289] this implies that the enforceability of arbitral awards relies on the effectiveness of the domestic courts to adjudicate appropriately with regard to the text and context. In this regard, issues arise.

First, it should be noted that although the room left to the States in the NY Convention provisions concerns all contracting States, in an African context where legal and judicial insecurities, this lack of clarity from the provisions entails more issues to address.

Second, it is submitted that art. I(3) of the NY Convention allows the Contracting States to restrict the applicability of the Convention through reciprocity or commercial reservations enshrined in the Convention.[290] This implies that the arbitral awards granted to a State which has ratified the NY Contracting on the basis of reciprocity would not be enforced in a non-Contracting State. This provision may present a challenge for the OHADA legislator in the sense that 5 out of 12 OHADA Member States have not ratified the Convention. Thus, issues may arise during the enforcement proceedings. This can be explained by the fact that implementation of such reservations might undermine the achievement of OHADA objectives of harmonization in the sense that foreign investors are seeking assurance that the States have arbitration-friendly legislation and that the domestic courts adopt a pro-enforcement approach.

On the flip side, the flexibility granted to the domestic courts also appears to be a reasonable approach in accordance with the sovereignty of a state. To this issue, participants from the semi-structured interviews addressed this issue.

Most of the participants indicated that the State Signatories operate under different legal systems. Thus, leaving the implementing rules of the Convention to the discretion of the States seems reasonable in view of the divergence of laws and principles. One participant added:

[289] Buchanan M, 'Public policy and international commercial arbitration' (1988) ABLJ 26 p.87
[290] See Art I(3) of the New York Convention

“More clarity is always sought by the texts and the judges, nonetheless justice remains an area of State sovereignty. In this context, transferring this authority and enshrining a uniform concept of public policy would be detrimental to the good conduct of arbitration.”

Another participant suggested a solution to address the issue:

“The legislator may assess the spirit of the NY Convention provisions and identify the key features of the provisions. This is in a view to adapt such features to OHADA law, improve it, and if needed make it compulsory.”

It is understood through these suggestions that while it is true that ratification of the provision by the whole member states would have streamlined the enforcement proceedings, a common core should still be found. In the meantime, it is submitted that the NY Convention is not the unique convention or agreement based on which an exequatur can be granted, regarding arbitral awards rendered outside the OHADA zone.[291]

To conclude, it is submitted that recognition and enforcement of an arbitral award is a complex process. Under OHADA law, the availability of viable and active arbitration institutions within the relevant states and awareness of arbitration is still unsatisfying since few published articles and cases law are available. Most important, few international arbitration references have their seats in Sub-Saharan Africa owing to the stereotype that African arbitrators and institutions are less experienced, impacting the arbitration practice in Africa as well as its attractiveness. The UAA appears to meet international standards by replicating the basic principles of international arbitration including the agreement to arbitrate, the principle of fairness, and the adversarial principle among others. This procedure pursuant to art. 13(1) prevails over any other proceeding and consequently, the domestic court shall decline jurisdiction except when it comes to issuing provisional measures for instance. Nonetheless, it is yet to review and analyse the concrete application and effectiveness of the enforceability of the CCJA rules as well as the Uniform Act on Arbitration, in OHADA arbitration practice. Although case law and doctrine remain an important issue in the region, it is undeniable that arbitration has extremely contributed to OHADA's objectives of harmonization and attractiveness. This substantiates the common belief that international arbitration is the most preferred mechanism for dispute settlement.

[291] The cooperation agreement France Côte d’Ivoire or the Antananarivo cooperation agreement

The key purpose of arbitration is to obtain a final and binding arbitral award that would be recognized and enforced in the territories where enforcement is sought. It is in this context that the NY provisions with their pro-enforcement approach aim at facilitating the enforcement of foreign arbitral awards. To remedy the inconsistencies regarding the interpretation of the provisions some innovations or reforms might be considered. Regarding the implementation of the NY Convention under OHADA law, it is submitted that the fact that the whole Member States have not ratified the NY Convention shall not be of concern. The rationale is that the NY Convention is not the unique convention based on which an exequatur can be granted to an arbitral award rendered outside the OHADA area. Hence, although it would have been interesting that the whole member states to ratify the Treaty for harmonization purposes, a common core should be found instead. As for now, the OHADA provisions appear to be in compliance with international law. In terms of enforcement of international private law regulations, jurisdiction is to the law of the strongest.

Nonetheless, challenges arise at the enforcement and post-enforcement stage owing to the diverse interpretations of the NY provisions by the Court. This mostly arises in case of challenges of arbitral awards on public policy grounds. The subsequent chapter discusses in depth two limited grounds for the refusal of enforcement of arbitral awards under the NY Convention, namely the arbitrability of disputes and the public policy exception. These grounds are discussed in the subsequent chapter with the aim to examine the issue of enforceability of arbitral awards in line with research questions.

# Chapter IV
# Arbitrability and public policy

## Introduction

Arbitrability determines the point at which the exercise of contractual freedom ends, and the public mission of adjudication begins.[292] The NY Convention states in this regard that enforcement of an arbitral award may be denied in the case where the competent jurisdiction in the State where enforcement is sought finds that:

"*The subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[293]

Through this article, it is understood that the domestic courts reserve the right to limit the areas and disputes that are subject to arbitration, and by ricochet deny enforcement of the arbitral award. To avoid such issues, most legal systems have adopted an arbitration-friendly approach by limiting the scope of non-arbitrable disputes.

This chapter discusses the controversial concepts of arbitrability and public policy as being both the most complex issues limiting the enforceability of arbitral awards. The concept of arbitrability mostly relates to public policy considerations in the sense that each State is sovereign to set out its social or economic policies. Accordingly, some matters would be contrary and consequently could not be settled through arbitration. In this context, arbitrability and public policy appear to be intrinsically linked owing to the fact that arbitrability in international disputes is attached to public policy considerations.[294] According to Brekoulakis, arbitrability should be assessed based on effectiveness. The commentator states that arbitrability shall consider whether the arbitral tribunal can get disposed of the pending dispute in an effective manner.[295] On another note, Mistelis considers that it is up to the arbitral tribunal to exercise its jurisdiction discriminately in

[292] Carbonneau, T.; Janson, F. "*The Law and Practice of Arbitration*", (2nd Ed., Juris Publishing, 2007) p. 65
[293] See art. V(2)(a) of the NY Convention
[294] Blackaby, N., Partrasides C, Redfern A and Hunter M "*Redfern and Hunter on International Arbitration"* (6th ed. OUP 2015) p. 123
[295] Brekoulakis, L.; Mistellis, L. "*On Arbitrability: Persisting Misconceptions and New Areas of Concern, in Arbitrability: International & Comparative Perspective*", (1st ed., Kluwer Law International, 2009), p. 48;

order to ensure that only appropriate matters are dealt with.[296] In this regard, the author further submits that tribunals should only be dealing with disputes specifically referred to them by the parties and exercise self-restraint in the case where certain matters manifestly cannot be settled through arbitration.

This solution might leave room for more flexibility for the arbitral tribunal in the sense that tribunals can ensure a more focused and efficient resolution of disputes, and consequently raise more issues during the arbitration proceedings as indeed, one cannot completely trust the arbitrators' ethics or sense of repartee. This substantiates the relevance of the domestic rules and case law, that is to set out appropriate requirements and provide the appropriate guidelines.

### 4.1 The broad interpretation of arbitrability

The concept of arbitrability varies from one state to another and is attached to public policy matters. In this regard, the arbitration proceedings are restricted to the limitations set by the States' legal systems based on various requirements.

Pursuant to art. V(2)(a) of the NY Convention:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country."

Arbitrability draws a clear distinction between the disputes to be resolved through arbitration and those exclusive to the courts. In this respect, the NY Convention[297] and the Model Law[298] limit these disputes to those capable of settlement by arbitration. For instance, under French law, arbitration capable of settlement excludes specific areas including family law as well as matters with public interests. In this view, the French approach appears restrictive. In contrast, the German approach appears less restrictive as the Civil Code of Procedure only excludes claims involving both an economic and non-economic interest. [299]

[296] Ibid.
[297] Arts II(1) and V(2)
[298] Arts 34(2)(b) and 36(1)
[299] See art. 1030 of the German civil code of procedure

Arbitrability, just as public policy differs from one State to another depending on the political, social, or economic policies. Hence, the States should consider their reservations with regard to the public interests in order to allow users to resolve their disputes by arbitration. Parties shall meticulously consider the relevant laws including the *lex arbitri*, the law of the place of arbitration, and the law of the territory where enforcement is sought.

Arbitrability has not been discussed further by English courts which instead focused on defining and interpreting the scope of application *rationae materiae* of the agreement to arbitrate. Consequently, courts had issues in defining the scope of arbitration especially when it comes to the role and powers of the arbitral tribunal. Nonetheless, the English judiciary in some decisions provided indications regarding the matters that could be settled through arbitration under English law, hence developing the arbitrability issue through a few cases of law. For instance, in *O'Callaghan v Coral Racing Ltd* a dispute related to a gaming transaction, the Court annulled the transaction pursuant to the Gaming Act 1845 provisions on the grounds that the dispute did no longer require the arbitral tribunal to determine the legal rights. The Court considered that the latter had no authority to assess the case. Along the same lines, in *Soleimany v Soleimany*[300] a dispute related to the supposedly illegal practice of a company under English law, the Court's rationale was that the dispute to be capable of settlement through arbitration must be capable of legal resolution. In this regard, the Court of Appeal based on public policy considerations set aside the award which was based on Jewish law, the applicable law. These decisions represent very few cases developed by the English courts on the arbitrability of disputes.

### 4.2. Judicial interpretations of public policy under domestic courts: compatible or contradict?

The complexity of the scope of public policy has divided scholars attempting to provide a common definition to the term and leading to a myriad of interpretations undermining the domestic courts' approach when it comes to enforcing foreign arbitral awards. Hence, this section discusses public policy and the pro-enforcement approach of public policy through various legislations including English law, European laws including French law and OHADA law.

[300] *Soleimany v Soleimany* [1999] QB 785

Domestic courts' interpretations differ when it comes to the determination of public policy as a domestic or international concept, leading to an inconsistency of the public policy scope likely to jeopardize the efforts of the NY Convention to facilitate recognition and enforcement of arbitral awards. The Swiss Courts for instance consider public policy as a domestic concept,[301] on the grounds that the Swiss lawmakers while drafting the texts rightfully chose the term public policy had necessarily in mind "*the system of values prevailing in the part of the world where the country of which they are entrusted with adopting the laws is located, as well as the founding principles of the civilizations to which this country belongs.*"[302] Moreover, the German Court's rationale when it comes to what the concept of public policy encompasses is as follows: "…apart from violations of basic civil rights, an infringement upon public policy will result from the violation of a rule concerning the fundamental principles of political or economic life. Public policy will also be infringed upon when the arbitral award is irreconcilable with German concepts of justice."[303] This reference to the concept of justice has also been adopted by the Swiss Courts.[304]

It is submitted that domestic courts are able to assess an arbitral award's compliance with internal and international public policy for enforcement of arbitral awards. It was held by the English court in *D.S.T. v. Rakoil*[305] that the arbitral award violated or endangered the interest of the state's citizens, thus is considered as a bar to enforcing the arbitral award, adding the term "clearly injurious to the public good".[306] Whilst the French Courts have taken a restrictive approach to review the conformity of an international award with international public policy, upholding in *SNF SAS v Cytec Industries BV*[307] that the violation of public policy shall be "flagrant, actual and concrete". Such a violation can result in the refusal of enforcement of an international award on French territory. This stringent standard ensures that only clear and significant violations of public policy will be considered as grounds for refusing enforcement, providing a measure of certainty and predictability in the enforcement process.

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[301] *S.p.A. [X] v. S.r.l. [Y]* [2006] 132 III 389, accessible at http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf (Last accessed 01/11/2021)
[302] Ibid.
[303] Court of Appeal of Hamburg, January 26, 1989, Yearbook Commercial Arbitration 1992, 491
[304] Federal Tribunal, Switzerland, (2011) Decision 5A_427/2011
[305] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*, [1986 D No. 2196] [1987 R No. 273]
[306] Ibid.
[307] *SNF SAS v. Cytec Industries B.V., Court of Appeal of Paris, 23 March 2006, XXXII Y.B. COM. ARB. 282* (2008)

Arbitral awards that contravene public policy vary from jurisdiction to jurisdiction, therefore an arbitral award can be contrary to the public policy of the state of the arbitral seat and non-contrary to the public policy of the state where enforcement is sought. For instance, the arbitration provisions of Saudi Arabia provide that in order for an arbitral award to be set aside, it must violate "the provisions of Sharia and public policy" while under Polish arbitration law,[308] to set aside an arbitral award shall be contrary to the fundamental principles of the legal order of the Republic of Poland', including a situation amounting, in essence, to "the erroneous interpretation by an arbitral tribunal of a contract", albeit the consequence of that misinterpretation was a violation of a party's property rights.[309] The courts, aware of the need to provide a narrow interpretation of public policy grounds demonstrate that they prefer to extensively review the arbitral award on a case-by-case basis.[310]

### 4.2.1. The English Courts' approach

English courts are usually reluctant to apply the public policy exception, to the extent that commentators stated that it did not exist a case in which public policy has been applied by the English courts.[311] Nonetheless, in the leading decision *Soleimany v. Soleimany*,[312] public policy applied. In this case involving the smuggling of carpets out of Iran through a contract between a father and his son, the English court raised the illegality of the contract and in order to preserve the integrity of arbitration proceedings refused to enforce the arbitral award in these terms:

"*The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it."*

The English courts have consistently emphasized that the public policy exception should be applied in a narrow and limited manner. They recognize that the public policy exception should only be invoked in cases where the enforcement of an award would be contrary to

[308] See Art. 1206 of the CPP
[309] Koepp, J.; Ason, A. 'An anti-enforcement bias? The application of the substantive public policy exception in Polish annulment proceedings' (2018) 35(2) JIA p. 169
[310] Ibid.
[311] See Kerr, M. 'Concord and conflict in international arbitration' (1997) 13 AI 121 p.83
[312] [1999] QB 785

the most fundamental principles of justice and morality. Mere errors of law or fact, or dissatisfaction with the outcome of the arbitration, are not considered sufficient grounds for invoking the public policy exception. Nonetheless, in a pro-enforcement arbitration approach, the English court denied a challenge to enforce arbitral awards based on public policy considerations, on the ground that the allegations had not been substantiated. The Court added that a balance shall be made between "public policy of discouraging international commercial corruption and public policy of sustaining arbitral awards."[313]

Furthermore, it is submitted that the English courts adopt a balanced approach towards the public policy exception which according to the English judiciary cannot be universally defined owing to its subjective nature. This has been well-illustrated in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd*.[314] In this case, the English Court held that public policy can never be given an exhaustive and universal definition, however:

"*The public policy defence covers cases in which it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.*"[315]

In this case, the court held that public policy cannot be exhaustively and universally defined. Instead, the public policy defense encompasses situations where it can be demonstrated that there is an element of illegality or that the enforcement of the award would clearly be injurious to the public good. Alternatively, it may be established that the enforcement of the award would be wholly offensive to an ordinarily reasonable and fully informed member of the public, on whose behalf the powers of the state are exercised. This nuanced approach taken by the English courts reflects their commitment to respecting the finality and integrity of arbitral awards, while also acknowledging the need to safeguard public policy concerns. By adopting a flexible and case-by-case analysis, the English courts ensure that the public policy exception is not applied in an overly broad or arbitrary manner, but rather in a manner that strikes a fair balance between competing interests.

[313] *Westacre investments Inc. v. Jugoimport-SPDR Holding Co. Ltd* [1999] 2 Lloyd's Rep 65
[314] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*, ICC Case No. 3572
[315] *Ibid.*

### 4.2.2. The French Courts' approach

French courts have for long adopted a restrictive approach regarding the setting aside of arbitral awards on an EU competition law basis, stating that the breach of French public policy shall be "flagrant, specific and concrete".[316] Indeed, since the reform of 2011, there is no major evolution of jurisprudence when it comes to public policy, as the Supreme Court has, as of today, still not progressed on this matter. Moreover, it appears that the French legal system went from trust to mistrust regarding the domestic courts, but also assist in defiance from the Paris Court of Appeal towards the arbitrators. Questions remain as to whether it is owed to the doctrine asking for more control or it is a natural evolution deriving from changes in the personalities of the judges, formation, or different visions of arbitration.

What has not changed after the reform is the rationale behind the arbitral award. In considering public policy in relation to an arbitral award, the focus is primarily on the practical outcome of the dispute rather than the arbitrator's reasoning. The emphasis is placed on examining the solution provided by the award and its conformity with public policy considerations.On the contrary, since 2011, the Paris Court of Appeal has amended the scope of its control. In the *Thales* case,[317] the French court held that in order to annul or refuse the exequatur, the violation of public policy shall be "*flagrant, effective and concrete*"[318], a decision demonstrating a case law more restricted over the years, which was strengthened in *Grands Moulins de Strasbourg* in 1991 that the judge mentioned the terms the effective and concrete violation of public policy.[319]

The landmark ruling in the *Thales* case was the first in which the French judges considered the challenge of an international arbitration award on the grounds that a breach of EC competition law rendered it unenforceable on public policy grounds. The French Court of Appeal held that "…*while EC competition law did form part of French international public policy, a violation must be flagrant, effective and concrete in order to justify setting aside an arbitral award*.[320]

Thus, the Court of Cassation held that there was no such violation. Nonetheless, critics have argued that the requirement of a "flagrant" breach of international public policy on the

[316] *Thales Air defence BV v. GIE Euromissile* (2004)
[317] *SA Thales Air Defence v. GIE Euromissile and SA EADS France* (1er Ch., sect. C, 18 November 2004)
[318] Ibid.
[319] Case N°89-22.042 [1991]
[320] Ibid.

face of the award has led to a formalistic standard of review, which amounts to no real review at all.[321]

The decision in *Thales* was reaffirmed in *SNF v. Cytec*,[322] a case involving the challenge of the enforcement of an arbitral award on the grounds that the award was contrary to international public policy due to a breach of EC competition law. The dispute went first to the Paris Court of Appeal comprising the same three judges as in *Thales*. In this case and for the first time, the French Court of Cassation confirmed the strong pro-arbitration policy of French courts as there were very few decisions on the arbitrability of competition law matters and the enforcement of arbitral awards on this matter. Thus, case law was mostly based on decisions of the Paris Court of Appeal. The French Court of Appeal in *Sté SNF v. Sté Cytec Industries BV*[323] ruled that on an application to annul an award on public policy grounds, stating that the Court's review "…could only be extrinsic since only the recognition or the enforcement [of the award] is examined with respect to compatibility with international public policy…"

The Court of Appeal thus confirmed the pro-arbitration policy in this case involving an alleged breach of EC Competition Law that was already established in its previous decisions. Subsequently, the Court of Cassation held that:

"Concerning the violation of international public policy, only the recognition or the enforcement of the arbitral award has to be examined by the judge [hearing the application to set the award aside] with respect to its compatibility with public policy, with control being limited to the flagrant, effective and concrete character of the alleged violation."

The Supreme Court concluded by approving the recognition and enforcement of the arbitral awards as it has exercised its control "within the limits of its power of control, that is without an examination of the substance of the arbitral award".[324] This decision confirmed the strict approach of the Court in the review of arbitral awards for setting aside arbitral awards or challenging proceedings, although this decision seems more favourable to the enforcement of arbitral awards than *the Eco Swiss* decision[325] of the European Court of Justice (ECJ) in which the ECJ allowed for limited review. It was held that the domestic

[321] Peterson, P. 'The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?', See Kluwer Arbitration Blog, (2014) http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruptionis-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/ (Last accessed 30 August 2022)
[322] Case No. 04/19673 [2008]
[323] CA Paris, 1er Ch. civ., 4 June 2008
[324] *Case No. 06-15320, First Civil Chamber* [2008]
[325] *Eco Swiss China Time Ltd. V. Benetton International NV*, case C-126/97 [1999], ECR I-3055

court shall annul an arbitral award contrary to EC competition law where domestic rules require it to grant an annulment on the basis of a breach of public policy. It is interestingly noticed that the "interrelation of arbitration and competition law" best demonstrated "antitrust claims arbitrable",[326] which was affirmed in *Mitsubishi Motor v Soler Chrysler-Plymouth.*[327]

This landmark case has raised concern to determine whether an American court should enforce an agreement to arbitrate antitrust claims when that agreement arises from an international transaction. Undoubtedly the US antitrust laws aim at promoting national interest by outlawing anti-competitive practices. The principle underlying the antitrust policy is that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution."[328]

The US Supreme Court held in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*[329] that private antitrust claims are arbitrable in a transaction arising in international commerce, adding that if an international contract contains a broad arbitration agreement, policy favouring arbitration overrides the domestic public policy against arbitration of antitrust claims.

The Court of Cassation through these decisions confirmed the French courts' "longstanding policy not to review the merits of an arbitrator's decision".[330] This rationale has also been confirmed in the two decisions in the Schneider cases in 2009 and 2014[331] which derived from earlier decisions based on corruption allegations. Previous decisions allowed a review of the law and the facts as long they related to the application of the relevant rule of public policy.[332]

Thus, the standard of review by French courts of arbitral awards rendered in international arbitration proceedings on grounds of violation of international public policy has long been

[326] Quote, E.; Liu, M., 'Third party arbitration in the UK: critically assessing the applicable rules of the joinder of two different proceedings under the Brussels Recast Regulation (EU1215/2012)' (2021) 42(6) ECLR, p. 303
[327] *Mistsubishi Motor v Soler Chrysler-Plymouth* 473 U. S. 614 (1985)
[328] *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).*
[329] See *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.* 473 U.S. 614 (1985)
[330] Citation of Judge Hascher, who was part of the formation of the Paris Court of Appeal which ruled over the *Thalès v. Euromissile and SNF v. Cytec* cases
[331] *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Limited* [2009]; 1st Civil Chamber [2014]
[332] *Sté European Gas Turbines SA v. Sté Westman International Ltd,* Paris CA, 1st Civil Chamber, [1993]

considered a minimalist approach, justified by principles such as the finality of arbitration awards and the prohibition of the revision of awards on their merits by the courts.

In 2014, the Supreme Court rejected the review on points of law and facts of the arbitrator's decision, however, in the same year the Court of Appeal reconsidered this solution in *Gulf Leaders v CFF*,[333] and reaffirmed its solution in *MK Group v Onyx*,[334] *Alstom Transports v. Alexander Brothers*[335] et *Sorelec v Lybia*[336] that corruption is a violation of 'international public policy'. In *Gulf Leaders v CFF*, the Court held that:

"Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge to set aside proceedings, seized of an application based upon article 1520-5 of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an actual or concrete manner."[337]

Thus, it was after conducting its own review of the facts and applying the relevant principle of law that the Court of Cassation dismissed the application. The French courts have long held that corruption is an "obvious, effective and concrete" violation of international public policy.[338] Hence, an arbitral award enforcing a corrupt scheme will not be recognised in France or could be set aside by the courts.

More recently, in *Webcorp v. Gabon*[339] case, the Paris Court of Appeals set aside an arbitral award that had granted the Maltese construction company Webcor ITP (Webcor) and its Gabonese subsidiary Grand Marché de Libreville (GML) more than 100m$ in damages on the ground of the violation of international public policy as it held, based on the evidence discovered only after the award has been rendered, that the underlying contracts were obtained through corruption. The court found that while negotiating the contracts, Jean-François Ntoutoume Emane, former mayor of Libreville was offered a luxurious honeymoon by the construction companies, which together with the accompanying circumstances led it to consider that there were "serious, precise and

[333] *Sté Gulf Leaders for Management and Services Holding Company ("Gulf Leaders") v. SA Crédit Foncier de France* N. 12/17681 [2014]
[334] *Case n° 15/21703, 1st Civil Chamber,* CA Paris [2018]
[335] *Case n°16/11182 N° Portalis 35L7-V-B7A-BY3JK*, CA Paris, [2019]
[336] *Sorelec v. State of Libya*, ICC Case No. 19329/MCP/DDA [2020]
[337] *Sté Gulf Leaders for Management and Services Holding Company ("Gulf Leaders") v. SA Crédit Foncier de France* N. 12/17681 [2014]
[338] See *Alstom Transports v. Alexander Brothers, Case n°16/11182 CA Paris* [2019]
[339] *Webcor ITP Limited and Grand Marche De Libreville v La Commune De Libreville and La République Gabonaise - ICC Arbitration Case* No 21458/MCP/DDA [2018]

consistent indications".[340] With this decision, the Court confirmed that an award giving effect to corrupt practices cannot be granted recognition and/or enforcement in France as it violates international public order. The court also reminded that a mere violation of a mandatory provision of foreign law cannot *per se* justify setting aside an arbitral award in France.[341]

Through these judgments and analysis from the Paris Court of Appeal with regard to public policy, it is noted that the Court of Appeal operates a thorough review of compliance with the requirements of public policy and seeks *de jure* and *de facto* elements regarding corruption. Then, the court in addition to the evidence presented to the arbitral tribunal, accepts any new evidence from the parties. The Paris Court of Appeal does not consider the observations of the arbitrators throughout the control as in *Libya v. Sorelec,*[342] where the Court held that although the claim or argument was not submitted to the arbitrators, the court may proceed with the control of requirements and compliance with international public policy. The Court found in *Sorelec* that the awards were contrary to the French conception of international public policy owing to a settlement agreement procured through corruption. The ground in *Webcorp v. Gabon*[343] is that the Paris Court of Appeal set aside an ICC arbitral award enforcing a settlement agreement owing to the agreement procured by the corruption of public officials. The decision adopted by the French courts is in line with anti-corruption rules in arbitration. Relying on the international consensus of the definition of corruption enshrined under Article 16 of the 2003 United Nations Convention against Corruption, which it had earlier endorsed in the *Alstom v Alexander Brother*[344] and *Securiport v. Republic of Benin*[345] and the 1997 OECD Convention on Combating Bribery, the Paris Court of Appeal held that:

"The prohibition of bribery of public officials is one of the principles which violation cannot be disregarded by the French legal system, even in an international context. It is, therefore, a matter of international public policy."[346]

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[340] Ibid.
[341] See 'Legal News. France – a honeymoon to remember – award set aside over corruption allegations (Gabon and City of Libreville v Webcor and GML, Home/Arbitration/Arbitration analyses archive/2021' https://www.lexisnexis.co.uk/legal/news/france-a-honeymoon-to-remember-award-set-aside-over-corruption-allegations-gabon-city-of-libreville
[342] *Case No. 18/02568, CA Paris* [2020]
[343] *Webcor ITP Limited and Grand Marche De Libreville v La Commune De Libreville and La République Gabonaise - ICC Arbitration Case* No 21458/MCP/DDA [2018].
[344] *Alstom Transports v. Alexander Brothers, Case n°16/11182 CA Paris* [2019]
[345] *Securiport v. Republic of Benin*, ICC Case No. 22814/DDA
[346] *Sorelec v. Libya*, ICC Case No. 19329/MCP/DDA [2020]

Consistent with its previous rulings, the Paris Court of Appeal confirms in *Libya v. SORELEC*[347] the use of the "red flags"[348] test. According to this method, the courts admitted corruption by relying on circumstantial evidence to determine whether the underlying contract was procured by corruption. Such evidence shall be qualified as "serious, specific and consistent" contrary to the French conception of international public policy. Thus, the vice in question can be reported through the Red flags technique. In other words, the Appeal Court will not verify whether the evidence of corruption is reported, as the evidence does not exist from the perspective of the parties. Therefore, they will only have to invoke accurate and serious evidence related to the corruption allegations, and once all the evidence is gathered *in fine* the Court may set aside the arbitral award, a view contrary to the current view of the Supreme Court but a view which consolidates the construction of the jurisprudence of the Court of Appeal which holds that since an inadmissibility argument cannot have the effect of enabling the recognition of an arbitral award that would violate international public policy, the issue of corruption can be raised at any time. Hence, in this case were considered red flags: the state of civil war Libya was in at the time, the abnormal procedure followed for concluding the contract, the hastiness of the signing and the unusual terms of the contract.

This case illustrates and confirms the provisions of article 1466 of the CCP providing that "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."

Finally, the Paris Court of Appeal also held that it would review an award's compatibility with the international public policy even in cases where the corrupt scheme had not been alleged by the parties before the arbitral tribunal.

Regarding the reform of 2011 and its effort to judicially improve the control of arbitral awards and their compliance with public policy, questions remain as to whether there is real control of the effective and concrete nature of the breach of requirements regarding public policy while the Court adjudicates, or when are presented to the Court required elements with regard to domestic law. Since domestic law requirements are based on public policy elements including the right to oblivion, the inability of the judge to rule on evidence that no longer exists which are not considered by the Court of Appeal during

[347] Ibid.

[348] Red flags are a test to assess circumstantial evidence, inspired by US FCPA practice pursuant to which the party seeking to have the award set aside discharges the burden of proof by relying on "serious, precise and consistent" circumstantial evidence of the corrupt scheme.

review. Most important, as to whether the French judge's position has evolved regarding his view of arbitration, it is submitted that the case law is as of today more restrictive, although the case law evolution of the Paris Court of Appeal appears over the years logical and coherent. In this respect, it is hoped that OHADA law draws on the French courts' approach to provide to reduce the inconsistencies in the CCJA rulings. The rationale is that OHADA provisions mainly derive from French law owing to the colonial influence. Thus, it is expected that future CCJA case law adopts the same approach. OHADA law observes a different approach when it comes to the notion of public policy. It is thus worth discussing the notion of public policy under OHADA law.

### 4.2.3. The African Courts' approach

The OHADA legislator has not explicitly defined the scope of international public policy within the framework of OHADA rules, and to date, there has been limited case law on this matter. Consequently, the determination of the concept of international public policy under OHADA law remains uncertain. Geographical factors play a significant role in shaping the scope of public policy, as it is contingent on the specific jurisdiction involved. However, the CCJA has contributed to providing some elucidation on the concept of international public policy under OHADA law through its decisions applying both the Uniform Act on Arbitration (UAA) and the CCJA Arbitration rules. These decisions offer valuable insights into the understanding and interpretation of international public policy within the OHADA regime.

First, the decision in *Republique du Benin v Societe générale de surveillance*[349] marks an important development in the understanding of international public policy within the OHADA framework. The CCJA recognized the res judicata principle as an integral part of international public policy, highlighting its fundamental role in ensuring judicial security and upholding the finality of arbitration awards. The res judicata principle, which essentially means that a matter that has been adjudicated and conclusively determined by a competent court cannot be relitigated, is a cornerstone of the legal system and promotes legal certainty. By including it within the realm of international public policy, the CCJA affirmed the principle's significance not only at the domestic level but also in the context of international arbitration. This recognition aligns with the provisions of Article 26(e) of the UAA, which specifically references international public policy as a ground for annulment of an arbitral award. The inclusion of res judicata as an aspect of international public policy

[349] N° 068/2020.

underlines its importance as a universally recognized principle that should be upheld and respected by arbitral tribunals.

By affirming the res judicata principle as part of international public policy, the CCJA contributes to the promotion of judicial security and the finality of arbitration awards within the OHADA region. It strengthens the enforceability of arbitral decisions and reinforces the legitimacy and effectiveness of the arbitration process. Furthermore, this decision serves as a valuable precedent for future cases involving international public policy issues in OHADA arbitration, providing guidance for parties and arbitrators in understanding the scope and application of this concept.

*Enforcement of the Res Judicata principle under the UAA and the CCJA Arbitration rules*

*Res judicata* is a fundamental doctrine illustrating the finality of a dispute which has already been determined by a court. This principle ensures judicial security and the principle of justice by preventing a party from re-litigating any claim, defence, or issue which has already been litigated. In this context, the CCJA in *Republique du Benin v Societe générale de surveillance*[350] made a significant determination that the principle of res judicata forms part of international public policy. While it is widely accepted, though not universally, that a violation of res judicata is contrary to public policy, the CCJA's recognition of this principle reinforces its importance in the context of international arbitration. The principle of res judicata prohibits an arbitral tribunal from issuing a decision in a case involving the same parties and subject matter when a competent court has already rendered a ruling, provided that there was no jurisdictional challenge. The CCJA emphasized that the violation of res judicata, which undermines the finality and certainty of judicial decisions, should be considered a breach of international public policy and subject to annulment. In the specific case at hand, the CCJA declared that the partial arbitral award, which affirmed the competence of the arbitral tribunal to rule again on a request related to the validity of a contract, was contrary to international public policy. This decision was based on the finding that the contract in question had already been annulled by a state court, and thus the arbitral tribunal lacked jurisdiction to revisit the matter.

The CCJA's ruling in Republique du Benin v Societe générale de surveillance underscores the importance of upholding the principle of res judicata in maintaining the integrity and

[350] *Republic of Benin v. SGS Société Générale de Surveillance SA*, Judgment n° 068/2020

effectiveness of international arbitration. By considering a violation of res judicata as contrary to international public policy, the CCJA provides a strong deterrent against relitigating matters that have already been conclusively determined by a competent court. This decision contributes to the promotion of judicial certainty and the finality of arbitral awards within the OHADA jurisdiction.[351]

Furthermore, due to the dual function of arbitration centre and jurisdiction conferred by the OHADA legislator to the CCJA enshrined under the CCJA Arbitration Rules[352] including the authority to make the arbitral awards rendered under its auspices[353] enforceable,[354] CCJA cases benefit from the *res judicata* and are enforceable within the whole OHADA area grouping the 17 Member States. It is thus submitted that any decision from the CCJA cannot be challenged before any other court in any of the seventeen Member States.[355] In the event the decision has been challenged, the judgment rendered by a Court of Appeal nevertheless remains a final decision to implement the *res judicata* rule as long as it (arbitral award) is not annulled. In case a challenge is dismissed, the arbitral award becomes irrevocable. The violation of the principle of *res judicata* is also considered a violation of international public policy which is enshrined in Articles 29(2) and 30 (5) of the CCJA Arbitration Rules. Hence, it was held in *Planor Afrique v Atlantique Telecom*[356] that the arbitral tribunal making a ruling regarding the same case and the same parties violates international public policy, thus the arbitral award must be annulled.[357]

The authority of the arbitral tribunal to hear disputes arises from the exercise by a State of its prerogatives. This is because a public authority must be limited when it comes to the question of redress owed to a legal person resulting from damage due to the exercise of those prerogatives, as far as that State may resort to arbitration in respect of its rights, and without having to judge the validity of the acts taken by the State in exercising its prerogatives authority. In this context, in *État du Benin v. société commune de participation*,[358] the Court instead of limiting the arbitral award to pecuniary penalties rightfully held that the decree had no effect on the agreement of the parties, thus the said

[351] Ibid.
[352] See art. 1.2 of the CCJA Arbitration rules
[353] See Article 30.1 of the CCJA arbitration rules
[354] See Article 30.2 of the CCJA arbitration rules;
[355] See also order N°003/2009/CCJA 22/01/2009; *ECOBANK BURKINA SA C/ JOSSIRA INDUSTRIE SA, JURIDATA* N° J003-01/2009
[356] *Planor Afrique v Atlantique Telecom*, N. 03/2011
[357] ibid.
[358] *Etat du Bénin v. Société Commune de Participation,* N° 104/2015

agreement shall not be suspended on the ground that the decree has violated international public policy and must be annulled.

The concept of international public policy remains very unclear in the sense that the legislator remains silent on the matter, leaving the discretion of determination to the courts. When it comes to the CCJA, the court observes a strict approach on this provision, as illustrated in *Pyramidon v. Agence d'exécution des Travaux d'Infrastructure du Mali.*[359] In this case, the Court held that challenging an arbitral award on the grounds that the arbitral tribunal had disturbed the public order throughout the arbitration proceedings was inadmissible. It emerges from this ruling that the admissibility of an action for annulment lies within the court's exclusive jurisdiction in assessing the dispute. The court in this regard assesses the facts of the disputes and the geographical context.

In *Société Nestle Cameroon v. Groupe Abbassi*,[360] an arbitral award has been wrongfully criticized on the ground that it had violated international public policy by making a unilateral interpretation of the order of referral ruling out the law of the parties, thereby failing to comply with their will pursuant to art. 21 of the OHADA Treaty.[361] The arbitral tribunal after assessing the case decided that:

"*Since the minutes of the case management conference is a consensual document requiring the signature of the Parties alongside those of the members of the arbitral tribunal under Art. 15.2 of the CCJA Arbitration Rules, it is ineffective for the petitioner to maintain that the wording found cannot be considered to expressly modify Art. 20.1 of the contract, due to the fact that the arbitral tribunal did not question the Parties on their intentions*.[362]

The tribunal also considered that:

"*the autonomy of the parties, a pivotal principle in international arbitration in particular with regard to the determination by the parties of the law applicable to the merits of the dispute; commands to give full effect to the choice of the Parties freely expressed in the minutes of the case management conference specifying unequivocally the rules the parties wish to see applied to the resolution of their dispute to deduce that will be applied the Uniform Acts*

[359] N. 098/2014
[360] Case N° 081/2019
[361] Art.21. Pursuant to an arbitration clause or submission agreement, any party to a contract may submit a contractual dispute to arbitration as provided for in this part, where one of the parties is domiciled or has his usual place of residence in the territory of a State Party, or where the contract is performed or will be performed wholly or partly in the territory of one or more States Parties. The Common Court of Justice and Arbitration shall not itself settle such a dispute. It shall appoint or confirm arbitrators who shall keep the court informed of the progress of the proceedings and submit the draft award to the court for its approval in conformity with article 24 below.
[362] *Société Nestle Cameroon v. Groupe Abbassi*, Case N° 081/2019

*applicable within the OHADA State Parties and French law residually, according to the first item of their agreement in the minutes of the case management conference.*[363]

Hence, the Court held that there was no breach in international public policy and the petition for annulment lacked merits.[364]

These decisions demonstrate an inconsistent interpretation regarding the arbitrability of the competition law claims and public policy. They also demonstrate that their implementation on domestic arbitral awards remains at the exclusive discretion of the Courts.

Public policy varies from one state to another, therefore an arbitral award can be contrary to the public policy of the state of the arbitral seat and non-contrary to the public policy of the state where enforcement is sought. In view of the inconsistencies regarding the interpretation of the concept of public policy in the OHADA region, the participants were asked their views on the inconsistent approach of the CCJA case law as well as the silence of the legislator.

Most participants do not find relevant to establish a proper definition of public policy under OHADA law and stated that it is to the court to provide substance to the concept rather than the legislator. The rationale is that it would be challenging for the legislator to provide a definition that is likely to change over the years owing to the moral standards, customs and standards of justice. Another participant added:

“This would constitute a dilution of the authoritarianism of the legislator. The courts are able to provide further clarification to the concept of international public policy by considering factual evidence regarding each case.”

It is understood through these responses that the legislator cannot provide all answers but may at least provide some hints and the CCJA should trace the path of what could be considered as falling within the public policy concept.

Those in favour of a clear definition stated that the legislator may provide a definition of international public policy provided that such a definition is clearly delineated or explained so that it is easier to understand the thought of the legislator. Furthermore, it was stated that this lack of definition could lead to dilatory practices which could be prevented with a clear definition and legislated concept.

[363] Ibid.
[364] Case N° 081/2019

Nevertheless, it is advisable to exercise prudence in assigning the definition of the concept to the discretion of individual states, thereby allowing for the gradual evolution and refinement of the said concept over time. In *Telecel Faso,*[365] the CCJA considered that the conflict between a court and an arbitral decision shall be assessed with regard to the res judicata principle. Thus, the Court of Appeal confirms that *res judicata* constitutes a principle of public policy. This demonstrates an effort from the Court to provide further guidance with regard to this complex notion which, in some cases, may influence the Court's ruling to set aside arbitral awards.

### 4.3 Grounds for setting aside and refusing the enforcement of arbitral awards: towards a standardised setting?

Setting aside an arbitral award represents an action from the losing party to an arbitration to challenge the validity of an arbitral award in order to get it set aside, annulled.

The interpretation of international public policy by the CCJA in its initial case *Société Nationale pour la Promotion Agricole dite SONAPRA c/ Société des Huileries du Bénin dite SHB*,[366] has generated controversy. Specifically, it was determined that as the applicable law governing the dispute between two Beninese companies pertaining to domestic trade was the Beninese law, the matter fell within the scope of domestic arbitration. Consequently, violation of international public policy was wrongly invoked to set aside the arbitral award. This reasoning was criticized as it bypasses the OHADA legal system which prevails over domestic systems for the implementation of OHADA law[367] under which international public law is the common ground of mandatory rules of OHADA Member states.[368] The implementation of the UAA to a setting aside procedure supersedes the recourse to mandatory domestic rules non-recognised by the other states, as the contrary would lead to legal insecurity in view of the differences between the legal systems. Hence, In response to the controversy, the CCJA adjusted its position in the subsequent case of SONAPRA. The Court clarified that a violation of public policy should be understood as related to international public policy, highlighting the need for claimants to demonstrate in what manner the arbitral award is contrary to international public policy.

[365] *ATLANTIQUE TELECOM S.A. c/ PLANOR AFRIQUE S.A ; TELECEL FASO S.A. [2010]*
[366] *Société Nationale pour la Promotion Agricole dite SONAPRA c/ Société des Huileries du Bénin dite SHB* n° 045/2008
[367] Issa-Sayegh, J. 'L'ordre juridique OHADA' Ohadata D-04-02
[368] Douajni, G. 'La notion d'ordre public international dans l'arbitrage OHADA' (2005) 29 RCA p. 56; Ehongo, B. 'L'ordre public international des Etats parties à l'OHADA' (2006) 34 RCA p. 27

This adjustment serves as an illustration that only a violation of international public policy holds the authority to invalidate an arbitral award, emphasizing the importance of aligning with the international standards and principles recognized within the OHADA legal framework. The controversy surrounding the interpretation of international public policy by the CCJA highlights the ongoing process of refining and clarifying the application of this concept within the OHADA arbitration system. It underscores the significance of ensuring coherence and consistency in the interpretation and implementation of international public policy in order to maintain legal certainty and promote the effectiveness of arbitral awards within the OHADA jurisdiction.

Moreover, any arbitral awards rendered in the territory of one OHADA Member State is subject to exequatur before the competent judge of the State who may deny the request in the case where the arbitral award goes against international public policy pursuant to art. 31.4 of the UAA which provides that:

"*The recognition and the exequatur shall be denied when the award is manifestly contrary to international public policy.*"

Alternatively, the parties may resort to the CCJA which shall adjudicate within six months and check the compliance of the awards with international public policies.[369] Concerns arise regarding the time issue of arbitral enforcement and public policy: it appears that the enforceability process would require more time for the judges to verify the conformity with international public policies since the revised UAA makes no provision for the time limit to apply for the enforcement order on the award following exequatur. This is mostly due to the inconsistency and lack of clarity from the legislator in defining what constitutes international public policy, which has eventually divided scholars in this approach. Nonetheless, it should be noted that international public policy may constitute a transposition of domestic public policies in an international context within the OHADA regime.[370]

## Conclusion

Parties choose arbitration for various reasons: arbitration offers a solution of confidentiality and discretion required for business confidentiality; quick especially in international

[369] Art. 31 of the CCJA Rules
[370] *Societe Nationale pour la Promotion Agricole v. Societe des Huileries du Benin*, CCJA N. 04/2011

arbitration as there are fewer legal remedies. Therefore, the award is swifter; the competence of the arbitrators although extending the criteria regarding the disclosure obligation and evaluation of the independence of the arbitrators. Regarding French law, the reform is a good step toward making French arbitration law more accessible although we may still notice some inconsistencies as some aspects of the reform have not been implemented remaining incomplete and suggesting that the reform does not prepare or consider the development of case law for future judgments in French arbitration law. Nonetheless, the reform has not only clarified and codified significant principles that already existed in the French case law of arbitration. As to the interpretation of public policy under OHADA law, it is noted that the legislator remains silent on the matter while the CCJA is yet to clearly decide on the matter. Nevertheless, case law provided further guidance such as the res judicata principle which shall be considered a principle of public policy.

The next chapter is the core of this project. It critically assesses the enforceability of arbitral awards with regard to both legal regimes: the UK and the OHADA. The rationale behind is to determine what lessons can be learnt from the UK's long-standing approach in arbitration. These would serve as potential suggestions for implementation in OHADA law for better efficiency.

# Chapter V

# Enforcement of arbitral awards in developing and developed countries: Comparative study between the UK and the OHADA regime

## Introduction

This chapter delves into the central focus of the study, which examines the effectiveness of enforcing arbitral awards from two distinct perspectives, with special emphasis on the UK and the OHADA arbitration framework. These two systems are fundamentally different due to the UK's common law system and OHADA's civil law system inherited from civil law countries like France. The chapter primarily analyzes the Arbitration Act 1996, which governs the recognition and enforcement of arbitral awards in English arbitration, as well as the Uniform Act on Arbitration and CCJA Arbitration Rules that regulate OHADA arbitrations. Through a comprehensive examination of both jurisdictions, this study aims to identify the similarities and differences between their legislative frameworks using a combination of research methods including doctrinal research, quantitative analysis, and qualitative approaches such as semi-structured interviews and survey questionnaires.

By conducting this comparative study, the objective is to identify gaps in both systems and assess the extent to which OHADA can draw from English law, and vice versa. The chapter addresses key issues such as the separability of the arbitration agreement, the competence-competence principle, and judicial intervention before, during, and after the arbitral proceedings. By examining these aspects, the study aims to uncover valuable insights and lessons that the OHADA arbitration framework can learn from English law.

Furthermore, the chapter focuses on the core aspect of the project, which is the effectiveness of arbitral award enforcement. It recognizes that both legal systems may encounter obstacles in the enforcement process, and aims to shed light on these challenges and potential solutions within each framework.

## 5.1 Enforcing arbitral awards in the UK

The effectiveness of arbitration is gauged in terms of the parties' expectations, encompassing both the expediency and the outcome of the proceedings. The efficacy of international arbitral awards, therefore, hinges upon the conditions governing their enforcement, necessitating practical considerations. A critical evaluation of the effectiveness of arbitral awards raises pertinent inquiries concerning the efficiency of the arbitral tribunal in conducting hearings and resolving disputes, as well as the efficacy of enforcing such awards in relevant jurisdictions. Doctrine indicates that a direct correlation exists between the effectiveness of the arbitration process or the arbitral award and the parties' expectations when they choose this method of dispute resolution. Delanoy corroborates this view and posits that the parties' expectations are inherently intertwined with the quest for effectiveness. He further contends that the pursuit of effectiveness lies at the heart of the arbitration process, as it is presumed that the parties' choice of arbitration implies their intention to bypass domestic courts in order to safeguard their desires and expectations. The author implies that resorting to arbitration circumvents the involvement of domestic courts, which may exceed their jurisdiction by reevaluating the facts and legal issues submitted to the arbitral tribunal.[371] Hence, it can be inferred that the effectiveness of arbitral awards is demonstrated when they yield the anticipated outcomes desired by the parties. These expectations find support in instruments such as the New York Convention and arbitration-friendly legislation, including those of the United Kingdom and France.

### 5.1.1 Effectiveness of English arbitration proceedings

#### A. Attributes of the English arbitration framework

A key feature of English arbitration is that irrespective of the fact that the Arbitration Act of 1996 has not adopted the UNCITRAL Model Law, it was inspired by its rules for the drafting of the Act, establishing a pro-arbitration approach in UK legislation. This resulted in London being ranked as the most preferred seat of arbitration in 2019, dethroning Paris.[372] English law was recognized as the most preferred choice representing 16% of ICC disputes

[371] Delanoy, LC 'Le contrôle de l'ordre public au fond par le juge de l'annulation : trois constats, trois propositions' (2007) RA p. 35

[372] The ICC Dispute Resolution Statistics 2019 reports 114 cases for London against 106 cases for Paris

regarding the applicable or substantive law, with 17.5% of the arbitrators appointed from the UK.[373] Nevertheless, it is submitted that the Arbitration Act does not address all aspects of the arbitration proceedings including the arbitral tribunal's duty of confidentiality. The Act does not include provisions on duty of confidentiality, leaving the matter to the exclusive jurisdiction of the courts that adjudicate on a case-by-case basis.[374] This implies that the arbitral tribunal and the parties are under implied duties to maintain confidentiality in English arbitration, with some exceptions. One of the exceptions includes an express agreement between parties to exclude confidentiality. The duty of confidentiality can be subject to certain restrictions as agreed upon by the parties, taking into account their individual interests and specific rationale. It is worth noting that circumstances may arise in which upholding confidentiality obligations can come into conflict with the principles of public policy. In *Symbion Power LLC v Venco Imtiaz Construction Company,* [375] the Court dismissed the application to set aside an arbitral award alleging serious irregularity pursuant to s. 68(2) of the Arbitration Act 1996. In the case at hand, the plaintiff contended that the judgment shall be rendered anonymously. Nevertheless, this argument was dismissed on the basis that while privacy concerns were raised, it is essential to differentiate between the privacy of the hearing proceedings and the public disclosure of the judgment itself. Lord Jefford J. held in this respect:

"*There is a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be confidential to the parties.*"

It is submitted through this decision that the legislator has not provided specific rules to govern confidentiality in English arbitration, nonetheless, *Symbion Power LLC v Venco Imtiaz Construction Company* demonstrates a willingness from the English Courts to derogate from the implied confidentiality rule in respect of exceptions such as public policy matters.

According to one of the members of the DAC,[376] the Arbitration Act of 1996 operates under three general principles outlined in Art. 1 including fairness,[377] party autonomy,[378] and the

[373] Ibid.
[374] Lord Saville, L. 'Departmental Advisory Committee on Arbitration Law: 1996 Report on the Arbitration Bill' (1997) 13(3) 275 AI, p. 17
[375] *Symbion Power LLC v Venco Imtiaz Construction Company* [2017] EWHC 348
[376] See "*The Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill"* (1996)
[377] See s. 1(a)
[378] See s. 1(b)

limitation of judicial intervention.[379]

Fairness implies that the arbitral tribunal shall act impartially and avoid unnecessary delays while the parties shall do their utmost in order to contribute to the good conduct of the proceedings, stated as follows:

> "The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;"

Gary Born argues in this regard that care shall be performed regarding the terminology used when it comes to the concept of procedural fairness in international arbitration. The rationale behind this statement is to avoid assuming that domestic proceedings apply to international arbitration proceedings. The author adds that the term "due process" is usually used in domestic legal systems to refer to specific legal doctrines related to proceedings within one jurisdiction. But in practice, the term is wrongfully used by some authorities in international arbitration proceedings. Through this statement, it is suggested that the term "procedural fairness" which is very much concerned with the treatments granted to the parties during the proceedings as enshrined in the Model Law[380] shall be used instead so as to avoid confusion.[381]

An example of due process is illustrated in the case *Municipio de Mariana and others v. BHP Group.*[382] In the aforementioned case, the primary focal point revolved around the ramifications of the Covid-19 pandemic on the arbitration proceedings. Specifically, the key question centered on whether there had been a violation of due process when the arbitral tribunal mandated that the hearing be conducted remotely, against the objection of one of the parties. Notably, this case was regarded as one of the most expansive and intricate class actions in England.

The Court's ruling addressed two fundamental principles. Firstly, it addressed the request for an extension of the deadline, considering the delays caused by the Covid-19 pandemic and the necessary measures implemented in response. Secondly, it examined the suitability of virtual hearings in light of the unprecedented circumstances presented by the pandemic.

The defendants sought an extension of the deadline, which would consequently lead to the postponement of the hearing. The Court, taking into account the evolving nature of the

[379] See s. 1(c)
[380] See art. 18 of the UNCITRAL Model Law
[381] Born, G. "*International Commercial Arbitration"* (KLI, 3rd ed. 2021) p. 2300
[382] [2020] EWHC 928

pandemic and its unpredictable consequences, acknowledged the uncertainty surrounding the feasibility of an in-person hearing by July. Accordingly, to avoid further delays in light of the complexity and significance of the case, the Court determined that proceeding with virtual hearings was appropriate.

Furthermore, the Court concluded that the nature of the matter at hand could be justly resolved through virtual hearings, as it primarily required a judicial examination of the presented material, consideration of the parties' written arguments (referred to as "skeleton arguments"), and subsequent oral submissions and arguments.

This decision signifies a shift in perspective, indicating that parties and legal professionals are likely to become more receptive to adapting to changing circumstances. Moreover, it emphasizes the need for appointed arbitrators to acquire the necessary skills and proficiency to successfully conduct virtual hearings.

The second principle is party autonomy, which constitutes a fundamental element in international trade, granting the parties the freedom to designate the governing law applicable to their dispute. This principle can be encapsulated by the following statement:

> "The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary for the public interest."

Based on this principle, the parties may disregard non-mandatory provisions and tailor the arbitration agreement to their needs. Nevertheless, the parties' freedom to select the applicable rules and determine the arbitration process is not absolute. Party autonomy may be limited by the applicable law in cases where the arbitral award is set aside on public policy grounds. The Supreme Court in *Jivraj v. Hashwani*[383] confirmed that an arbitration clause requiring the appointed arbitrators to belong to a specific religious belief was contrary to EU anti-discrimination legislation.[384] This demonstrates that the party autonomy principle may be subject to limitations if contrary to public policy, widely recognized as one of the major exceptions to party autonomy.[385]

When it comes to the scope of judicial intervention in arbitration proceedings as discussed in the following sections, it is submitted that the court's powers are limited to certain actions such as the appointment of arbitrators if no agreement has been made,[386] the summoning

[383] [2011] UKSC 40
[384] See the Employment Equality (Religion or Belief) Regulations (2003)
[385] *Richardson v Mellish* [1824] 2 Bing 229
[386] See s. 18 of the Arbitration Act 1996

of witnesses and collection of evidence,[387] and the grant of interim injunctions[388] among others. The Arbitration Act states in this regard:

"In matters governed by this Part, the court should not intervene except as provided by this Part."

The drafting of this article demonstrates the influence of the UNCITRAL Model Law on the Arbitration Act in terms of style, structure and contents[389] addressed through its latest reform with the aim to structure the provisions logically, in a clear and comprehensive language similar to the Model law. This would ensure to make it available to international users familiar with the UNCITRAL Model Law.[390]

The concept of non-intervention lies in the fact that the domestic court shall not interfere in an arbitration proceeding agreed by the parties through the arbitration agreement, so as to create a balance between the authority of the arbitral tribunal and the powers granted to the domestic courts to act in support of arbitration. Compliance with this principle of non-interference aligns with the principles of the Arbitration Act discussed earlier which are party autonomy and procedural fairness. This would ensure the reliability and effectiveness of the arbitration proceedings so as to avoid litigation[391] through celerity and neutrality as well as compliance with the competence-competence principle.

In an effort to be aligned with the international standards and best practices enshrined in the Model Law, judicial intervention in the Arbitration Act 1996 is limited to the necessary and required support to arbitration such as the dismissal of the challenge of an arbitral award based on alleged serious irregularity pursuant to s. 68 and illustrated earlier through *Symbion Power LLC v Venco Imtiaz Construction Company.*[392] Nonetheless, it is submitted that the reform of the Arbitration Act also includes the role of the domestic courts in support of arbitration and their powers conferred through s. 44, owing to the recurrence of this issue in previous and recent case law. In *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC*,[393] the Supreme Court affirms the court's authority to grant an anti-suit injunction pursuant to s.37 of the Senior Courts Act 1981. This authority applies to several cases, where no statutory basis for an injunction under the Arbitration Act is provided or no arbitration proceedings are expected. In this respect,

[387] See s. 43
[388] See s. 44
[389] See s. 17J of the UNCITRAL Model Law
[390] See the Report on the UNCITRAL Model Law on International Commercial Arbitration 1989
[391] *Fazalally Jivaji Raja v. Khimji Poonji & Co.* AIR 1934 Bom 476
[392] [2017] EWHC 348
[393] [2013] UKSC 35

the competent jurisdiction is to summon the parties to refer the dispute to arbitration. Thus, English law tends to be very much cautious regarding compliance with judicial non-intervention. The general principle is that judicial intervention applies in arbitration proceedings following exhaustion of all available remedies. For instance, judicial intervention is not allowed in case where the parties can refer the dispute to an emergency arbitrator to order an interim relief as enshrined in the LCIA Rules[394] and the Arbitration Act.[395] In the landmark case, *Gerald Metals SA v The Trustees of the Timis Trust and others*[396] Lord Leggatt J held that the test of urgency as enshrined under s. 45 of the Arbitration Act shall not apply and the domestic court has no jurisdiction to grant interim relief in cases where an emergency arbitrator could be appointed. Thus, it is submitted that English courts are to rather intervene in support of arbitration.

One of the distinguishing features of arbitration, in contrast to court judgments, is the enhanced enforceability of arbitral awards. The final and binding nature of the arbitral tribunal's decision empowers the prevailing party to seek enforcement in jurisdictions where the losing party holds assets. Consequently, there is a reasonable expectation that the losing party will comply with the arbitral award. However, it is not uncommon for certain parties to resist voluntary compliance and pose obstacles to enforcement.

To address this challenge, the subsequent section undertakes a comprehensive analysis of the principal avenues available under English law for the enforcement of arbitral awards. By exploring the legal mechanisms and procedural frameworks established within the English legal system, this section seeks to provide a scholarly understanding of the strategies and remedies that can be employed to overcome resistance and ensure the effective enforcement of arbitral awards.

## B. Enforcement and challenges of arbitral awards: judicial intervention vis-à-vis jurisdictional challenges

When the losing party fails to voluntarily comply with an arbitral award, the prevailing party often encounters challenges in ensuring enforcement. In such instances, the prevailing party must take proactive measures to secure the enforcement of the award. Judicial intervention becomes necessary at various stages, including before, during, and after the

[394] See art. 9B
[395] See s. 44
[396] [2016] EWHC 2327

arbitration proceedings. The subsequent section concentrates on the enforcement and post-enforcement phases, specifically examining the practical implications of the powers vested in the English courts concerning arbitration proceedings.

By delving into the authority and jurisdiction of English courts in relation to arbitration, this section elucidates the practical ramifications and effects of court intervention in ensuring the effectiveness and enforceability of arbitral awards. It aims to provide a comprehensive understanding of the procedures and mechanisms through which the English courts exercise their powers, thereby contributing to a deeper insight into the dynamics between arbitration and judicial involvement in the enforcement process.

*Enforcement of arbitral awards under English law:*

Sections 66 and 101 of the Act govern respectively enforcement of domestic and foreign arbitral awards in the UK. First, s. 101(2) of the same Act states:

"*A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect*."

Under the New York Convention, arbitral awards can be enforced in England and Wales, and they are recognized as final and binding on the parties involved. In cases where a document is presented in a foreign language, a certified translation is required for enforcement purposes. However, there is a notable distinction between domestic arbitral awards governed by Section 66 of the Arbitration Act and New York Convention awards governed by Section 103 pertaining to foreign arbitral awards. Unlike domestic awards, there are specific circumstances outlined in Section 103 where the enforcement of foreign arbitral awards may be denied, such as when the subject matter of the award is deemed non-arbitrable. Consequently, it can be inferred that enforcing New York Convention awards may pose additional challenges compared to enforcing domestic arbitral awards. Indeed, s. 66(1) of the AA 1996 provides as follows:

"*An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.*'

The summary procedure as enshrined under s. 66 of the AA 96 grants discretion to the domestic court to grant leave for an arbitral award to be enforced. The case *Sovarex S.A. v Romero Alvarez S.A* exemplifies this statement. In this case, the English Court held that:

“There was no reason why the enforcing party should be compelled to start proceedings all over again by commencing an action on the award thereby potentially wasting both time and costs. There is nothing in s66 itself or the CPR which requires an alternative mode of procedure in the event of the application being challenged on the facts.”

This statement served as a practical example for further judgments where the English Court provided further clarifications on the scope of ss. 66 and 101 of the AA 1996 in the context to enforce domestic and foreign arbitral awards in the UK. The case *A v B*[397] serves as a significant reminder of the approach taken by the courts when considering applications for the enforcement of arbitral awards under s. 66 of the Arbitration Act. This section stipulates that an arbitral award can be enforced in the same manner as a court order. However, as established in *West Tankers Inc v Allianz SPA & Generali Assicurazione Generali SPA*,[398] for an award to be validly enforced, the rights conferred by the award must be expressly sought. In this particular case, the prevailing party sought enforcement of the arbitral award through an order granting permission to proceed with enforcement. The court, however, set aside the order on various grounds. First, it was determined that the full amount of the award debt was not outstanding. According to the court, the arbitral award should have established a clear "right to payment" of the accelerated sum. Nevertheless, the application for enforcement was not dismissed outright, and it was held that the factual dispute regarding the debt could be resolved and determined under Section 66 at a subsequent hearing. At this hearing, the court will examine whether an oral agreement stating that the payment should not be enforced has been effectively made. Secondly, the court held that the claim form relied on s. 101 of the Arbitration Act 1996, which pertains to New York Convention arbitral awards, whereas the ex parte application was made under s. 66 of the Arbitration Act 1996. This decision serves as a reminder that it is the responsibility of the parties to ensure that the relevant legal grounds are brought to the attention of the court.

While it is true that there can be instances where there is an overlap between the jurisdiction of the arbitral tribunal and the domestic court, it is ultimately the relevant court that has the final decision-making authority regarding the enforcement of arbitral awards. The competent jurisdiction possesses the power to address factual issues that may arise when the arbitral tribunal is *functus officio*, unless the arbitral tribunal retains jurisdiction

[397] [2020] EWHC 952 (Comm).
[398] Case C-185/07

upon fulfillment of certain obligations between the parties. In such cases, it can be challenging to persuade the court to enforce such an award.

In a recent case,[399] the Court dismissed a challenge to deny enforcement of an arbitral award pursuant to s. 66 of the AA 1996 on questionable grounds. In this case, it was held that the absence of one of the parties for the hearing on the merits owing to reasons beyond its control such as securing a lawyer was a valid reason that the party had no other choice but to cease the hearing. Thus, a challenge on this ground shall be dismissed. This confirms the English Courts' pro-arbitration approach to enforcing arbitral awards pursuant to s. 66 even when faced with illegality allegations. Indeed, in line with the pro-enforcement approach English courts restricted grounds to set aside arbitral awards even in cases of illegality allegations. In *Alexander Brothers v. Alstom*[400] the English court, despite corruption allegations enforced an arbitral award on the grounds that the objections raised shall be considered instead as an abuse of process. The abuse of process has been enshrined by the courts in *Johnson v. Gore Wood*[401] where it has been held that the party making the claim shall have raised it earlier. The English courts continuously demonstrate through case law its pro-enforcement approach and reluctance to consider corruption grounds during enforcement proceedings but also to intervene in arbitration proceedings while the arbitral tribunal is empowered to.

### *C.* **Challenges of arbitral awards: a high hurdle for success?**

The finality of arbitration proceedings is that the arbitral awards rendered be effectively enforced. It might be argued that a high number of arbitral awards are voluntarily complied with by the losing party. Nevertheless, there are cases where the losing party instead resists enforcement and challenges the award. In this case, the domestic courts will determine the relevance and validity of the appeal through the review of both the arbitral tribunal's rationale and the hearing of the facts.[402]

Lord Michael Kerr argued that "the growth of arbitration, as an alternative to litigation, reflects its ability to escape from the limitations of the courts".[403] Indeed, arbitration features include time-saving, the possibility for the parties to choose the competent

[399] *Shell Energy Europe Limited v Meta Energia SpA* [2020] EWHC 1799 (Comm)
[400] *Alexander Brothers Limited v. Alstom Transport S.A & Alstom Network UK Limited* [2020] EWHC 1584
[401] *Johnson v. Gore Wood & Co* [2002] 2 AC 1
[402] See *Dallah v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46
[403] Thomas, DR. "*Handbook of arbitration practice by Bernstein Ronald QC*" (Sweet and Maxwell, 1987) p.134

authority for the resolution of their disputes, and the possibility to elude the time-consuming court proceedings and the potential non-enforceability of foreign judgments. These benefits to name a few accounts the great success of arbitration as a preferred method for dispute resolution in international commercial disputes. Mistellis confirmed in stating that "international arbitration has become the established method of determining international commercial disputes".[404]

The main aim of the Arbitration Act of 1996 was to reinforce the party autonomy principle and competence-competence principle while restricting judicial control. In this regard, Lord Steyn stated that "The supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on question of law and the power to remit."[405] Indeed, the main obstacle of English arbitration is to detach itself from judicial control, unlike the Model law which prevents assistance from the courts as well as judicial intervention during arbitration proceedings.[406] Following the reasoning of the Model law, the Arbitration Act of 1996 in s. 1(c) states that:

"*The provisions of this Part are founded on the following principles and shall be construed accordingly in matters governed by this Part the court should not intervene except as provided by this Part.*"

The term "shall" instead of "should" raised criticisms from commentators such as Yu[407] and Cohen[408], and the general view was that using "shall" implied that the provision aims to serve more as a recommendation than a mandatory provision. The English court in *Vale do Rio Doce Navegacos SA v Shanghai Bao Steel Ocean Shipping Co Ltd and Sea Partners Ltd*[409] held in this respect that the attempt through the provision was not to adopt a strict approach on judicial intervention in arbitration proceedings. Nevertheless, it is noted that other cases demonstrated an *ultra petita* approach from the courts.[410] In *Lesotho Highlands v Impreglio SpA,*[411] the House of Lords affirmed that domestic courts is empowered to intervene in disputes concerning errors of law or instances where the arbitral tribunal deviates from the principles of enforcement. This decision establishes that

[404] See Blackaby N, Partrasides C, Redfern A and Hunter M "*Redfern and Hunter on International Arbitration"* (OUP, 6th ed. 2015) p.38
[405] Steyn, L. 'England's Response to the UNCITRAL Model Law of Arbitration', (1994) 10 AI p.136
[406] See art. 5
[407] Yu, H. 'Five Years On: A Review of the English Arbitration Act 1996 Hong-lin Yu Journal of International Arbitration' (2002) 19(3) JIA p. 220
[408] Coen, M. 'Missed Opportunity to Revise the Arbitration Act 1996' (2007) 23(3) AI p. 462
[409] *Vale do Rio Doce Navegacos SA v Shanghai Bao Steel Ocean Shipping Co Ltd and Sea Partners Ltd* [2000] EWHC 205 (Comm)
[410] See *JT Mackley and Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315
[411] *Lesotho Highlands v Impreglio SpA* [2006] 1 AC 221

domestic courts have the power to intervene not only in matters governed by the Arbitration Act provisions but also at any stage of the arbitration proceedings, as deemed appropriate. It underscores the court's role in ensuring the correct application of legal principles and upholding the integrity of the arbitration process. Thus, the ruling recognizes the authority of domestic courts to provide assistance and oversight in arbitration matters, particularly in cases involving legal errors or deviations from established enforcement principles.

This section focuses on the restricted grounds available to parties seeking to challenge an arbitral award under English law. The Arbitration Act of 1996 provides limited avenues for such challenges, specifically outlined in sections 67, 68, and 69. These sections respectively permit challenges based on the lack of substantive jurisdiction, serious irregularities impacting the arbitration proceedings, the arbitral tribunal, or the arbitral award itself, and the appeal of an arbitral award on a point of law. These provisions establish the framework for parties to raise legitimate concerns and seek redress in cases where the specified grounds for challenge are met.

*Lack of substantive jurisdiction*

First, following the exhaustion of all remedies,[412] an arbitral award may be set aside on the grounds of lack of substantive jurisdiction[413] for which case the Court shall proceed to the rehearing of the issues and evidence, without being bound by the arbitral tribunal's decision *de jure or de facto*. The principle is confirmed in *Hellenic Petroleum Cyprus Limited v Premier Limited*[414] where the Court held that application of s. 67 of the Act to challenge the substantive jurisdiction of the arbitral tribunal implies more than merely reviewing the arbitral award. It is instead to re-examine the evidence regardless of the arbitral tribunal's rationale. This was also confirmed in *GPF GP S.àar.l. v Republic of Poland*,[415] the first case related to the challenge of an investment treaty arbitral award under a BIT that has been set aside by an English Court on jurisdictional grounds. Justice Bryan reinforces the position of the Supreme Court's ruling in *Dallah v Pakistan*[416] that pursuant to art. 67 of the AA 1996, any challenge to substantive jurisdiction requires a full rehearing instead of proceeding to a review of the arbitral tribunal decision on the same issue of jurisdiction. Thus, it is for the Court to adjudicate the existence of the arbitral

[412] See ss. 57 and 70(2) of the Arbitration Act 1996
[413] See s. 67
[414] [2015] EWHC 1894
[415] [2018] EWHC 409 (Comm)
[416] [2010] UKSC 46

tribunal's jurisdiction regardless of its reasonings or how the arguments were presented before the arbitral tribunal. The Court overturned parts of the award, replaced the relevant paragraphs, and confirmed the arbitral tribunal's authority. This decision appears unique in many respects. First, Justice Bryan J admitted new arguments while it is understood through the Act that all arguments shall be made earlier. Second, in the rare cases related to lack of jurisdiction in an investment treaty dispute, the domestic courts either confirm the arbitral tribunal's ruling or overturn the finding of jurisdiction. In this case, the Court overturned a finding of no jurisdiction and returned the claim to the same arbitral tribunal. It would be worth observing and discussing how the arbitral tribunal eventually addresses it. Finally, it is submitted that this decision would not apply to ICSD Arbitration as arbitral awards under these rules are not subject to supervisory jurisdictions. Thus, it is up to the parties to carefully consider all factors for the choice of dispute resolution when commencing proceedings under an investment treaty.

*Serious irregularities*

The grounds of a serious irregularity enshrined in s. 68 of the Act concerns those affecting the arbitral tribunal, the arbitral proceedings, and the arbitral award.[417] In this context, challenges may be successful only on serious grounds such as substantial injustice affecting the arbitral proceedings, serious irregularity including the excess of jurisdictions from the arbitral tribunal, and failure of the tribunal to comply with its duty.[418] This was confirmed in *Lesotho Highlands Development Authority v Impregilo SpA*[419] where the English Court held that for a challenge to be successful, the party shall do more than argue that the arbitral tribunal has not made the right decision. Instead, the party shall demonstrate a substantial injustice deriving from the irregularity raised.[420] These limited grounds do not empower the courts to engage in a substantive review of the merits of a case, even in situations where the arbitral tribunal fails to provide sufficient weight to specific evidence[421] or the publication of an arbitral award is delayed.[422]

Successful challenges under s. 68 remain rare, as demonstrated by the English Commercial Court which according to its 2017 and 2018 Reports revealed that there has

[417] See s. 68
[418] *K & Ors v P & Ors* [2019] EWHC 589
[419] [2005] 3 WLR 129, [29]
[420] See *ABB AG v Hochtief Airport GMBH* [2006] EWHC 388
[421] *Schwebel v Schwebel* [2012] EWHC 3280
[422] *BV Scheepswerf Damen Gorinchem v The Marine Institute* [2015] EWHC 1810

been no successful challenge for these legal years.[423] In line with the extremely low success rate, the court years 2019 and 2020 experienced a significant decrease in the number of applications to challenge arbitral awards under s. 68,[424] which resulted in only 2 challenges out of 19 to be successful[425] in 2019.[426] Furthermore, the 2020 minutes reported only one successful s.68 application,[427] although later on the 2021 report updated the 2019 report for the 2018-2019 court years adding 2 partially successful challenges.[428] The successful case *Xstrata Coal Queensland P Ltd & Anor v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd*[429] concerns an unsuccessful attempt to enforce an arbitral award in China under the NY Convention. The Court considering the risk that parties may attempt to take advantage of alleged uncertainties with regard to the identity of a party exercised caution by referring the arbitral award back to the arbitral tribunal for reconsideration. The primary concern was to eliminate any ambiguity or doubt regarding the parties' identities, particularly in relation to their representation and inclusion in the award. This exceptional decision underscores the pro-arbitration approach embraced by the English Courts, aiming to uphold the integrity and clarity of the arbitration process. By ensuring that the identities of the parties are accurately reflected in the submissions and subsequently covered in the award, the Court seeks to maintain the fairness and effectiveness of the arbitration proceedings. With regard to the successful challenges for the 2020-2021 court years, it is submitted that there have been no successful challenges although 14 applications still await a decision.

*An appeal on a point under English law*

An appeal on a point of law enshrined in s. 69 of the AA 96 was inspired by the Model Law. This provision may only be brought with the agreement of both parties or permission of the Court.[430] The point of law shall affect the rights of parties, including an arbitral award that

[423] Accessible at https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf (Last accessed 30 September 2022)
[424] Accessible at https://www.judiciary.uk/wp-content/uploads/2022/07/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf (Last accessed 30 September 2022)
[425] See *P v D [2019] EWHC 1277 (Comm)* and *Fleetwood Wanderers Ltd v AFC Fylde Ltd [2018] EWHC 3318 (Comm)*
[426] For the full report, see https://www.judiciary.uk/wp-content/uploads/2020/02/Minutes-of-Comm-Ct-Users-Group-20.11.19.pdf (Last accessed 30 September 2022)
[427] *Xstrata Coal Queensland P Ltd & Anor v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324
[428] Accessible at https://arbitration.site/wp-content/uploads/2020/02/UK-stats.pdf (Last accessed 30 September 2022)
[429] [2020] EWHC 324 (Comm)
[430] *Kyla Shipping Company Ltd v Bunge SA* [2013] EWCA Civ 734

does not deal with a relevant and essential question of law[431] or a question of public policy. This ground is non-mandatory as it may be agreed by both parties in writing, although parties usually rely on ICC[432] or LCIA Rules[433] which both exclude any right to appeal on this ground.

The right to appeal implies compliance with four requirements set out under s.69(3) including:

- The determination of the question which will substantially affect the rights of one or more of the parties;
- The question raised shall be the one that the arbitral tribunal was asked to determine;
- On the basis of the findings of fact in the award: (i) the decision of the tribunal on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubts;
- Despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

With regard to these requirements, O'Reilly argues that it is much more difficult to persuade commercial clients that appeals are a good thing than it is to persuade their lawyers.[434] On the same basis, it is submitted that satisfying these requirements appear extremely challenging for the appellant, confirmed by the fact that there are very rare successful appeals on a point of law pursuant to s. 69. Nevertheless, some may argue in favour of s.69 appeals procedures on the basis that the parties would have expressly agreed had they considered the matter. This statement aligns with Lord Saville's reasoning:

"it seems to me that it is well arguable that this limited right of appeal can properly be described as supportive of the arbitral process. Where the parties have agreed that their dispute will be resolved in accordance with English law, and the tribunal then purports to reach an answer which is not in accordance with English law, it can be said with some

[431] *Fehn Schiffahrts GmbH & Co KG v Romani SPA* [2018] EWHC 1606
[432] See art. 34(6) of ICC Rules
[433] See art. 26(8) of the LCIA Rules
[434] O'Reilly, M. 'Appeals from Arbitral Awards: the Section 69 Debate', the Tenth Annual Review of the Arbitration Act (2007) TTARAC p. 6

force that unless the courts correct this error, the tribunal itself will have failed to carry out the bargain of the parties."[435]

O'Reilly on the other hand argues that in practice however, there is no such express choice of law clause.[436] Thus, the point that s. 69 reflects the agreement of the parties is tantamount to saying that the provisions under s. 69 would be implied. It is understood through this statement that the author considers that the submission that s.69 provisions reflect what the parties would have agreed disregards the negative aspects of the appeals proceedings. As a matter of fact, under s.69 of the Act parties may appeal on a point of law arising out of an arbitral award. The domestic court shall disregard questions that were not asked to be determined by the arbitral tribunal and if permission to appeal is granted, the domestic court shall either confirm, amend or remit the arbitral award to the arbitral tribunal for further consideration. In this respect, it is expected that the Court proceeds with caution while assessing the merits. The test to allow appeal under s. 69 relies on whether the issue is of general public importance so as to open serious doubts or whether the arbitral award is wrong. In *Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd and Another,*[437] the Court dismissed the application to grant permission to appeal on the grounds that the arbitral award was obviously wrong, reiterating how s. 69 challenges are determined and the requirements for the appeal to be granted. The Court considered that "the kind of situation envisaged is one where the judge looks at the award and thinks 'Something must have gone seriously wrong; that just cannot be right'." It held that the arbitral tribunal's award was not obviously wrong, and the supervisory powers of the Court are limited to assess very few materials and in this respect, it shall not review complex and large volumes of arguments submitted by the parties, but instead examine the arbitral award on possible errors in the rationale. To this, end, the Court held that the argument that the arbitrator misconstrued the lease owing to the fact that he is not a lawyer is inconsistent as the parties are free to select the arbitrator of their choosing. This having been said, the arbitrator's award was not "obviously wrong".

In *WSB v FOL*,[438] the English Court provides further clarification and practical considerations regarding the challenges to arbitral awards pursuant to s. 69 of the Act. It held that the party shall not evade the refusal of the Court to grant permission to appeal by seeking the appeal to be relisted as an oral hearing as s.69 challenges are in writing,

[435] Ibid.
[436] Ibid.
[437] [2019] EWHC 704)
[438] [2022] EWHC 586 (Comm)

proceeds without an oral hearing and if dismissed are final unless the Court finds the hearing to be required for the case. The Commercial Court Guide of 2022[439] provides the right to oral hearings under ss. 67 and 68 only, which in this case remains no less challenging as the party applying for an oral hearing may face practical constraints owing to the hearing, which is likely to limit its ability to make use of this option granted. Parties must have valid and solid grounds to request oral hearings for the Court to consider the request, which is even more challenging when it comes to s. 69 challenges which demonstrate a high threshold requirement. This decision is interestingly relevant as a reminder in the sense that the Court reiterates that parties shall not circumvent the refusal of permission to grant permission to appeal by attempting to set aside the decision so as to have the dispute relisted as an oral hearing. In the case where the party fails to meet the requirement enshrined in s. 69(5), the decision becomes final. Thus, parties must ensure to have a real prospect of success. This decision aligns with the English judiciary's pro-arbitration stance which strives to support the finality of arbitral awards.

These decisions indicate that applications under s. 69 of the Arbitration Act are generally unsuccessful due to the significant challenge faced in mounting a successful challenge before the domestic courts. Case law provides clear evidence of the exceptionally low success rate of such challenges, highlighting the exceptional nature of circumstances under which the courts exercise their supervisory powers. Moreover, these decisions affirm the status of the arbitral tribunal as an independent authority within the arbitration process.

The determination of the question which will substantially affect the rights of one or more of the parties as pursuant to s.69(3) aims at preventing any appeal on a question of law that was not raised earlier or was not the key ground of the arbitral award. Consequently, the domestic court's rationale would not affect the outcome of the dispute.[440] The provision also limits the appeal to the issues raised by the parties throughout the proceedings, and which were relevant to the determination of the issue. In *Alegrow SA v Yayla Argo Gida San ve Nak A.S*,[441] the Court held that the GAFTA Appeal Board wrongly found that Alegrow SA repudiated its contract with Yayla Argo Gida San ve Yayla failing to provide a shipment schedule when there was no contractual obligation to provide such schedule. To this respect, the Court held that arbitral awards shall be treated reasonably without substantial inconsistencies likely to make them invalid or frustrate the arbitration

[439] Accessible at https://www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf (Last accessed 30 September 2022)
[440] *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2018] EWCA Civ 991)
[441] *Alegrow SA v Yayla Argo Gida San ve Nak A.S* [2020] EWHC 1845

proceedings, which was contrary to the Board's decision. The court stressed that the grant of permission to appeal shall not prevent English courts from upholding the arbitral award. They shall address the issues and not overturn the application based on flaws detected, for the arbitral award to be deemed valid. This decision demonstrates that the permission to appeal is fallible, thus it is to the arbitral tribunal to appropriately adjudicate so as to avoid errors, and to the domestic courts to exercise caution when considering the merits. In another decision,[442] the Court provides the same reasonings and allowed the appeal on the grounds that the issues raised in the dispute were of general public importance and the answers provided by the arbitral tribunal with regard to the three issues raised serious doubts, which satisfied the requirement for the permission to appeal as pursuant to s. 69. To grant permission to appeal, the Court invoked the distinctiveness of the "Fairchild enclave"[443] owing to the difficulty to rationalise the consequences arising from Fairchild. It is yet to see the outcome of the appeal, especially with regard to the overarching principles of fairness as opposed to the principles of orthodox insurance law.

Furthermore, the case *Tricon Energy Ltd v MTM Trading LLC*[444] illustrates the principle that the Court may grant permission to appeal in the case where the question is one of general public importance and the decision of the tribunal is at least open to serious doubts. The Court held that the arbitral tribunal wrongly concluded that the claim brought was not contractually time-barred based on the fact that one party failed to submit the bills of lading with its demurrage claim. Hence, the Court allowed the appeal on a point of law pursuant to s. 69. Through this principle, the Court shall see to it that the domestic courts are allowed to provide answers to the legal issues likely to arise.

These grounds aim to ensure that the arbitral proceedings comply with principles of fairness and integrity. Following the substantive review, the Court shall confirm, vary the award, or set aside the award in whole or in part.

Meeting these requirements poses a considerable challenge for the appellant, as evidenced by the very rare successful appeals on a point of law under Section 69.[445] This is owed to the fact that the parties mostly exclude the right of appeal, and the chances to

[442] *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2018] EWCA Civ 991)
[443] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22
[444] [2020] EWHC 700
[445] Gulley, D. 'The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996', (2008) 36(3) HLR p.17
Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol36/iss3/17

obtain the Court's leave under s. 69(3) is challenging. According to Dedezade,[446] the drafters of the Arbitration Act of 1996 intended to impose strict limitations on the grounds for permission to appeal. It can be inferred that this objective has been largely accomplished, as evidenced by the consistently low success rate in applications seeking to challenge arbitral awards on points of law. The statistics indicate that only a small number of s.69 applications have achieved success within the system. This suggests that the scope for successful appeals on legal grounds is significantly limited. The author contends that the low rate of successful s.69 applications is a result of the stringent criteria and the high threshold that must be met, thereby reflecting the intended goal of the legislation to restrict the scope of appeals.[447] To further analyse this issue, this section discusses the three last Commercial court reports published by the Judiciary of England and Wales released with the aim to provide the number of applications to challenge arbitral awards and the success rate of these challenges made before the English courts.

The 2019[448] Report revealed that there have been two successful challenges in the 2018-2019 court year[449] and in this regard expressed the "*hope that parties were hearing the message that the hurdle for these applications is high*".[450] This decrease can be attributed to the applications to challenge arbitral awards to the deterrence of the high threshold to successfully challenge arbitral awards. The two successful challenges demonstrate the hurdle for successful challenges and the non-interventionist approach of the English Judiciary as developed below.

First, the case *Nubiskrug Gmbh v Valla Yachts Ltd*[451] [2019] EWHC 1219 (Comm) well illustrates how an appeal on a point of law pursuant to s. 69 can succeed. The Court held that the arbitral tribunal wrongly determined that the claimant was under the duty to make payments to the buyer on the basis of a breach of its contractual management obligations which put the buyer in difficulty. The Court highlighted the complexity of the issue of restitution which had not been fully addressed. Owing to the lack of clarity and complexity of the issues on the face of the arbitral award, the Court allowed the appeal and remitted the matter back to the arbitral tribunal for reconsideration. Following this decision, it will be

[446] Dedezade, T. 'Are you in? Are you out? An analysis of Section 69 of the English Arbitration Act 1996: Appeals on Questions of Law' (2006) IALR, p.56
[447] Ibid.
[448] Accessible at https://arbitration.site/wp-content/uploads/2020/02/UK-stats.pdf (Last accessed 21 October 2021)
[449] *Nubiskrug Gmbh v Valla Yachts Ltd* [2019] EWHC 1219 (Comm); *Silverburn Shipping IOM Ltd v Ara Shipping Company LLC* [2019] EWHC 376 (Comm)
[450] Ibid.
[451] [2019] EWHC 1219 (Comm)

interesting to see what the tribunal decides regarding the buyer's entitlements to the sums paid in accordance with restitution and breach of obligations.

The second successful challenge is the case *Ark Shipping Company LLC v Silverburn Shipping* (IOM) Ltd.[452] In this case, the Court considered the obligation to keep the vessel in class at all times under a bareboat charter as an absolute obligation and a condition of the charter. The Court held that the arbitral tribunal wrongly found the construction of an obligation in a contract not to be a condition. The Court provides further clarity on the principles applying to the classification of contractual terms as conditions or innominate terms and highlighted the interpretation of the parties' continuing obligations during the life of a charter party with regard to substantial matters such as classification status. The Court allowed the appeal as a reminder for the charterers to fulfill their obligation to keep vessels in class at all times, failing which the owners will have the right to terminate the charter party and claim the return of the vessel.

The 2020 Report presents statistics respectively for the court years 2018-2019, 2019-2020, and 2021-2022 and provides updates to the 2019 report, resulting in the initial report to be inaccurate.[453] Following the review of the report, it is difficult to state the rationale behind the decrease in applications between the 2019-2020 and 2020-2021 court years. In contrast to the previous court year, where there were four successful challenges under s.69, the subsequent court year of 2020-2021 saw no successful applications under this provision. This notable difference indicates a significant decrease in the number of appeals on points of law that resulted in a successful challenge to arbitral awards. The absence of successful s.69 applications during that period suggests a heightened level of stringency in the courts' approach to such appeals.[454] It is understood through the statistics that challenges of arbitral awards have limited chances of success in the UK. The English judiciary through case law stressed that successful challenges will be in extreme cases so as to preserve the pro-arbitration approach. The three reports examined above demonstrate the very high threshold to succeed in the challenge of arbitral awards under ss. 68 and 69 of the Arbitration Act.

This reinforces the significance of approaching challenges under s.69 with caution and careful consideration. The absence of successful applications in the recent court year

[452] [2019] EWCA Civ 1161
[453] Accessible at https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf (Last accessed 30 September 2022)
[454] Ibid.

emphasizes the difficulty faced by appellants in meeting the stringent criteria for a successful challenge on legal grounds. It remains to be seen how this trend will evolve over the coming years, as further statistical data will be necessary to determine whether there will be an increase in successful challenges or if the current pattern will persist in the long term.

*Setting aside foreign arbitral awards*

Pursuant to s. 103(2) of the Arbitration Act, an arbitral award based on the NY Convention provisions may be set aside only on limited grounds including the case where the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. This results in a stay of enforcement proceedings as illustrated in *Yukos Capital SARL v OJSC Rosneft Oil Company.*[455] In this case, the English Court considered whether an arbitral award that has been set aside could be enforced under common law. It was held that enforcement of this award was not precluded, hence could be enforced as long as the party could provide evidence that the foreign court's decision offends the "basic principles of honesty, natural justice and domestic concepts of public policy."[456]

Thus, an arbitral award that has been set aside by a foreign court may be enforced based on public policy, including fraud, corruption and illegality from the foreign jurisdiction. Nonetheless, it is submitted that the English court confirmed the restrictive approach of public policy pursuant to s. 103 of the Arbitration Act 1996. The Act made a distinction between an arbitral award enforcing a contract to bribe and an award involving alleged bribery in the underlying contract. As an illustration, in *RBRG Trading (UK) Ltd v Sinocore International Co Ltd*[457] the plaintiff argued that the outcome of the arbitration proceedings was based on fraudulent bills of lading. The Court held that this was a failed attempt at fraud that was not sufficiently linked in order to trigger the public policy exception. Therefore, the basis of the claim was not the attempted fraud, consequently, the loss due to this attempt was only collateral. This demonstrates that English Courts critically assess the applicability of s. 103 of the Arbitration Act.

[455] [2014] EWHC 1288
[456] Ibid.
[457] [2018] EWCA Civ 838

Overall, it is submitted that there are limited grounds to challenge an arbitral award pursuant to the Arbitration Act of 1996. The primary objective of the Arbitration Act is to promote efficiency and streamline arbitration proceedings while limiting judicial interference. In line with this intent, the courts have adopted an approach that seeks to restrict the grounds on which parties can challenge and set aside an arbitral award, as it was held in *Bandwidth Shipping Corporation Intaari*[458] where Waller LJ held that: "*the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to Section 68 and in particular by reference to Section 33… It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under s. 33 and s. 68.*"[459]

It is understood that judicial intervention aims at ensuring both fairness during the proceedings and the rights of the parties especially party autonomy one of the key features of arbitration. This was confirmed in the landmark case *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd*[460] where the Court provided further clarifications on how shall be assessed the apparent bias and impartiality of the arbitral tribunal. This decision demonstrates that the Court observes a strict approach to the arbitrators' duties in the proceedings.

This legitimate intervention from the court is likely to thwart the independence and private character that differentiates arbitration from other forms of litigation. Pursuant to s. 66 of the Arbitration Act of 1996, domestic arbitral awards may be enforced by the courts through actions or summary proceedings while foreign arbitral awards may be enforced through international conventions.[461] Indeed, foreign arbitral awards may fall within the scope of international treaties and conventions to which England is a party including the NY Convention, the Geneva Convention of 1927 and the ICSID Convention. To this respect, pursuant to ss. 100 to 103 of the English Arbitration Act 1996, any award issued in a NY Contracting state may be enforced but also challenged pursuant to the same grounds listed in the NY Convention. Nevertheless, it is submitted that case law demonstrates the English judiciary's perception that arbitral awards shall be challenged under specific circumstances needing judicial intervention to address it.[462]

[458] *Bandwidth Shipping Corporation Intaari (the 'Magdalena Oldendorff')* [2008] 1 All ER 1015
[459] Ibid. See par. 38
[460] [2020] UKSC 48
[461] Part III of the Arbitration Act of 1996
[462] See *La Société pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC (Statoil)* [2014] EWHC 875

The Court's pro-arbitration stance is a boon to the English legal system and by ricochet to London status as it would strengthen its attractiveness as a preferred seat of arbitration. It remains to be seen whether future court statistics will reveal any increase in successful challenges to arbitral awards. However, there are ongoing concerns regarding the effectiveness of English awards and the long-term status of the UK as an international hub for dispute resolution post-Brexit. The subsequent section will explore the potential impact of Brexit in the foreseeable future. By assessing these potential impacts, it will be possible to gain insight into whether London's attractiveness as a dispute resolution destination may be affected in the long run.

As of December 2021, the New York Convention has garnered significant international participation, with 169 Contracting States worldwide, including countries within the OHADA region in Sub-Saharan Africa. These Contracting States demonstrate their commitment to aligning their practices with international standards and best practices. The subsequent section delves into the efforts of developing countries in pursuit of effectiveness and harmonization. Economic globalization necessitates the harmonization of laws and adherence to international standards and best practices, which these countries are actively striving to achieve.

### 5.2. OHADA arbitration: the test of transnational and international standards

The assessment of the effectiveness of arbitral award enforcement encompasses several crucial dimensions. These include the expeditiousness with which enforcement proceedings are carried out, the extent to which domestic courts recognize and enforce arbitral awards, and the frequency of successful challenges to arbitral awards. By scrutinizing these aspects, a comprehensive understanding of the overall efficacy of the enforcement mechanisms can be obtained. Within the realm of the OHADA arbitration framework, the theoretical underpinnings of arbitral award enforcement are explored, with particular emphasis placed on the notable reform of 2017. This reform introduced a modernized set of rules aimed at bolstering the enforcement regime under OHADA law, and its reception has been largely positive among commentators. Nevertheless, it is important to note that the success rate of challenges to arbitral awards before the CCJA is estimated to be approximately 30%. This statistical finding suggests that there remains scope for enhancing the effectiveness of arbitral award enforcement within the OHADA context.

Against this backdrop, the present study endeavors to meticulously examine and evaluate the effectiveness of arbitral award enforcement in both the developed jurisdiction of the United Kingdom, governed by the Arbitration Act 1996, and the developing framework of the OHADA arbitration system, which operates under the civil law tradition inherited from countries such as France. Employing a comprehensive research approach, encompassing mixed methods such as doctrinal research, quantitative analysis, as well as qualitative techniques like semi-structured interviews and survey questionnaires, this comparative investigation seeks to identify the disparities and convergences between these two legal systems.[463] This demonstrates that unlike the English Courts, the CCJA Supreme Court does not place a high threshold so as to limit challenges of arbitral awards and adopt a pro-arbitration stance. The main changes of the reform aligning with the objectives of harmonization of the domestic laws are the requests for recusal of the arbitral tribunal[464] which are strictly regulated especially with regard to the timing. Also, arbitration can now be conducted based on a convention or instrument related to investment.[465] A new mechanism called "med-arb"[466] as well as a mechanism for arbitral awards on agreed terms[467] have been implemented so as to diversify the portfolio of procedures. Furthermore, the reform conferred powers to the arbitral tribunal to appoint experts and order provisional measures or interim reliefs, which is a commendable progress mainly modelled after the French Civil Code of Procedure.[468] Finally, the new art. 2 of the revised UAA specifies that any person and public entity may be a party to arbitration regardless of the legal nature of the contract, and by ricochet waive their rights to invoke their own laws to challenge the arbitrability of the dispute, their legal capacity or the validity of the arbitration agreement.

Despite the objectives of harmonization raised by the new UAA, the articulation between the domestic laws, the UAA rules and the international conventions give rise to many issues for both practitioners[469] and judges[470] likely to undermine the effectiveness of the arbitral awards. Although the UAA may guarantee its theoretical efficiency, the practical aspect appears to present several obstacles that hinder its effectiveness such as the business climate, corruption or the issues encountered at the enforcement stage of arbitral

[463] 6 annulments were granted by the CCJA out of 22 set aside proceedings, which equals to around 27% of success rate
[464] See art. 8 of the UAA
[465] See art. 3
[466] Art. 8.1
[467] Art. 19
[468] Art. 13 and 14
[469] *Sociétés des ciments d'Abidjan (SCA) c/ Burkinabé des ciments et matériaux* Ohadata J-03-83 [2001]
[470] CCJA *Vodacom International limited c/ Congolese Wireless Network SPRL* N° 003/2017

awards among others. Indeed, the flow of foreign investment in Sub-Saharan Africa over the years and globalisation of trade resulted in the implementation of several companies in the growing region. Commercial disputes have significantly risen and by ricochet attracted the attention of African leaders to rely on alternative dispute settlement mechanisms such as arbitration to address commercial issues.

The innovations of the last reform as well as the state of arbitration practice within the OHADA regime are assessed through analysis of the legal framework and the case law. Then, this section first analyses the arbitration reform, the issues occurring during the arbitration proceedings as well as the legal gaps. Secondly, this section assesses whether the new arbitration law effectively improved the texts by examining the existing flaws under OHADA arbitration. This aims at identifying the issues likely to obstruct the good practice of arbitration within the OHADA area. The section analyses the impact of the reform on the CCJA as an arbitration centre, owing to the significant low case reported over the past several years. It is also noted that the availability of viable and active arbitration institutions within the relevant states and awareness of arbitration is still unsatisfying since few published articles are available and all cases law are not necessarily easily accessible. The most striking issue is that very few international arbitration disputes have their seats in Sub-Saharan Africa, mostly owing to the stereotype that African arbitrators and institutions are less experienced. This considerably affects the arbitration practice in Africa as well as its attractiveness. In this respect, it is yet to review and analyse the concrete application and effectiveness of the implementation of both the CCJA Arbitration rules and the UAA within the region. The current analysis is made of some references to foreign laws including English and French law.

### 5.2.1. Enforcement and challenges of arbitral awards under OHADA law

Enforcement of arbitral awards in Sub-Saharan Africa presents challenges and risks for foreign businesses, especially when enforcement is sought against one State. which African leaders attempted to address through OHADA provisions. These provisions are useful for parties who must enforce the arbitral awards in the region although most arbitration seats are usually outside the OHADA region and administered by leading arbitration institutions such as the ICC and the LCIA. It is of relevance to enquire about the arbitral regime in the territory where enforcement is sought. As of today, the NY Convention of 1958 was signed by 12 out of 17 OHADA Member States, in an effort to meet the

international standards and best practices. This willingness to meet the international requirements aims to expand OHADA law outside the region so as to cover the entire continent and attract foreign investments. The UNCITRAL Model Law on international commercial arbitration is intrinsically linked to the NY Convention in terms of facilitating recognition and enforcement of arbitral awards, the difference being that the Model Law applies solely to international commercial arbitration and assists the States in modernising their arbitration framework so that all arbitral awards are treated uniformly and enforceable. Nevertheless, it is submitted that the UAA has not adopted the UNCITRAL Model Law on international commercial arbitration, it retains the essence of the Model law such as fundamental principles of international commercial arbitration enshrined in the legislative guide. It may be assumed that the reasoning behind the reluctance of OHADA leaders to adopt the UNCITRAL Model law on arbitration relies on the influence of the French legal system which has also not adopted the legislative guide, although it is submitted that the Paris Bar Association is an observer in UNCITRAL.

The UAA is applicable to both domestic and international arbitration and regulates all arbitration proceedings conducted within a Member State. In cases where the UAA does not apply, the provisions of Law No 93-671 of 1993 relating to arbitration come into effect.

This section focuses on the reasons underlying the challenges faced within OHADA law, which undermine the effectiveness of arbitral awards in the region. Firstly, it explores the issues associated with the diversity of legislations within the OHADA region, which can impede the harmonization objectives set by OHADA and, more significantly, hinder the enforcement of arbitral awards in OHADA territories. Secondly, it examines the conflicts of jurisdiction that often arise, resulting in unnecessary costs and delays during the enforcement process.

### A. Balkanisation of the laws over OHADA rules

Initially, business law in Sub-Saharan Africa was very heterogeneous, specifically in the franc zone. This represented a major impediment in the sense that the diversity of texts was inconsistent with the economic context. Thus, it is assumed that the balkanisation of the texts was the main factor of the sluggishness of foreign investments and economic development in the region as businesses have opted for more attractive regions in terms of legal and judicial security.[471] This explains the interest expressed by the OHADA Treaty

[471] Kirch, M. 'Historique de l'OHADA' (1998) 108 RP p. 129

towards arbitration, as the OHADA pioneers aimed at restoring the confidence of the investors by adopting mechanisms in line with international standards. Scholars and the OHADA pioneers considered[472] potential conflict of both laws and jurisdictions within the region as being the main issue of the implementation of OHADA laws, which led to the question as to whether there is indeed a conflict of laws between domestic laws and OHADA regulations or conflict of jurisdictions leading to a balkanisation of rules obstructing the enforceability of arbitral awards. In this respect, online surveys and semi-structured interviews have been conducted so as to provide further clarification on this issue. Despite the common belief supports the existence of conflicts of law in the region due to the diversity of laws, the survey revealed that 75% of the respondents considered that the diversity of legislation had no impact on the compliance of the domestic rules with the OHADA regulations. This result is consistent with the current legislation in the sense that when it comes to conflicts of law, art. 10 of the Treaty states that uniform acts prevail over domestic laws in cases the areas or matters are already covered under OHADA law. In this case, the domestic text is replaced by the text of the applicable uniform act. Furthermore, the interview participants unanimously concurred that the existence of the presumed conflict of laws was notably absent. Further elaborating on this prevailing notion among scholars, the interviewees expounded upon their perspectives, with the majority asserting that the notion of conflict of laws barely exists as of today, primarily due to the explicit clarity found within Article 14 of the Treaty.[473] According to Philiga Sawadogo,[474] historical conflicts between community-based institutions, such as UEMOA,[475] ECOWAS,[476] and OAPI,[477] which have their own legislative texts and mechanisms for resolving disputes, have been prevalent. Consequently, in principle, conflicts should not arise because the existing uniform acts under the OHADA Treaty already address all relevant areas. This is exemplified by Article 35 of the OHADA Treaty, which states the following:

"*This Uniform Act shall stand in place of the arbitration law within the Member States.*"

[472] Ibid. See also the Preamble of the OHADA Treaty
[473] The Common Court of Justice and Arbitration shall ensure the uniform interpretation and application of the Treaty, its rules of enforcement as well as Uniform Acts and decisions.
[474] Filiga, S 'OHADA Arbitration law: key principles and application prospect' (2003) DE p. 970
[475] West African Economic and Monetary Union
[476] Economic Community of West African States
[477] African Organisation for Intellectual Property (OAPI)

Consequently, the previous domestic provisions are deemed abrogated due to the primacy of OHADA law over domestic law. [478] Lawmakers are not allowed to legislate in this area except when the law only completes the existing provisions if incomplete, in areas within which the uniform act remains silent or allows flexibility.[479] Under such circumstances, the OHADA legislator leaves room for manoeuvre to the Member States. Nevertheless, the States are not allowed to create new legislation on arbitration or any of the other 10 areas covered by OHADA. Conflicts of law should not be an issue as the law already determined the issue. Yet, there are cases resulting in potential conflicts of law. For instance, there might be cases where certain domestic laws are considered by the domestic courts on disputes covered by one of the uniform acts. In a decision, the CCJA specified that "the *abrogation also concerns domestic provisions identical to those of the Uniform Acts."*[480] Yet, the same Court in 2001 disregarded the repealing scope of the UAA to the benefit of domestic law,[481] illustrated in *M. Delpech Gérard et Mme Delpech Joëlle c/ Sté SOTACI*[482] where it was held that the action for annulment was valid despite the plaintiff invoking a waiver of the right to appeal. Indeed, the institution referred to the Ivorian legislation while art. 4 of the UAA provides that the validity of an arbitration clause is determined by the will of the parties without necessarily referring to any domestic provision. The CCJA Arbitration rules being an element of the will of the parties, the institution should have analysed the possibility of waiving the right of appeal without referring to Ivorian law but instead to the effectiveness of the parties consent to such waiver and argued that the UAA was silent at that time regarding the possibility of waiving a right of appeal. This demonstrates the tendency of courts to disregard OHADA provisions either out of hostility or because they lack the expertise in certain cases, which may lead to a conflict of both laws and jurisdictions. Nevertheless, recent case law demonstrates a different approach of the CCJA promoting OHADA provisions and the arbitral tribunal's jurisdiction.[483]

In terms of implementation regarding the interpretation of OHADA provisions, the domestic courts have exclusive jurisdiction. Thus, it is important that the domestic courts adopt a pro-arbitration approach so as not to interfere with the proceedings and inflict unnecessary

[478] See Tchantchou, H. "*La supranationalité judiciaire dans le cadre de l'OHADA : étude à la lumière du système des Communautés européennes*" (L'Harmattan, 2009) p. 205 ; Diédhiéou, P. 'L'article 10 du Traité OHADA : quelle portée abrogatoire et supranationale', (2007) 7 RDU, p. 265. ; Abarchi, D. 'La supranationalité de l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique', (2000) 37 RBD p. 7

[479] Reform of 2014 on General commercial law: each country can decide on whether to have a minimum amount for the creation of certain type of companies e.g SARL etc.

[480] Order n° 001/2001/EP

[481] *M. Delpech Gérard et Mme Delpech Joëlle c/ Sté SOTACI* CCJA n° 010/2003

[482] Ibid.

[483] *Hotel Eda Oba v. Xoelevator*, N. 094/2017

delays and expenses. In some cases, the community texts including the West African Economic and Monetary Union (hereinafter UEMOA) and Central African Economic and Monetary Community (hereinafter CEMAC) might come into conflict with OHADA texts, yet this would occur in rare cases as there are marginal issues that may only affect specific aspects that are not necessarily relevant.[484]

*The issue with the determination of the competent jurisdiction*

Meyer argues that domestic laws within the OHADA area remain silent on certain areas of arbitration[485] as the spread of OHADA law appears to be slow compared to Western countries and African common law countries. One of the reasons may be that as Etoundi states, the first obstacle encountered by the litigants in an arbitration procedure is the determination of the competent jurisdiction[486] for the setting aside of the arbitral awards. Indeed, Regarding the setting aside of arbitral awards and the grant of exequatur, arts. 25, 28, 30, and 32 of the UAA refer to the terms 'relevant authority' or 'competent jurisdiction', which remains an issue. This creates more concerns and uncertainties owing to the diversity of jurisdictions within the Member States. Thus, while in Côte d'Ivoire the competent jurisdiction is the Commercial Court, in another country relevant authority may be the Court of the first instance owing to the lack of institutions or infrastructures in some States. The determination of the competent jurisdiction is left to the discretion of the States, which is inconsistent with the OHADA Objectives of harmonization. In this respect, it is hoped that the legislator addresses this issue in a forthcoming reform and designs appropriate common rules in line with the African context instead of importing a system of law.

The issue regarding the competent jurisdiction to proceed with the control of procedure has still not been dealt with since the adoption of the UAA and the CCJA Arbitration Rules, while both texts aim to harmonize the disparate legal systems in the region. This silence can be explained by the fact that OHADA cannot interfere with this area of law which is exclusive to the domestic courts to determine the relevant authority to adjudicate. In this regard, provisions enacted before or following the UAA govern all procedural aspects of the arbitration proceedings provided they are consistent with the OHADA provisions.

[484] Both the CEMAC and UEMOA have established specific regulations for banks. In cases where a bank encounters financial difficulties and no longer complies with safety ratios and other requirements, it may be placed under judicial administration.
[485] Meyer, P. ''*L'acte uniforme de l'OHADA sur l'arbitrage*'' (Bruylant, 2002) p. 629
[486] See Onana Etoundi, F. 'Grandes tendances jurisprudentielles de la Cour Commune de Justice et d'Arbitrage', 39 RDUA p. 162

The Beninese court in a commendable decision[487] contributed to the development of jurisprudence on the issue, the Beninese court adjudicated a dispute involving the determination of the competent jurisdiction, specifically the Court of the first instance and the Court of Appeal. This decision, which can be commended for its insightful reasoning, addressed the question of authority allocation between these two courts. The court ruled in favor of the court of the first instance, invoking Article 25.4 of the Beninese legal framework. This provision states that in cases where a specific jurisdiction is not explicitly designated by law, the matter in question falls within the jurisdiction of the domestic courts. The court's decision was founded on the principle of procedural law, emphasizing the need to allocate authority in situations where a particular jurisdiction is not expressly stipulated. This landmark decision holds significant weight in the jurisprudential landscape as it helped clarify and provide guidance on the determination of competent jurisdiction in similar cases. By affirming the authority of the court of the first instance in the absence of explicit allocation, the decision not only resolved the specific dispute at hand but also contributed to the development of a more coherent and consistent approach in Beninese jurisprudence. The significance of this decision should not be underestimated, as it not only fills a void in existing case law but also serves as a valuable precedent for future cases involving similar jurisdictional issues. By establishing a clear and reasoned approach based on the applicable legal provisions, the court's decision offers a solid foundation for the consistent application of jurisdictional rules within the Beninese legal system. In an effort to address the existing legal gap within the OHADA framework, the OHADA legislator implemented the referral procedure, which requires each Member State to enact supplementary legislation to complement the uniform acts within their respective jurisdictions. This measure aims to provide a comprehensive framework for resolving various issues related to arbitration, encompassing matters such as the organization of proceedings, the recognition and enforcement of arbitral awards, and the setting aside of such awards. Alas, a very few countries including Cameroon, Senegal and Togo have adopted a text facilitating the identification of the competent judge for the setting aside of the arbitral awards.[488] It is worth highlighting that the limited number of countries that have enacted such provisions underscores the need for greater consistency and uniformity across the OHADA region. Encouraging other Member States to follow suit and adopt similar measures would contribute to a more robust and comprehensive legal framework for arbitration, enhancing the overall effectiveness and credibility of the OHADA system.

[487] CCJA, N. 15/2008
[488] The three countries have adopted permanent texts in this regard. Cameroon adopted its text in 2003.

Most domestic jurisdictions refer any question related to arbitration to the UAA or the CCJA Arbitration rules while community texts refer the question to domestic laws. It would be a huge progress for harmonization of the laws and procedures if the other Member States followed the initiatives of Cameroon, Senegal and Togo, pending a forthcoming reform.

### B. Potential conflicts of jurisdiction within the OHADA area

Conflicts of jurisdictions within the OHADA framework primarily manifest in cassation proceedings, wherein domestic courts are entrusted with the application of OHADA law under the oversight of the OHADA legal system. The OHADA law assumes the role of determining the validity of decisions and providing authoritative guidance to resolve jurisdictional conflicts. In order to mitigate such challenges, the OHADA legislator has implemented mechanisms to prevent their occurrence. Notably, exclusive jurisdiction is accorded to domestic courts for interpreting uniform acts and other OHADA texts. Nevertheless, during the course of interviews conducted for this study, a legal practitioner and arbitrator participant opined that certain disputes continue to be brought before national supreme courts despite the CCJA's exclusive jurisdiction. Under Article 18 of the OHADA Treaty, parties contesting a court's jurisdiction may refer the matter to the CCJA within two months of receiving the court's ruling. The CCJA possesses the authority to overturn such decisions. The interviewee indicated that while these cases were more prevalent during the early years of OHADA, their occurrence has diminished with greater caution exercised by legal professionals during the drafting process. This viewpoint suggests that despite the perception of persistent conflicts of jurisdictions, practical instances of such conflicts may be less prevalent. It is noteworthy to mention that prior to the implementation of the Uniform Act on Arbitration (UAA) and the CCJA Arbitration Rules, the absence of specific arbitration legislation in case law contributed to a certain degree of skepticism towards arbitration. It is essential to acknowledge the endeavors undertaken by the OHADA legislator to address conflicts of jurisdictions and establish a coherent arbitration framework. Nonetheless, sustained vigilance and adherence to meticulous drafting practices by legal practitioners are imperative to ensure appropriate allocation of disputes to the relevant jurisdiction and to uphold the exclusive authority of the CCJA in arbitration matters. By fostering increased awareness and comprehension of the OHADA arbitration regime among legal professionals, the risk of conflicts of jurisdictions can be minimized, thereby enhancing the overall effectiveness and efficiency

of the OHADA system in effectively resolving commercial disputes.[489] In terms of provisional measures, the domestic law was contrasted. For instance, while the Ivorian courts retained jurisdictions,[490] the Cameroonian courts tend to decline jurisdiction so as to order interim relief measures despite the existence of an arbitration agreement.[491] This could be explained by the fact that arbitration was still unknown notwithstanding the fact that the political context was not favourable to this new mechanism. Nevertheless, the implementation of the OHADA arbitration law prompted the domestic courts to be more favourable to arbitration. For instance, the courts were more inclined to decline jurisdiction when required.[492] In contrast, in a few cases, the CCJA condemned the domestic judges who exceeded jurisdiction while the arbitral tribunal was empowered to.[493]

Arts 25 and 27 of the CCJA Rules provide that the only way to contradict an arbitral award is to set aside the arbitral award through an application brought before the relevant jurisdiction of the State where the arbitral award was issued, within one month. In the early years of OHADA law, cases law considered that shall be deemed unwritten any clause waiving any challenge of arbitral awards which was reversed in *Delpech v. Sotaci*[494] where the CCJA held that challenging an arbitral award was available under the earlier version of the UAA. In this regard, the CCJA held in a decision that:

"The waiver of any remedy being a mere obligation for each party to do something, its violation does not affect the admissibility of the action for annulment exercised by one of the parties but opens right to damages."

Hence, it is submitted through this decision that challenging an arbitral award was also admissible under the previous UAA notwithstanding that the previous case law did not follow the reasonings of the texts. Conditions to set aside arbitral awards are contained in Art. 26 of the UAA and include the cases as follows:

- the arbitral tribunal has ruled without an arbitration agreement or based on an agreement that is void or expired;
- the arbitral tribunal was irregularly composed, or the sole arbitrator was irregularly appointed;

[489] CA Bamako, 30 August 1978
[490] *SOCGIEX-CI v. PREMOTO v. BICICI* n. 317/97 [1997]
[491] CA Douala, SOCIAA v. BAD [2000]
[492] *Illoul Christian Antoine v. Rongiconi Charles Philippe* Ohadata J- 12-212. In this case, the ruling was made following the arbitral award.
[493] See *Liquidation Société CIM Sahel Energie SA v. Les ciments Sahel dite CDS SA,* N°47/2015
[494] *Delpech v. Sotaci* No 010/2003

- the arbitral tribunal ruled without conforming to the mandate with which it has been entrusted;
- the principle of due process has not been respected;
- the arbitral award is contrary to international public policy;
- the award fails to state the reasons on which it is based."

This provision suggests that under the UAA, an arbitral award may only be set aside under the above grounds, confirmed by the CCJA which held in *Constructions metalliques ivoiriennes v. Fraternité Saint Jean Eudes d'Abatta*[495] that domestic laws have no jurisdiction to implement their own applicable rules with regard to the setting aside of arbitral awards other than the ones provided by the OHADA legislator under the UAA. In this regard, the OHADA legislator emphasises the inadmissibility of these decisions rendered based on domestic rules. The rationale is that the UAA repeals all domestic provisions contrary to the provisions pursuant to Art. 10 of the OHADA Treaty which states that the uniform acts are automatically mandatory and applicable within the OHADA area, superseding the domestic laws on arbitration. In another decision, the CCJA reaffirmed that the UAA has precedence over domestic laws, hence the Court of Appeal's decision to set aside an arbitral award based on the non-compliance of a time limit to issue the award was neither part of the grounds prescribed under Art. 26 of the UAA nor a provision of public policy provided by the same text. To this respect, the Court of Appeal had not violated arts. 11 and 26 of the UAA on the grounds that the annulment of the arbitration agreement before the arbitral tribunal had no legal basis, so shall be dismissed instead.[496]

Furthermore, it is submitted that in 2021, in view of improving its laws, the OHADA selected a team of experts in a view to draft a proposal regarding a new Uniform Act of Private law. This draft will include proposals on conflict of laws, conflicts of jurisdictions and the circulation of judicial and extrajudicial documents. This uniform act would be the tenth OHADA Act and will be binding and applicable to the whole Member States.

### C. Judicial intervention or judicial interference?

Arbitration as a private justice is broadly perceived as an alternative mechanism for dispute settlement, although as Bostanji argues it may sometimes be considered as a method

[495] N. 062/2012
[496] *George Forrest Belgium v. Les Ciments du Sahel*, N. 094/2020

competing with state justice.[497] Yet, presented as lacking *imperium,* the arbitrator would require assistance from the domestic judge so as to successfully conduct the arbitration proceedings.[498] This demonstrates that the effectiveness of the procedure relies also on the cooperation and control of the domestic court. As arbitration derives from a non-judicial procedure, Oumar Bah argues in this regard that domestic courts in the OHADA region essentially adopt a legislative approach which aims to harmonize arbitration law and contribute to the improvement of the business climate.[499] The author confirms that the domestic judge intervenes only to ensure that the arbitral award claimed by one of the parties is in accordance with the fundamental principles of a good justice promoting the adversarial principle but also equal treatment of both parties. This exception implies ruling on emergency matters and ordering interim measures but not on the merits, as pursuant to Art. 13 of the UAA domestic courts have no jurisdiction to rule on the merits. This exception was confirmed in *United Bank for Africa v. Beneficial Life Insurance*[500] where the CCJA overturned the Court of Appeal's interim relief on the grounds that the petition required a substantive examination of the validity of the agreement made by both parties, which is not within the competence of the interim relief judge, hence should decline jurisdiction.

Domestic jurisdictions and arbitration have for long been conflicting owing to the expansion of arbitration in the resolution of commercial disputes worldwide at the expense of judicial justice on one hand, and the interference of domestic courts in the arbitration proceedings on the other hand. This mistrust towards private justice has shifted towards cooperation mostly due to the globalisation of the world economy and greater awareness of arbitration.[501] It is noted that 80% of international disputes, especially international investments were subject to arbitration.[502] As the effectiveness of arbitration relies on the existence of a support aiming to thwart potential obstructions likely to obstruct the proceeding the domestic court appears as a key character for the good conduct of the arbitration proceedings. This includes granting exequatur and applications to set aside arbitral awards.[503] While it is true that the parties and the arbitral tribunal may encounter issues in the event of judicial interference, it is submitted that the texts by conferring courts'

[497] Bostanji, S.; Horchani F.; Manciaux, S. ''*Le juge et l'arbitre*'' (Pedone, 2014) p.28
[498] Bühler, M. ''*Le défi de la complémentarité entre le juge et l'arbitre dans l'espace OHADA''* (Penant, 2018) p.98
[499] Bah, O. *"L'efficacité de l'arbitrage OHADA : Le rôle du juge étatique''* (Bruylant, 2020) p.123
[500] 018/2015
[501] Amougou A. ''*Le Cameroun et le droit international*'' (Pedone, 2014) p.34
[502] Racine, J-B. 'Elements d'une sociologie de l'arbitrage : Actes de la journée d'étude du Groupe Sociologiz de l'arbitrage du comité français de l'arbitrage' (2012) RA p. 86
[503] See art. 25 of the UAA and 29 of the CCJA Rules

powers exercisable to support arbitration provide that the intervention shall comply with the authority granted to the arbitral tribunal.[504] The principle of judicial non-intervention prohibits judicial interference in cases where the arbitral tribunal is empowered to. This principle has for years received less attention from scholars since few academic papers discuss the issue in the OHADA context. Yet, authors such as Delvolvé and Rachdi discussed the issue in favour of the court intervention.[505] Indeed, notwithstanding the place granted to judicial intervention in the arbitration proceedings, Delvolvé argues that arbitration is too important for it to be left solely under the competence of arbitrators. Boularbah indicates that as a "good Samaritan," the domestic judge is supportive of arbitration when issues arise.[506] This can be explained by the origin of the term "juge d'appui" or support judge[507] acting in support of the arbitration process originally deriving from Swiss law in year 587, then emerging in French case law and doctrine in year 588.[508]

Considered the "guardian angel" of arbitration,[509] the mission of court intervention is to assist parties and the arbitral tribunal throughout the arbitral process. As an illustration, it was held by the French court that under penalty of recusal, the arbitral tribunal must reveal any fact likely to raise doubts in the minds of the parties regarding its qualities and expertise which are the essence of the judicial function.[510] This implies that the independence and impartiality of the arbitral tribunal are key foundations of the arbitral function and failure to meet these requirements may lead to the recusal of the arbitral tribunal.

Art. 13 of the UAA defines the scope of jurisdiction of the domestic court as follows:

> "When a dispute, for which an arbitral tribunal is seized pursuant to an arbitration agreement is brought before a domestic court, the latter must, if one of the parties so requests, decline jurisdiction.
>
> Where the arbitral tribunal is not yet seized, or if no arbitral request has been filed, the domestic court shall also declare itself incompetent, unless the arbitration agreement is manifestly null or manifestly inapplicable to the case. In that case, the competent jurisdiction shall issue a final decision on its jurisdiction within a maximum of fifteen (15) days. Its

[504] Bah, O. ''*Efficacité de l'arbitrage OHADA*'' (Bruylant, 2020) p. 132
[505] Delvolvé, J. 'L'intervention du juge dans le décret du 14 Mai 1980 relatif à l'arbitrage' (1980) RA p. 680
[506] Boularbah, H. 'Le juge étatique : le bon samaritain de l'arbitrage' (Bruylant, 2013) p.36
[507] For discussion, see Chapter 4.
[508] Bah, O. 'Efficacité de l'arbitrage OHADA' (Bruylant, 2020) p.93
[509] Ibid.
[510] Cass. 1ère civ. 16 march 1999 n. 96-12.748

> decision may only be appealed before the Common Court of Justice and Arbitration in accordance with its Rules of Procedure.
>
> In any case, the competent jurisdiction may not on its own motion declare itself incompetent.
>
> However, the existence of an arbitration agreement shall not preclude a court at the request of a party and in the event of a recognized and reasoned emergency, to issue interim relief measures so long as such measures do not imply an examination of the merits of the case, for which only the arbitral tribunal has jurisdiction."

The article suggests that domestic courts must not interfere but instead cooperate with the arbitral tribunals. By contrast, art. 10.4 s.1 of the CCJA Rules does not indicate the domestic judge's jurisdiction, but states that: "*The arbitral tribunal alone is competent to rule on its own jurisdiction and on the admissibility of the request for arbitration.*" This provision, based on art. 8.4 of the ICC Arbitration Rules illustrates the competence-competence principle constantly reaffirmed by the CCJA in several cases law, including *Ousseini v. Délégation de l'Union Européenne au Niger*[511]where the CCJA dismissed the appeal and held that the arbitral tribunal has exclusive jurisdiction to assess the validity of the arbitration clause. Hence, the Court of Appeal must decline jurisdiction with regard to the autonomous character of the arbitration clause, although this autonomous character of the arbitration clause is not absolute. In case of any objection or incompetence raised by one of the parties leading to an action for annulment, art. 26 of the CCJA Arbitration Rules provides that the competent court may assess the arbitral tribunal's jurisdiction, confirmed in *Wanmo v. Nguessi*[512] where the CCJA held that the court was entitled to ascertain the arbitral tribunal's rationale with regard to the arbitration clause and assess whether it rightfully retained jurisdiction. Yet, it is submitted that prior to the incompetence and objection raised by one of the parties, these claims must have been raised before the arbitral tribunal. Consequently, the arbitral tribunal shall first rule on its own jurisdiction.

Arbitral awards are under international or transnational law (OHADA Treaty) and the law deriving from it (CCJA Arbitration rules). To this view, domestic jurisdictions cannot invoke their law in order to set aside an arbitral award or to request an exequatur as illustrated in *SCI Plaza-Center c/ Société de Coordination et d'Ordonnancement Afrique de l'Ouest*.[513]

[511] N. 152/2018
[512] N. 151/2017
[513] CA Abidjan, n° 741, Ohadata J-08-259 [2004]

Indeed, the will of the parties excludes domestic jurisdictions. They select the arbitral tribunal but in case of issues during the proceedings, the enforcement of the arbitral awards or post-enforcement, the arbitral tribunal not having enough *imperium* shall rely on the domestic judge in order for the jurisdiction to proceed with control regarding the proceedings, the exequatur or the setting aside of an arbitral award. Hence, the action of the domestic judge may to some extent contribute to the effectiveness of OHADA law, specifically arbitration. Nonetheless, it is noted that as there is no appeal under OHADA law, the supervising judge shall not proceed with a rehearing of the case but shall only control whether the grounds for setting aside the arbitral award are justified. Otherwise, the request shall be denied.

Whether it is a matter of challenging an arbitral award or requesting exequatur, the CCJA procedure attempts to provide celerity so as to reduce judicial intervention, prevent the risk of a dilatory procedure and the abuse of remedies affecting the enforcement of arbitral awards.[514] Enforcing an arbitral award in the OHADA area requires the obtention of the recognition of the arbitral award delivered by the competent jurisdiction where the decision was issued through the production of the original award and the arbitration agreement or authenticated copies,[515] as well as a sworn translation in French if applicable.[516] On the other hand, an exequatur triggers the enforcement process[517] and is issued by the competent jurisdiction of the Member state. The condition of issue is subject to a request before the president of the CCJA who has the discretion to approve and grant or refuse the request through an order.[518] In this regard, the CCJA Arbitration rules provide recourses against the arbitral award,[519] including recourses through third-party opposition or actions for annulment within the two months following notification of the arbitral award.[520]

Domestic courts may intervene in support of the arbitration proceedings on limited circumstances, although parties may consult the relevant jurisdictions in case of issues encountered including the constitution of the arbitral tribunal,[521] appointment of an

[514] Bredin, J. 'La paralysie des sentences arbitrales étrangères par l'abus des voies de recours' JDI (1963), p. 638 ; Lecuyer, H. 'Exercice abusif des recours contre les sentences arbitrales : de quelques manifestations de l'ire judiciaire' (2006) RA p. 537
[515] Art. 30. In Côte d'Ivoire, the competent jurisdiction is the president of the High court Court of First instance)
[516] Art. 31 of the UAA
[517] Arts. 30-34 of the UAA
[518] Art. 30.2.1 CCJA Arbitration rules
[519] Art. 29, art. 32 and art. 33
[520] Art. 29.3 of the CCJA Rules
[521] Arts. 5 and 8 of the UAA

arbitrator to rule on challenges against arbitrators,[522] the extension of the term in case no indication was made,[523] order of interim measures when necessary or if it would be performed outside the OHADA area when there should be no review of the case on the merits[524] to assist the arbitral tribunal at its request.[525] The Common Court of Justice and Arbitration confirmed its commitment to protecting arbitration agreements in cases where one of the parties requests that the court intervenes so as to avail themselves of the binding nature of the rules of *res litigiosa*.[526] The landmark case *Carlos Domingos Gomes contre B.A.O*[527] illustrates this non-interventionist approach adopted by the Supreme Court. In this case, the CCJA had to consider public policy provisions related to ordinary general meetings and the dismissal of company executives. After reiterating the terms of the arbitration agreement, the CCJA held that in presence of an arbitration clause, the domestic judge shall decline jurisdiction. This decision confirms the effectiveness of the arbitration agreements within the OHADA area in accordance with international jurisprudence[528] and comparative law.[529] It also demonstrates that the CCJA remains strict when it comes to the competence-competence principle.

In *F.K.A c/ H.A.M*,[530] the Court held that the parties failed to decline the domestic court's jurisdiction, and the appellant failed to comply with art. 13 of the UAA. The court in the same decision provided further clarification on disputes brought before an arbitral tribunal by virtue of an arbitration clause, in the case where the plaintiff seizes the domestic jurisdiction regardless of the clause and the defendant does not raise the court's lack of jurisdiction. In this regard, it is deemed that both parties have supposedly waived their rights to rely upon an arbitral tribunal, and consequently, the lack of jurisdiction raised as a new plea shall be declared inadmissible.[531] Within this context, Pr. Emmanuel Gaillard argues that what demonstrates the maturity of legislation is compliance with the competence-competence principle specifically its negative effect[532] also enshrined in Art. 13 of the UAA. Thus, compliance with this principle is the gauge of the viability of the

[522] Art. 7 of the UAA
[523] Art. 12 of the UAA
[524] See art. 13
[525] See art. 14
[526] *Carlos Domingo GOMES c/ Banque de l'Afrique Occidentale dite BAO* CCJA n° 035/2010
[527] Ibid.
[528] Rozas, F. 'Le rôle des juridictions étatiques devant l'arbitrage commercial international' (2001) 290 RCADI
[529] Poudret, J.; Besson, S. ''*Droit comparé de l'arbitrage international*'' (Bruylant, 2022)
[530] *F.K.A c/ H.A.M* n° 4/2006
[531] *Société Navale Guinéenne dite SNG S.A. c/ Société Africaine de Commerce dite SAFRICOM* CCJA N° 047/2010
[532] See *Atlantique Telecom S.A. c/ Planor Afrique S.A* N° 041/2010

arbitration system.[533] Along the same lines, the UAA in its art. 13 enshrines the negative effect of the competence-competence principle.

The previous version of the UAA raised controversy following its implementation, owing to the fact that some domestic courts wrongfully retained jurisdiction despite an existing arbitration agreement. This issue is now addressed under Art. 13 which clarifies the scope of the competence-competence principle under OHADA law. The article enshrines the arbitral tribunal's jurisdiction over the court to decide on the case and issue arbitral awards. This implies that the domestic court shall decline jurisdiction following acknowledgment of the existence of an arbitration agreement as the arbitral tribunal has chronological priority to rule on its own jurisdiction.

The main effect of this principle is that it allows the arbitral tribunal a priority review and the domestic courts may intervene only in cases where an arbitral tribunal is challenged. In this regard, the first three decisions of the CCJA confirmed an important evolution and maturity of OHADA law. The three cases are: *Macaci v. Jean Pierre,*[534] *Sow Yérim Abib c/ Ibrahim Souleymane AKA et Koffi Sahouot Cédric* [535] and *Dam Sarr c/ Mutuelle d'Assurance des Taxis Compteurs d'Abidjan dite MATCA*.[536]

In *Macaci v. Jean Pierre*, the CCJA was to consider a ruling of the Abidjan Court of Appeal which found that regarding the settlement of disputes arising from a contract, the relevant jurisdiction shall be distinct from the one dealing with disputes covering the appendix of the contract. This reasoning was rejected on the basis of the arbitration agreement included in the contract and its indivisibility with the appendix. The dispute arose from a framework convention between the concerned parties that included the arbitration clause, and the implementation of the contract was governed by a subsequent agreement. The Ivorian jurisdiction retained jurisdiction, and the CCJA quashed this decision on the ground that the supplemental contract being closely linked to the main contract, the competence-competence applies. Hence, the arbitral tribunal shall be the one entitled to verify whether the contract is valid or not.

Along the same lines, it is submitted that the arbitral tribunal has jurisdiction when the dispute is related to both the validity and the implementation of the main contract, hence the domestic court shall decline jurisdiction as it is not a *prima facie* nullity. In this regard

[533] Gaillard, E. 'La jurisprudence de la Cour de cassation en matière d'arbitrage international' (2000) 3 ASA 47 p.85
[534] *Société de manufacture de Côte d'Ivoire dite MACACI c/ May Jean Pierre* CCJA N° 012/2005
[535] *Sow Yérim Abib c/ Ibrahim Souleymane AKA et Koffi Sahouot Cédric* CCJA n° 020/2008
[536] *Dam Sarr c/ Mutuelle d'Assurance des Taxis Compteurs d'Abidjan dite MATCA* CCJA n° 043/2008

in *Sow Yerim v/ Souleymane Ibrahim K*[537] the Court considered that since the dispute concerned the validity of the contract and not its implementation, the arbitration clause shall not apply, as well as both the negative effect of the principle and the autonomy of the arbitration clause towards the main contract, since the autonomy of the arbitration clause implies that in the case where the contract is void, the arbitration clause shall not be affected, a helpful reminder of the autonomy of the arbitration clause. The appeal brought by the party was based on the ground that the lower jurisdictions had separated the judicial authority by drawing a distinction between disputes related to the validity of the share transfer convention which included the arbitration agreement and those related to the execution of the transfer of shares. The CCJA concluded that there was no need to examine the essence of the dispute as the autonomy principle of the arbitration agreement with respect to the main contract imposes upon the arbitral tribunal, subject to challenges, to exercise its jurisdiction on every element of the dispute submitted, either regarding the existence, the validity or the implementation of the agreement.

This *prima facie* nullity of the arbitration clause requires to be assessed by the courts in order to declare an arbitration clause void, and the CCJA ruled on a restrictive approach of the control of arbitration clause in *Dam Sarr v. MATCA*[538] where the Court rejected the position of the lower courts as they had not substantiated their arguments that the arbitration clause was void, given that the irregularity shall be obvious. The Ivorian courts had retained their authority invoking that an undertaking to arbitrate was invalid. Aligned with the French case law, the CCJA quashed the decision of the Court of Appeal on the ground that the latter has ruled without substantiating to what extent the arbitration clause included in the transactional protocol is void, missing to provide a legal ground to its ruling. To this respect, the CCJA reminded that the courts shall process a brief examination. Along the same lines and in a similar approach, the CCJA in *Canac Airways v. Société Transgray*[539] rightfully rejected the Malian court's reasoning that given the nullity of the contract, the main contract shall also be void and affect the arbitration clause, a decision contrary to art. 4.1 of the UAA.

The autonomy of the arbitration clause implies that it is considered to be separate from the underlying contract of which it forms part, the consequence being that it shall continue to operate regardless of whether the contract is terminated or frustrated. This principle has

[537] *Sow Yérim Abib c/ Ibrahim Souleymane AKA et Koffi Sahouot Cédric* CCJA n° 020/2008
[538] *Dam Sarr c/ Mutuelle d'Assurance des Taxis Compteurs d'Abidjan dite MATCA* n° 043/2008
[539] *Société Transrail c/ Société CANAC SENEGAL S.A. et Société CANAC RAILWAYS SERVICES INC* N° 040/2020

significant importance in commercial contracts in the sense that if one party to the contract invokes a breach of contract, the underlying contract shall not be terminated for all purposes. The arbitration clause survives any frustration, consequently, the parties shall rely on arbitration to resolve their dispute.

OHADA case law has for twenty years attempted to provide further clarification when it comes to the determination of the interim relief courts. The negative effect of the arbitration agreement prevents domestic jurisdictions from deciding on disputes within their scope while the positive effect grants jurisdiction to the arbitral tribunal. Nonetheless, despite the differences and intricacies of the doctrine, it is noted that nothing prevents the court from granting interim relief measures as the scope of the court's jurisdiction remains controversial without regard to Art. 13 on interim relief measures. Hence the court in charge of such measures may only intervene on temporary measures which shall have no effect on the substance of the case. For a better understanding of the issue of jurisdiction discussed, the next section discusses judicial intervention and interim measures prior to the adoption of OHADA texts in order to better grasp the role of domestic courts under the new OHADA provisions.[540]

*Jurisdiction of the interim relief court*

Case law helped clarify the temporary character of domestic courts' decisions. In *SOCIAA v. BAD*[541] The Court affirmed the authority of domestic courts to grant interim relief even in the presence of an arbitration agreement. In a specific case, the Cameroonian Court of Appeal noted that the applicant failed to bring the case within the one-month timeframe stipulated by the court order that authorized the seizure of the vessel, as stated in Article 61(1) of the UPSRVE. Consequently, the court order was deemed to be withdrawn, highlighting the temporary nature of interim relief, as recognized by the Court. However, it appears that the competent judge overlooked the provisions of Article 13(4) of the UAA, which states the following:

"However, the existence of an arbitration agreement shall not preclude a state court, at the request of a party and in the event of a recognized and reasoned emergency, to order

[540] Amoussou-Guénou, R. 'L'état du droit de l'arbitrage interne et international avant l'adoption des instruments de l'OHADA' (2000) Ohadata D-08-34
[541] CA Douala 15th May [2000]

provisional or conservatory measures so long as such measures do not imply an examination of the merits of the case, for which only the arbitral tribunal is competent."

Overall, case law indicates that the competent jurisdiction can intervene in two specific scenarios: emergency situations and interim reliefs. In essence, the measures granted by the court should be of a temporary nature, aimed at protecting against the occurrence of a fact or situation that could lead to irreversible and harmful consequences. However, in practice, many domestic jurisdictions diverge from this principle and tend to issue decisions that directly impact the substance of the dispute. It is in response to this trend that the CCJA emphasizes that the resolution of substantive disputes falls exclusively within the jurisdiction of the arbitral tribunal.

*Emergency measures with no effect on the substance of the dispute*

A thorough examination of case law reveals that judicial intervention in arbitration proceedings continues to be a recurring issue, leading to debates and divergent viewpoints among scholars. This matter persists across jurisdictions, encompassing both developing and developed countries. Notably, countries such as the United Kingdom and France, renowned for their rich arbitration traditions, are not exempt from this challenge.[542] Although art. 13(4) of the UAA appears clear and explicit, some domestic jurisdictions attempt to extend their jurisdictions to any dispute provided that the case has not yet been brought before the arbitral tribunal, which demonstrates a reading or interpretation that is fragmented and subjective as it could be understood through this reasoning that art. 13 subordinates the court's jurisdiction to the non-examination of the substance of the case. The emergency of the case is not a strong argument as it should not interfere with the jurisdiction of the arbitral tribunal. In this regard, the case *Société United Bank for Africa (UBA) v. Benéficial Life Insurance (BLI)*[543] ends any controversy related to the *rationae materiae* jurisdiction of the interim relief judges. It was held that the court's jurisdiction is not automatic in cases where the dispute has not yet been submitted to the arbitral tribunal. Furthermore, the domestic jurisdiction should not delve into the substance of the dispute in order to intervene. If the domestic court does involve itself in the substance of the dispute, it fails to meet the requirements for intervention, as it lacks the authority to issue interim relief measures regardless of the jurisdiction of the arbitral tribunal. The same

[542] *Camship Cameroun v. Bomaco* Cass. Com. No 95-16192 [1997]
[543] 018/2015

principle applies when the domestic court terminates a contract based on a cancellation clause. In this context, the CCJA (Common Court of Justice and Arbitration) has taken a commendable approach by refuting the misconception that the domestic judge possesses the competence to adjudicate a claim that is not challenged. In this context, the CCJA in *Liquidation CIM Sahel Energie SA v. Les Ciments Sahel dite CDS SA*[544] highlights a significant aspect pertaining to the termination of contracts not being categorized as interim relief. Consequently, the arbitration agreement remains intact and enforceable, underscoring the CCJA's insistence on the negative implications associated with disregarding the competence-competence principle. This decision serves as a demonstration of the CCJA's commitment to upholding the priority and efficacy of the arbitral tribunal's jurisdiction. It becomes evident through this case that domestic courts often exhibit a tendency to assert their jurisdiction in issuing interim relief measures, thereby exceeding their prescribed authority.

Overall, jurisprudence remains favourable to the judicial intervention in arbitration, the main issue being the tendency of the domestic courts to exceed their jurisdictions when it comes to issuing interim relief measures on the substance of the dispute. Nonetheless, the CCJA, acting as a guardian of arbitration integrity, ensures stringent sanctions against any instances of such jurisdictional overreach. The CCJA Arbitration rules provide that the court is competent for the actions for annulment and exequatur of the arbitral awards.[545] As the domestic court's jurisdiction covers various aspects of the proceedings, it is difficult to assess twenty years of case law on this matter. Although the UAA defines the scope of the court's jurisdiction, practice demonstrates that its implementation raises controversy. Nevertheless, case law provides further clarification regarding the jurisdiction of the court assisting with emergency matters. It should be recalled that the interim relief court shall only intervene for interim measures and not on the substance of the dispute. Previous case law before the implementation of the UAA and CCJA rules provisions was not favourable to such measures. The view was contrasted in the sense that the Ivorian courts retained jurisdictions[546] while by contrast, Cameroonian judges declined jurisdiction where there was an arbitration clause.[547] Yet, the development of OHADA arbitration has had

[544] *CIM Sahel Energy SA v. Les Ciments Sahel dite CDS SA* N°47/2015
[545] See arts. 25 and 29 of the CCJA Rules
[546] See *SOCGIEX-CI et PREMOTO v. BICICI* CCJA n° 137/2001
[547] See *Société Allation Property INC v. Société Sirpi Alusteel Construction & Société ELF SEREPCA* No 39/REF [1999]

tremendous benefits on OHADA law and consequently, domestic courts adopted more consistent positions.

Cases law demonstrates that the interference from the interim judge relief in the arbitration proceedings remains a question that has given rise to conflicting views among scholars as well as practitioners, although the CCJA drew the line between their competence and their limits in arbitration proceedings. Judicial intervention shall then be contrasted when assessing the courts' authorities in arbitral proceedings. It is hoped that over the years, the domestic courts learn from it and act accordingly.

The subsequent section will delve into an examination of the consequences of the 2017 reform, which has brought about significant changes and enhancements to OHADA arbitration. However, despite these advancements, certain legal gaps persist, indicating that the OHADA legislator may have overlooked certain aspects of the law. Furthermore, some amendments appear incomplete, resulting in legal voids that necessitate either further reform or the development of jurisprudence to complement the existing legal framework.

### 5.2.2. The reform of 2017 on OHADA arbitration framework: Innovations, improvements, and gaps

In the quest for modernisation and securing rights but most important promote arbitration through speed, transparent and effective proceedings, specifically on the 11th of March 1999, the UAA and the CCJA Rules came into effect, thus laying the foundation for OHADA Arbitration. This framework entails a dual system, comprising general applicable rules governed by the UAA and the CCJA Rules, which emanate from a supranational Court functioning both as an institutional arbitration body under Section V of the OHADA Treaty for the appointment of arbitrators, as well as a judicial court responsible for approving and reviewing arbitral awards. Consequently, parties have the choice to opt for arbitration under either of these two distinct regimes.

OHADA operates under a regime of uniform laws, which, upon adoption, automatically applies in all member states. The CCJA, serving as the Supreme Court, holds ultimate jurisdiction over all matters relating to OHADA Uniform Acts. By adopting the UAA and CCJA Arbitration Rules, the legislator seeks to fulfill the commitment to implementing

solutions that provide reassurance to foreign investors. It is within this context, and with the intention of preventing investors from encountering the sluggishness of the judicial system, that the OHADA legislator has institutionalized arbitration as a crucial alternative dispute resolution mechanism. Consequently, the organic and legal instruments necessary for investors are made available, allowing for the inclusion of an arbitration clause in contracts and affording users the freedom and ease to request and select a judge *ex ante*. Six years following the signing of the Treaty, specifically on the 11th of March 1999, the UAA and the CCJA Rules came into effect, thus laying the foundation for OHADA Arbitration. This framework entails a dual system, comprising generally applicable rules governed by the UAA and the CCJA Rules, which emanate from a supranational Court functioning both as an institutional arbitration body under Section V of the OHADA Treaty for the appointment of arbitrators, as well as a judicial court responsible for approving and reviewing arbitral awards. Consequently, parties have the choice to opt for arbitration under either of these two distinct regimes.

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Notwithstanding the growing interest for arbitration in Sub-Saharan Africa owing to the influx of investors in oil and gas or in the mining business across the continent, most arbitrations are not conducted under OHADA arbitration framework. This can be explained by the unreliability vitiating the regime with regard to the arbitration seats, the enforcement process or the reliability of the judicial courts. Furthermore, it is noted that the provisions contained important flaws likely to undermine the enforcement proceedings and consequently prevent the supranational organisation from achieving its objectives of harmonization and economic integration in Africa. In this regard, concerns arose with regard to the legal and judicial insecurity prevailing within the region. With the aim to position OHADA as a reliable legal system with competent institutions and align with the

growth of foreign investments, the Council of Ministers with the revision of both texts so as to strengthen the existing texts. The reform mainly operates changes on arbitrators' standard of impartiality, the constitution of the arbitral tribunal, time-limit regarding the exequatur request, and the time-limit regarding the setting aside of arbitral awards.

The reform undertaken by the OHADA legislator serves several key objectives. Firstly, it aims to facilitate an increase in foreign investments by creating an environment conducive to investment. This includes the promotion of alternative dispute resolution mechanisms, such as mediation, which has been established through a separate uniform act. Additionally, the reform seeks to harmonize the arbitration laws of OHADA member states, thereby enhancing the consistency and coherence of the arbitration system within the OHADA region. Moreover, the reform endeavors to modernize the arbitration system by aligning it with international standards. This involves endowing the CCJA with a dual role as both an arbitration center and a judicial court center. By aligning its operations with international norms, the CCJA aims to become a preeminent arbitration center in Africa, attracting both regional and international parties. This, in turn, would promote the adoption of OHADA arbitration rules, further appealing to foreign investors.

The CCJA has been entrusted with the responsibility of overseeing arbitration proceedings and conducting judicial review with regard to the annulment and enforcement of arbitral awards rendered under its auspices. This comprehensive mandate enables the CCJA to effectively govern the arbitration process within the OHADA framework, ensuring the reliability and enforceability of arbitral awards.[548] Thus, the OHADA legislator through the UAA and the CCJA Arbitration rules kept the promises illustrated under the OHADA Treaty to set up a method for dispute resolution aiming at reassuring investors. Prior to the establishment of OHADA, case law exhibited a general lack of support for arbitration, [549] with courts often expressing skepticism towards the inherent autonomy of the arbitral process.[550] The introduction of the Uniform Act on Arbitration (UAA) and the Arbitration Rules raised concerns and uncertainties regarding their practical application. Furthermore,

[548] See Moudoudou, P. 'Réflexions sur la Cour Commune de Justice et d'Arbitrage de l'OHADA', *Revue internationale de droit africain EDJA* (2005) Ohadata D-14-14.
[549] Cour Suprême CI Ch. judiciaire 1986; CA Bouaké, 1987 *Talal Massih c/ Omais* ; Cour Suprême CI 1989 ; *Talal Massih c/ Omais*, *Rev. arb*. 1989-3, p. 530, note L. Idot.
[550] M. Akakpo, *La protection de la partie faible dans l'arbitrage OHADA*, préface J.-B. Racine, L'Harmattan, 2018, n° 59.

scholars[551] held reservations regarding the CCJA's capacity to effectively fulfill its dual role with independent competence. [552]

This section assesses the practical effectiveness of the revised texts based on recent developments. Sub-Saharan Africa remains favourable to arbitration mostly due to its cultural heritage but as Meyer argues, still it is very little used.[553] Yet, the relevance of a rule is effectively assessed in the light of its implementation and enforcement. Thus, In order to comprehensively evaluate the implications and prospects of OHADA law, a thorough analysis of its historical, current, and future aspects is necessary. The forthcoming sections will explore the theoretical and practical efficacy of OHADA arbitral awards within the framework of its established rules. Nonetheless, it is worth noting that unlike Western jurisdictions OHADA has very low available cases law, doctrine and academic papers for reference and analysis.

### A. The revised Uniform Act on Arbitration of 2017: theoretical and practical effectiveness

A prominent aspect of the OHADA reform is the emphasis placed on arbitration as a highly effective mechanism for preventing judicial insecurity.[554] The revised texts, including the UAA and the CCJA Rules, aim to strengthen investor confidence and enhance the overall business climate within the region. The necessity for reform arose from the inadequacy and incompleteness of domestic laws in addressing arbitration-related issues. Through the UAA, OHADA Member States strive to establish a more transparent and stable legal framework, thereby positioning the UAA as a catalyst for fostering a competitive legal environment.

*Theoretical effectiveness of arbitral awards under the UAA*

Several provisions within the UAA contribute to the theoretical effectiveness of arbitral awards. For instance, the UAA sets forth limitations on challenges to arbitral awards. Such challenges automatically suspend the enforcement of the award and introduce delays in the proceedings. Additionally, the UAA introduces more favorable requirements for the

[551] Fouchard, P. « Le système d'arbitrage de l'Ohada : le démarrage », PA (2004), n° 205, n° 15; Ph. Leboulanger, P. '*L'arbitrage et l'harmonisation du droit des affaires en Afrique*', (RA, 1999)
[552] See Kam G. ; Ngwanza, A. 'La double competence de l'arbitrage CCJA à l'épreuve de la pratique'
[553] Meyer, P. ''*L'acte uniforme de l'OHADA sur l'arbitrage*'' (RDAI, 1999) p.23
[554] Albright, J 'Commercial arbitration in Africa: developments and challenges' (2019) 5(1) DEFA p.86

recognition and enforcement of arbitral awards, including the concept of "silence-exequatur," which will be further examined in the subsequent section. These provisions collectively aim to enhance the efficiency and enforceability of arbitral awards within the OHADA jurisdiction.

*Restriction to challenge arbitral awards*

Within the OHADA region, it is important to note that there is no provision for appeal or opposition against arbitral awards or decisions granting exequatur. However, it is possible to challenge the enforcement of arbitral awards, albeit under strict conditions, before the CCJA. The number of applications allowed for such challenges is limited to one, and they can only be made based on the grounds specified in Article 26 of the CCJA Rules.

It is worth mentioning that the previous version of the UAA, dated 1999, included similar criteria for challenging arbitral awards. The main difference lies in the recent amendments to the last two criteria. Previously, section e stated that a challenge could be made if "the arbitral tribunal violated the Member States' international public policy," and section f stated that a challenge could be made if "the arbitral award lacks sufficient reasoning." These amendments reflect a refinement and clarification of the grounds for challenging arbitral awards within the OHADA framework.[555] It is noted that these provisions are similar to the wording used by the French civil code of procedure in art. 1492.

Only two criteria differentiate the French Civil Code of Procedure from the UAA in this context. The first distinction pertains to the initial ground, which stipulates that an arbitral award may be annulled if the arbitral tribunal has either declined jurisdiction or upheld its jurisdiction.[556] The second difference concerns the final criterion, which involves the addition of the ground that the award was not made by a majority. Both the French Civil Code of Procedure and the UAA comply with the grounds for refusing enforcement of arbitral awards as set out in the provisions of the New York Convention. While many of the grounds are similar, including violations of due process or the public policy exception, there are instances where the provisions differ or certain grounds are absent in specific legislations. For instance, French law and the UAA do not include provisions regarding the parties' legal capacity or the invalidity of the arbitration agreement with respect to the

[555] See the UAA of 1999
[556] See art. 1492 of the Civil Code of Procedure

governing law. Furthermore, the UAA made a major innovation for the effectiveness of arbitral awards under art. 25 which provides as follows:

"*…the parties may agree to waive the annulment action against the arbitral award provided it is not contrary to international public policy.*"

The UAA introduces the waiver of the right to appeal provided that this waiver is not contrary to international public policy. This reform is welcome especially since first, no provision under the UAA of 1999 offered this possibility to the parties. Second, this amendment complies with art. 29.2 of the CCJA rules which provides as follows:

"*The parties may agree to waive the annulment action against the arbitral award, provided the award is not contrary to international public policy.*"

This waiver would serve as a countermeasure against dilatory practices by eliminating procedural challenges and potential delays that may arise during the arbitration process.The French CPP offers the same possibility[557] provided that the waiver is explicit and formal with a special agreement, since the waiver of this right could not result from a general clause.

In general, the provisions regarding the waiver of the right to appeal are not yet fully clarified under the UAA. However, the CCJA, which has already established the action for annulment, has consistently emphasised the requirement for unequivocal consent in cases of waiver. In a specific decision, the CCJA mandated parties to provide explicit evidence of their intention to waive their rights to challenge the decision. The CCJA further emphasised that the waiver of this right should not be presumed and must be clearly demonstrated by the parties involved. This approach underscores the importance of a clear and explicit waiver of the right to appeal within the OHADA arbitration framework.[558]

The waiver of the right to appeal presupposes the existence of an arbitral award that has already been rendered by an arbitral tribunal. However, in order for this arbitral award to be recognized and enforced, certain requirements must be satisfied, and the final decision on recognition and enforcement rests with the competent jurisdiction's discretion. The subsequent section will delve into the conditions that must be fulfilled for an arbitral award to be recognized and enforced under the recent reform.

[557] See art. 1522 of the French civil code of procedure
[558] *IAD c/ CMDT & GSCVM*, arb. 2013-4; *Planor Afrique c/ Atlantique telecom*, CCJA, 2013-4

*Enforcement of arbitral awards in the region following the reform*

The recognition and enforcement of arbitral awards under OHADA law entail two main aspects. Firstly, the existence of the arbitral award is established by presenting the original copy of the award and the original arbitration agreement. Secondly, the arbitral award must comply with public policy; otherwise, it may be set aside. The competent jurisdiction, which is the Court, performs a dual formal control to ensure the existence of the arbitral award and its conformity with public policy. The existence of the arbitral award presupposes the existence of an arbitration agreement concluded by the parties, granting the arbitral tribunal the authority to decide on the dispute. If such an agreement is absent, any arbitral award rendered by a tribunal lacking jurisdiction would be deemed invalid. The second requirement involves assessing whether the arbitral award complies with public policy. Oumar Bah explains that this requirement strengthens the autonomous nature of the arbitral award, as the competent jurisdiction evaluates whether the parties or the arbitral tribunal violated international public policy during the drafting of the award. This assessment safeguards the integrity and consistency of the legal system by ensuring that awards contrary to fundamental principles of law or morality are not recognized or enforced.[559] In this regard, the CCJA in a decision denied exequatur on the basis that the arbitral award violated international public policy. As an illustration of the said requirement, the Court held that:

"*An arbitral award is not limited to pecuniary penalties, thus the decree n 2013-485 of the 18th of November 2013 is deemed to have no legal effect regarding the convention on the setting up of companies as of 10th October 2008; consequently, the aforementioned convention shall not be suspended owing to the decree"*.[560]

The aforementioned decision serves as evidence of the rigorous approach adopted by the competent court in evaluating the conformity of the award with public policy. Gaudemet-Tallon further argues that this requirement, in relation to the parties' freedom, reflects a clear commitment to ensuring substantive justice.[561] To this view, it is submitted that the validity of an arbitral award is contingent upon its compliance with international public policy.

[559] Bah, O. ''*L'efficacité de l'arbitrage OHADA: Le rôle du juge étatique*'' (Bruylant, 2020) p. 28
[560] CCJA, 15 Oct. 2015
[561] Gaudemet-Tallon, H. 'Le pluralisme en droit international privé : richesses et faiblesses (le funambule de l'arc-en-ciel)' (2005) RC p. 235

Prior to the reform, the exequatur proceeding due to a legal vacuum on this matter could be either *ex parte* and prompt, or contradictory and time-consuming.[562] The *ex parte* exequatur enables to request enforcement of interim measures, providing partial effects to the arbitral award, while the adversarial proceedings could result in significant delays. Following the reform, The UAA provides a time-limit to obtain a decision regarding an exequatur request. This reform aims at preventing dilatory procedures by the competent jurisdiction. In order to thwart these judicial delays affecting enforcement of the arbitral award, the UAA provides that the competent jurisdiction seized by a request of recognition or exequatur shall adjudicate within 15 days. In the case where the Court has not ruled within the time limit, art. 31 provides as follows:

"*If at the end of this time limit the jurisdiction has not rendered its decision, the exequatur shall be presumed to have been granted.*"

Consequently, the exequatur proceedings are accelerated, and an automatic exequatur is provided. Although the OHADA provisions appear to be theoretically efficient on the enforcement of arbitral awards within the OHADA area, the practice demonstrates quite the opposite owing to the challenges encountered during the proceedings. Next section assesses the potential challenges frustrating the process despite a commendable reform aiming at reinforcing celerity in the arbitration process.

*Practical challenges hindering the effectiveness of arbitral awards*

In practice, enforcement and exequatur encounter several issues which led to the reform of OHADA provisions for better efficiency of the arbitral process. The reform may be hampered by the judicial services, the structural issues faced by the domestic jurisdictions or the competent authority itself among others. In this context, solutions might be considered to improve the effectiveness of the provisions by drawing on international institutions but also developed and arbitration-friendly countries' legislations including the ICC Rules, LCIA Rules and French arbitration law. This section sets outs the challenges arising at the enforcement stage and affecting the effectiveness of exequatur within the region with regard to *ad hoc* arbitral awards.

The first challenge is set out in Art. 30 of the UAA which provides as follows:

[562] CA Douala, 12 June 2013

"*The award shall only be subject to enforcement by virtue of an exequatur decision issued by the competent jurisdiction in the Member State.*"

This provision implies that enforcement of an arbitral award is only possible following exequatur is granted by the competent jurisdiction. This article in both the previous and the new version has the same wording and implication, and the legislator remains silent regarding the determination of the competent jurisdiction to grant exequatur. This silence representing an important legal gap consequently delays and undermines the proceedings.[563] It is noted that the determination of the relevant authority is left to the discretion of the domestic law pursuant to art. 30 of the UAA, and in the case where the law does not indicate the competent jurisdiction, the CCJA in the case *Sarci* held that:

"*In procedural law, (…) when a special text does not assign jurisdiction to a particular court, it falls within the ordinary courts* "[564]

This decision exemplifies the flexibility provided by the CCJA and the OHADA legislator to accommodate the requirements of each Member State's domestic law. It acknowledges the inherent diversity within the judicial systems of the Member States, which necessitates a tailored approach to determine the competent jurisdiction.

The variation in the judicial structures across different Member States poses significant limitations and challenges. As a result, the OHADA legislator has entrusted the determination of the competent jurisdiction to the domestic laws of each Member State. This approach recognizes the need to respect and accommodate the existing legal frameworks and practices within each jurisdiction.

For example, certain Member States have established dedicated Commercial courts to handle commercial disputes, while others have incorporated commercial chambers within their civil jurisdictions. These variations reflect the unique characteristics and historical development of each Member State's legal system.

By allowing the domestic laws to determine the competent jurisdiction, the OHADA legislator seeks to strike a balance between harmonization and respect for the autonomy of Member States in organizing their judicial institutions. This approach acknowledges the practical realities and ensures that the arbitral process aligns with the existing legal framework in each jurisdiction, thereby promoting a more effective and efficient resolution

[563] CCJA, 17 Juill. 2008, *Société africaine de relations commerciales et industrielles dite SARCI SARL c/ Atlantique Telecom et Telecel Bénin SA*
[564] Ibid.

of disputes within the OHADA region.[565] Hence, in order to streamline and simplify the OHADA texts, the legislator has made the deliberate choice not to explicitly designate the competent authority for each provision. Instead, the responsibility falls upon the Member States to determine the competent authority within their respective jurisdictions. This approach recognizes the varying legal systems and administrative structures across the OHADA region.

By allowing Member States to address the legal gaps and designate the competent authority, the OHADA legislator acknowledges the need for flexibility and adaptation to local legal frameworks. It recognizes that Member States are better positioned to determine the appropriate administrative bodies or courts to handle specific matters under the OHADA rules. This approach also encourages harmonization while respecting the principle of subsidiarity, whereby decisions are made at the most appropriate level of governance. It enables Member States to tailor the implementation of OHADA rules to their specific legal and administrative contexts, ensuring a more effective and efficient application of the OHADA framework. However, it is important to note that while Member States have the autonomy to determine the competent authority, they must still adhere to the fundamental principles and objectives of the OHADA Treaty and its uniform acts. This ensures a degree of consistency and coherence in the overall functioning of the OHADA system.

Ultimately, the decision to entrust the determination of the competent authority to the Member States strikes a balance between harmonization and respect for national legal systems, fostering a more effective and localized implementation of the OHADA rules.

The CCJA's ruling in *Société africaine de relations commerciales et industrielles dite SARCI SARL c/ Atlantique Telecom et Telecel Bénin SA*[566] holds significant importance as it serves as a reference case law rule that helps bridge the legal gap present in certain Member States. This ruling provides valuable guidance and interpretation on the application of OHADA law, particularly in situations where domestic legislation may be silent or insufficient.

By establishing a precedent through this ruling, the CCJA clarifies and standardizes the legal principles applicable to the case at hand. This reference case law rule offers guidance not only to the parties involved but also to legal practitioners, arbitrators, and domestic

[565] Bah, O. '*L'efficacité de l'arbitrage OHADA*' (Bruylant, 2020)
[566] *Société africaine de relations commerciales et industrielles dite SARCI SARL c/ Atlantique Telecom et Telecel Bénin SA* [2008]

courts in Member States. It contributes to a more consistent and predictable application of OHADA law within the region. Moreover, this ruling serves to reduce legal uncertainty and promote legal harmonization. It fills the gaps that may exist in Member States' legal systems by providing a clear and authoritative interpretation of OHADA law. This allows for greater legal certainty and facilitates the resolution of disputes in a more efficient and consistent manner. The reference case law rule established by the CCJA in this particular case underscores the important role of the court in shaping and developing the OHADA legal framework. It reinforces the principle of uniformity in the interpretation and application of OHADA law, promoting a cohesive legal environment across Member States.

Furthermore, it is noted that art. 34 of the UAA which provides a more liberal approach aligned with the effectiveness of the awards remained unchanged. Indeed, the article states that:

> "The arbitral awards rendered on the basis of rules different from those provided for in this Uniform Act shall be recognized in the Member States under the conditions provided for by international conventions possibly applicable and, in the absence thereof, under the same conditions as those provided in this Uniform Act."

Courts appear more strict regarding arbitral awards rendered outside the OHADA area. The case *Vodacom International limited c/ Congolese Wireless network SPRL*[567] provides an important illustration of the role of the CCJA in ensuring the recognition and enforcement of arbitral awards under the OHADA framework. In this case, a dispute arose between the Republic of Congo and Belgium, and an ICC arbitral award was rendered.

Initially, the Congolese court refused to grant exequatur (recognition) to the ICC arbitral award. However, the matter was subsequently brought before the CCJA, which overturned the decision of the Congolese court. The CCJA held that the Congolese court's refusal to enforce the award violated Article 34 of the UAA (Uniform Act on Arbitration), which governs the recognition and enforcement of arbitral awards within the OHADA member states.

The CCJA's decision was based on the understanding that arbitral awards issued under different rules, such as the ICC rules in this case, should be recognized by OHADA member states in accordance with the conditions set forth in the applicable international

[567] *N. 003/2017*

provisions. In particular, the CCJA emphasized the relevance of the New York Convention, which both the Republic of Congo and Belgium had ratified. The CCJA stated that the Congolese court should have considered and applied the provisions of the New York Convention when deciding on the recognition and enforcement of the arbitral award.

This case highlights the CCJA's commitment to upholding the principles of international arbitration and ensuring the effectiveness of the OHADA arbitration framework. By quashing the decision of the Congolese court and emphasizing the importance of international conventions, the CCJA reinforces the obligation of OHADA member states to recognize and enforce arbitral awards issued under different rules, in line with international standards.[568]

In another decision,[569] The CCJA provided different reasoning inconsistent with its previous jurisprudence. The decision of the Cameroonian court to grant exequatur to an arbitral award issued by the ICC, while applying Article 34 of the Cooperation Agreement between the two countries instead of the New York Convention, can be seen as a valid application of the principles established by the CCJA in *Vodacom International Limited v. Congolese Wireless Network SPRL*.[570] In this particular case, it appears that the Cameroonian court chose to rely on the Cooperation Agreement between the parties, which had been ratified by both states, rather than the New York Convention. This decision may be justified by the fact that the Cooperation Agreement specifically addressed the recognition and enforcement of arbitral awards between the two countries. According to the principle established by the CCJA, the New York Convention should be automatically applied in the absence of any other existing convention between the parties. However, in this case, the Cooperation Agreement existed and was invoked by the plaintiff as the basis for applying the specific provisions related to the recognition and enforcement of arbitral awards.

The CCJA, in its ruling, did not provide explicit grounds for disregarding the Cooperation Agreement and instead referred to Art. 28.6 of the ICC rules and Art. 41 of the Cooperation Agreement and held that:

« *In accordance with the above-mentioned provisions, the arbitral award which the exequatur was requested before the judge and issued under rules other than the ones laid down in the Uniform Act on Arbitration ; France and Cameroon both being bound by the*

[568] Ibid.
[569] CCJA, 27 Juill. 2017, *Geodis Projects Cameroon (GP CAM) SA c/ Tenga SA*
[570] Arrêt N° 253/2019

*New York Convention, it is therefore the said convention that shall apply to the exequatur procedure; thus the trial judge erred in denying exequatur; in holding that exequatur shall be refused, the court violated by refusing to implement art. 34 of the afore-mentioned article, thus the decision shall be quashed. »*

This decision appears to be inconsistent with its previous jurisprudence[571] but also art. VII(1) of the NY Convention which provides as follows:

"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

Article VII(1) of the New York Convention explicitly states that the provisions of the Convention should not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting states. This provision recognizes the autonomy of the parties to choose the applicable framework for recognition and enforcement, as long as it is provided for in a valid agreement.

The CCJA's decision, which disregarded the Cooperation Agreement and applied the New York Convention, seems to deviate from this principle. The lack of explicit grounds for disregarding the Cooperation Agreement in favor of the New York Convention may contribute to the inconsistency observed.

Overall, the Cameroonian court's decision to apply the Cooperation Agreement rather than the New York Convention, and the CCJA's invocation of certain provisions, demonstrate the complex interplay between international conventions and bilateral agreements in the recognition and enforcement of arbitral awards. The specifics of each case and the existing agreements between the parties play a crucial role in determining the applicable framework for recognition and enforcement. Hence, it is hoped that the CCJA reverses its decision in further cases to maintain consistency with both the OHADA provisions and the international conventions. The aim should be to ensure a harmonious application of the applicable frameworks and respect for the parties' autonomy in choosing the relevant rules for recognition and enforcement of arbitral awards.

[571] *Vodacom International limited c/ Congolese Wireless network SPRL,* Arrêt N° 253/2019

The reform of the CCJA (Common Court of Justice and Arbitration) in relation to its dual function as an arbitration center and a judicial court center is a significant aspect that warrants scholarly examination. The next section will delve into the details of this reform and analyze its effectiveness in light of the dual role bestowed upon the CCJA.

### B. The revised Common Court of Justice and Arbitration rules of 2017 and the duality of the CCJA

In the reform of OHADA arbitration, significant attention was given to the CCJA, which was granted a dual role as both an arbitration center and a judicial court centre. This reform aimed to modernise the arbitration system and enhance the attractiveness of the CCJA. By conferring the CCJA with the authority to govern arbitration proceedings and judicial review of arbitral awards, the reform sought to align the CCJA's operations with international standards. This would position the CCJA as a leading arbitration centre in Africa and promote the OHADA arbitration rules, attracting foreign investors. The CCJA's expanded functions allow it to play a crucial role in ensuring the effectiveness of the OHADA arbitration framework. It acts as an institutional arbitration body under the OHADA Treaty, appointing arbitrators and overseeing the arbitration process. Additionally, the CCJA serves as a judicial court for approving and reviewing arbitral awards. This dual function of the CCJA is intended to streamline and strengthen the arbitration process, providing parties with a reliable and efficient mechanism for resolving their disputes. It also ensures the uniform application of OHADA arbitration rules across member states. The introduction of the CCJA rules has sparked divergent opinions among scholars. Some view the new arbitral system as innovative and advantageous,[572] as it seeks to streamline and expedite the arbitration proceedings. The dual function of the CCJA is seen as an opportunity to consolidate its role as a reputable arbitration center and judicial court center, providing a comprehensive platform for dispute resolution within the OHADA framework.

However, others have expressed concerns about the potential implications of combining administrative and jurisdictional roles within the same institution. The exercise of judicial review and the power to set aside arbitral awards raise questions about the independence and impartiality of the CCJA. Skeptics argue that the dual function may create a conflict of

[572] Aka, N; Fénéon, A; Tchakoua, J ‘‘*The New OHADA Arbitration and Mediation framework*” 2nd ed. (DA, 2018) p. 89

interest or compromise the neutrality of the institution, potentially undermining the trust and confidence of businesses and foreign investors.[573]

In accordance with Article 25.3 of the UAA and Article 21 of the OHADA Treaty, the CCJA assumes the role of the Supreme Court concerning ad hoc arbitration. It is entrusted with the responsibility of overseeing and administering all arbitrations within its jurisdiction, effectively becoming the sole authority in ensuring the compliance of arbitral decisions with the law. This multifaceted role of the CCJA encompasses functions such as constituting the arbitral tribunal, ensuring the proper conduct of arbitration proceedings, granting exequatur (enforcement), and assessing actions for annulment. To maintain the integrity of the arbitration process and prevent any potential conflict of interest, Article 3.2 of the CCJA rules stipulates that the arbitral tribunal may be selected from a list of arbitrators compiled by the Court. This list is updated annually and does not include members of the CCJA. This provision aligns with international standards of impartiality and transparency, promoting the independence and neutrality of the arbitrators involved.

However, the article remains silent on the issue of potential involvement of a domestic court in both the arbitration and judicial proceedings of the same case. This raises a significant concern regarding the potential overlap and interaction between the CCJA's jurisdictional functions and the authority of domestic courts. The absence of explicit provisions addressing this issue leaves room for uncertainty and may necessitate further clarification or guidance to ensure a coherent and consistent approach. Nonetheless, the establishment of the CCJA as the central institution overseeing both arbitration and jurisdictional functions reflects the intention of OHADA to streamline and consolidate dispute resolution mechanisms within its member states. By concentrating these responsibilities within a single entity, OHADA seeks to enhance efficiency, promote uniformity, and uphold the integrity of the arbitration process. To address the concerns raised by the potential involvement of domestic courts, it may be beneficial for OHADA to provide additional guidance or establish mechanisms for coordination and cooperation between the CCJA and domestic courts. This would help ensure consistency, avoid conflicts of jurisdiction, and uphold the principles of impartiality and due process in the resolution of disputes.

The case of *Etat du Mali v. CFAO*[574] raised an important question regarding the potential conflict of interest arising from the participation of a CCJA judge in both the arbitration and

[573] Bah, O. ‘‘*L’efficacité de l’arbitrage OHADA : Le rôle du juge étatique*’’ (Bruylant, 2020) p.123
[574] *Etat du Mali v. CFAO*, N° 039/2014

annulment proceedings. The claimant argued that this violated the principle of separation between administrative and jurisdictional functions.

In response, the CCJA overturned the decision, citing Article 2.5 of the CCJA Arbitration rules, which does not explicitly prohibit judges from participating in both proceedings. This decision highlights the need for clearer guidance from the OHADA legislator to address such concerns and prevent inconsistencies in the interpretation and application of the rules.

It is crucial for the OHADA legislator to provide further clarity and guidance on this issue to avoid leaving it solely to the discretion of the courts. By establishing clear rules and principles regarding the involvement of CCJA judges in arbitration and annulment proceedings, potential conflicts of interest can be effectively addressed, and the integrity and impartiality of the dispute resolution process can be safeguarded.

The OHADA legislator should consider formulating provisions that clearly delineate the roles and responsibilities of CCJA judges in arbitration and annulment proceedings, emphasizing the importance of separation between administrative and jurisdictional functions. This would help mitigate any concerns about potential bias or conflicts of interest and ensure a fair and transparent resolution of disputes. By providing explicit guidance, the OHADA legislator can contribute to the development of a coherent and effective framework for the CCJA's dual function. This, in turn, will enhance the confidence of businesses and foreign investors in the arbitration process and further strengthen the credibility and effectiveness of OHADA's dispute resolution system.

Notwithstanding the favorable and effective approach demonstrated by the CCJA case law, concerns about impartiality and independence may arise due to its dual function, particularly during actions for annulment or exequatur requests. Although the CCJA courts have established their independence from their country of origin through case law, the OHADA legislator recognized the need for greater clarity in distinguishing the CCJA's dual role.

To address this issue, Article 1.1 of the revised CCJA Arbitration rules stipulates that members of the Court who are nationals of the State directly involved in the arbitral proceedings must withdraw from the case, and the President of the Court will arrange for their replacement. Nonetheless, it is important for the legislator to provide more nuanced guidance by clarifying the term "directly involved," which should encompass not only cases where the State is a party to the arbitration but also situations where the State may have

a potential influence or interest in the outcome. By adopting a more precise and inclusive approach, the legislator can mitigate concerns about potential bias or conflicts of interest. This would further enhance the perception of impartiality and independence of the CCJA, ensuring that parties can have confidence in the fairness and integrity of the arbitration and annulment proceedings.

It is indeed worth considering the reinstatement of a rule that prevents a court from having knowledge of a case in both the arbitral and judicial aspects. This amendment would align with the functional autonomy rationae materiae of the CCJA, which aims to maintain a clear distinction between the administrative and jurisdictional functions of the court.

By reintroducing such a rule, the CCJA can reinforce its functional autonomy and ensure the separation between its functions. This would help address concerns about potential conflicts of interest, enhance the perception of impartiality, and safeguard the integrity of the dispute resolution process. Clear guidelines and procedures should be established to prevent situations where the same judge or court has involvement in both the arbitration and subsequent annulment proceedings. By doing so, the CCJA can maintain its credibility and preserve the trust of parties involved in the arbitration process. The OHADA legislator, in collaboration with the CCJA, should carefully consider implementing this amendment to further strengthen the functional autonomy and effectiveness of the court. This would contribute to the harmonious development of OHADA arbitration and ensure the continued confidence of businesses, investors, and other users.

Indeed, the Getma saga,[575] as discussed in previous chapters, indeed raised concerns about the impartiality and independence of the arbitral tribunal involved, which consequently impacted the perception of the institution itself.[576] The CCJA set aside the arbitral award in this case on the grounds that the tribunal violated its mission by entering into a separate agreement with the parties regarding fees. This case generated criticism against the institution and had implications for its credibility as a supranational organization. To address such issues, the OHADA legislator introduced provisions in the recent reform to strengthen the oversight and control of fees-related decisions.[577] According to the new reform, any decision related to fees made without the approval of the

[575] *Getma International v. Republic of Guinea*, No. 16-7087 (D.C. Cir. 2017)
[576] Abarchi, D. 'La supranationalité de l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique', Ohadata D-02-02 p. 103; Tchantchou, H. '*La supranationalité judiciaire dans le cadre de l'OHADA : étude à la lumière du système des Communautés européennes*' (*L'harmattan, 2009*) p. 39
[577] See art. 24.4

Court is deemed null and void. Nevertheless, it is worth noting that this provision does not serve as a ground for annulment of the arbitral award itself.

Another criticism that has been raised pertains to the limited involvement of African lawyers in arbitration proceedings. It has been argued that an African supranational organization should primarily consist of African practitioners to ensure better representation and the advancement of the law. [578] This criticism highlights the importance of creating an arbitration community that includes African legal professionals.

The appointments of the arbitrators to an arbitration procedure do not automatically depend on nationality but rather on the expertise and qualifications of the arbitrators. Nonetheless, in certain cases, all members of the arbitral tribunal may indeed come from the same country, as seen in the cases *Société Ivoirienne de Raffinage dite SIR SA v. Bona Shipholding LTD and others*[579] and *Etat du Mali v. Société ABS International Corporate LTD.*[580]

To ensure the expertise of the arbitral tribunal and the effective administration of the arbitration process, Article 3.3 of the CCJA Rules stipulates that before making any appointments, the Court shall take into account various factors. These factors include the nationality of the parties, their residence, the nationality of their counsel or the arbitrators, the language preferences of the parties, the nature of the claims, and, if applicable, the governing law. By considering these factors, the Court aims to ensure a balanced and competent composition of the arbitral tribunal while taking into account the specific circumstances of each case. This approach contributes to the credibility and effectiveness of the arbitration process under the CCJA by promoting fairness, impartiality, and the selection of arbitrators with relevant expertise and knowledge.

Additionally, the CCJA provides in art. 4.1 that the arbitrator appointed shall be and remain impartial and independent of the parties while the UAA in art. 7.3 provides as follows:

> "The arbitrator shall enjoy full exercise of his civil rights and shall remain independent and impartial vis-à-vis the parties."

Indeed, in addition to African arbitrators, the CCJA accepts the appointment of foreign arbitrators by the parties, regardless of whether they are registered on the CCJA list or

[578] Amoussou-Guénou, R. 'L'arbitrage commercial en Afrique subsaharienne : état de la pratique et du droit', (1995), Université Paris II, op. cit., p. 63
[579] Arrêt N° 029/2007
[580] Arrêt N° 011/2011

not.[581] This allows for a diverse pool of arbitrators and ensures that parties have the flexibility to choose arbitrators based on their expertise and experience, regardless of their nationality.

It is noteworthy that the CCJA list of arbitrators includes practitioners from various countries outside the OHADA area. This demonstrates the international reach and recognition of the CCJA as a reputable institution for arbitration. Some notable individuals on the CCJA list of arbitrators include renowned practitioners such as Pr. Pierre Tercier, former President of the International Court of Arbitration of the ICC; Robert Dossou, former President of the Constitutional Court in Benin; and Gilbert Guillaume, former President of the International Court of Justice in The Hague. The presence of well-known practitioners from diverse jurisdictions on the CCJA list further enhances the credibility and expertise of the arbitration proceedings under the CCJA. It allows parties to benefit from the knowledge and experience of arbitrators who have a strong international reputation in the field of arbitration.

The diplomatic immunity granted to arbitrators under Article 49 of the OHADA Treaty is a notable aspect of the CCJA's arbitration framework. It highlights the international nature of the OHADA arbitration system, which encompasses parties with different nationalities and derives from an international agreement. This provision underscores the importance of attracting arbitrators from various jurisdictions and ensuring their independence and impartiality. The presence of a diverse portfolio of international arbitration experts and sub-Saharan African lawyers within the CCJA further contributes to the quality and expertise of the arbitral awards. This combination of professionals from different backgrounds and experiences strengthens the credibility and reliability of OHADA arbitration.

However, it is worth noting that in some cases, the CCJA has allowed for the constitution of arbitral tribunals composed entirely of international arbitrators. This is usually based on the specific circumstances of the dispute and the agreement of the parties involved.[582] An example of such a case is *Société Ivoirienne de Raffinage dite SIR SA c/ Bona Shipholding LTD and others*,[583] where the arbitral tribunal consisted of Alfred Smith, Emmanuel Fontaine, and Philippe Delebecque as the president. While this composition may enhance the reliability of OHADA arbitration, it could be seen as limiting the visibility and development of African arbitrators. It is worth noting that Ivorian lawyers have been actively involved in CCJA arbitration, representing parties in seven out of the eleven cases

[581] See art. 3.2 of the CCJA Rules
[582] The dispute concerned international maritime transport
[583] Arrêt N° 029/2007

studied.[584] This can be attributed, in part, to the proximity of Ivorian law firms to the CCJA's location in Abidjan. This proximity provides an advantage in terms of engagement and participation. It is possible that over time, Abidjan could emerge as a major hub and preferred arbitration seat within Africa, similar to the status of Paris for the ICC or London for the LCIA. That is a major hub and preferred arbitration seat in Africa.

Finally, the provisions for challenging arbitral awards and requesting exequatur under the CCJA also demonstrate the international character of the arbitration centre when it comes to the proceedings, in the sense that there is commendable progress to meet the international standards of best practices. Pursuant to Art. 21 of the OHADA Treaty and 29 of the CCJA rules, the CCJA has the exclusive authority to set aside an arbitral award or to grant exequatur, creating an arbitration system and centre distinct from the domestic jurisdictions.[585] This mechanism stands out in the sense that as Poudret argues, challenges of LCIA and ICC arbitral awards, leading arbitration institutions, are always brought before domestic jurisdictions.[586] The CCJA system constitutes in this context an innovation within the international arbitration practice.[587]

Overall, it is submitted that the duality of the CCJA may still raise suspicions and undermine the development of the CCJA in the sense that the numerous advantages may be diluted by the reluctance of the parties and practitioners to resort to OHADA arbitration. These concerns could undermine the development and acceptance of OHADA arbitration as a preferred method of dispute resolution. The analysis presented highlights that while the CCJA has established a clear theoretical distinction between its administrative and jurisdictional functions, there is room for improvement in practice. It is crucial for the CCJA to address any potential doubts or misconceptions regarding its independence, impartiality, and effectiveness in fulfilling both functions.

One way to enhance the reputation and reliability of the CCJA is by leveraging the presence of well-known international arbitration experts in the administration of procedures. The participation of renowned professionals can contribute to the institution's

[584] *SIR SA c/ Bona Shipholding LTD et autres*; *Société Ivoirienne de Raffinage dite SIR SA c/ Bona Shipholding LTD et autres* n° 029/2007, op. cit.) ; *Société Nationale pour la Promotion Agricole dite SONAPRA c/ Société des Huileries du Bénin dite SHB* N° 045/2008, op. cit.) ; *Atlantique Telecom S.A. dans l'affaire Planor Afrique S.A. c/ Atlantique Telecom S.A.* N° 003/2011, op. cit.) ; *Etat du Mali c/ Société ABS International Corporate LTD*, op. cit.) ; *République de Guinée Equatoriale et la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC) c/ la Commercial Bank Guinea Ecuatorial (CBGE)* N° 002/2012, op. cit.);
[585] Cuperlier, O. 'Arbitrage OHADA et personnes publiques' Ohadata D-13-65 p. 81
[586] J.-F. Poudret et S. Besson, ''*Droit comparé de l'arbitrage international*'' (Bruylant, 2002), p. 741
[587] Bourdin, R. 'Le Règlement d'arbitrage de la Cour commune de justice et d'arbitrage' (1999) 5 RCD p. 14

credibility and help establish the CCJA as a respected international arbitration center over time.

To achieve this objective, the CCJA shall invest in a robust marketing strategy. This strategy should aim to promote the CCJA's unique features, such as its dual function, the expertise of its arbitrators, and the advantages of OHADA arbitration. By effectively positioning itself in the competitive arbitration market, the CCJA can attract more parties and practitioners, thereby increasing its visibility and reputation.

### *B.1. Enforcement and exequatur proceedings under the CCJA*

Exequatur is a post-arbitral process in which the domestic court makes an arbitral award enforceable in the territory of that state. It is granted by the competent judge of the State where the enforcement is sought. Thus, enforcement and exequatur are intrinsically linked in the sense that one (exequatur) exists only by the grant of the other (enforcement). As an illustration, the rule of law, that is enforcement, is meaningful only if respected and the subjective right, that is exequatur exists through its effectiveness. Exequatur is enshrined in art. 30 of the UAA:

> "The award shall only be subject to enforcement by virtue of an exequatur decision issued by the competent jurisdiction in the Member State."

Enforcement aims to be embodied by positive outcomes, that is the grant of exequatur essential for the award to be enforced in the states where the winning party has assets. As laid down in the UAA, the exequatur shall be refused in the case where the award goes against international public policy, a complex term that, along with several jurisdictions, has not been defined yet by the legislator and the CCJA is yet to rule on the matter. Therefore, it is left to the discretion of the domestic courts. At this stage of the proceedings, the judge does not reconsider the substance of the matter but proceed to verifications related to the formal validity of the award or the compliance of the arbitral award with international public policy.

Another key aspect of the exequatur process is the role of the enforcement formula in the issuance and enforcement of arbitral awards. An arbitral award is deemed enforceable if two conditions are met: it cannot be challenged before the Court, and following the affix of the enforcement formula through a writ by the court officer or the competent jurisdiction on

the arbitral award for enforcement. This explains that the arbitral award is not legally binding *de jure* but only by virtue of an exequatur. In the case where the losing party does not perform following issuance of the arbitral award, the winning party will be able to request enforcement before the competent jurisdictions where enforcement is sought through an exequatur. The domestic court following a brief and formal examination will affix the enforcement formula prior to enforcement. The formality check includes, inter alia, the compliance of the arbitral award with public policy.

The legislator breaking with the tradition of the exequatur process exclusively granted by the domestic jurisdictions as it is now also conferred to the CCJA the authority to make the arbitral awards rendered under its auspices enforceable, which is what makes this institution an arbitration centre comparable to the imperium of a national jurisdiction, making it more modern than French law in this respect. Thus, under CCJA Arbitration, unlike *ad hoc* arbitration, exequatur is to the exclusive jurisdiction of the CCJA, as enshrined in the CCJA Rules as follows:

> "The award may be enforced as soon as it is rendered.
>
> The exequatur shall be requested by application to the President of the Court, and a copy addressed to the Secretary General. The latter shall immediately communicate to the Court the documents allowing the Court to establish the existence of the arbitral award and of the arbitration agreement."

The powers granted as *imperium* gives the CCJA the exclusive jurisdiction to issue exequatur which becomes automatically binding within the whole Member States, granted in the form of a certificate issued by the general secretary.[588] Refusal may occur in 4 situations: the non-existence or breach of the contract, infringement of the adversarial principle, violation of public policy[589] or in the case where the arbitral tribunal has exceeded its jurisdiction.[590]

The recent reform has introduced significant changes regarding the recognition and exequatur of arbitral awards. One notable modification is found in Article 31 of the revised Uniform Act on Arbitration. According to this provision, the domestic court responsible for

[588] See art. 31.2 of the CCJA rules
[589] *Planor Afrique; Etat du Bénin v. Société commune de Participation*, N. 104/2015 ; Société nationale pour la promotion agricole v. Societe des huileries du Benin, N. 045/2008
[590] Art. 25 OHADA Treaty; CA Ouagadougou, Jun. 5, 2009 N. 34, N. 001 (Burkina Faso), http:/www.ohada.com/jurisprudence/ohada/J-12-168.html

the recognition or exequatur process is required to issue a decision within fifteen days of being seized with the matter. This time limit serves to expedite the proceedings and ensure a swift resolution. Furthermore, the aforementioned article includes an additional provision that has practical implications. It stipulates that if the competent court fails to render a decision within the prescribed time limit, exequatur will be deemed to have been granted. This presumption of grant serves to avoid unnecessary delays in the enforcement process and provides parties with a level of assurance that their arbitral awards will be promptly recognized and made enforceable. These reforms have been acknowledged by scholars such as Fénéon[591] and Ngwanza,[592] who have highlighted the positive impact of these provisions on international businesses seeking efficient enforcement of their arbitral awards. The emphasis on expeditious decision-making and the presumption of grant create an attractive framework for parties involved in international arbitration, as it offers the prospect of a timely and streamlined process for obtaining the necessary recognition and enforceability of their awards. By implementing these reforms, the OHADA legislator demonstrates a commitment to enhancing the effectiveness and efficiency of the recognition and exequatur process. The provisions align with the growing demand for expeditious dispute resolution mechanisms in the international arena and contribute to establishing OHADA as an attractive jurisdiction for resolving commercial disputes.

### *B.2. Implementation of the silence-exequatur: Practical implications*

In light of the recent reform, a new concept has been implemented: the silence-exequatur, consisting of automatic recognition and enforcement of arbitral awards.[593] This implies that the judges are now required to rule on the exequatur request within 15 days, a time-limit aiming to facilitate and streamline the process. The controversial aspect is that in the silence of the judge, the arbitral award shall be deemed granted. In the objective of assessing the impact of this innovation, respondents were asked about its implementation and contribution to the recent reform.

Art. 31 of the revised Uniform Act on Arbitration states in this regard:

> "…The national jurisdiction, seized by a request for recognition or exequatur, shall render a decision within fifteen (15) days from the day of

[591] Aka, N; Fénéon, A; Tchakoua, J '*The New OHADA Arbitration and Mediation framework*" 2nd ed. (DA, 2018) p. 209
[592] Ngwanza, A. et Zuber, A. *'L'arbitrage OHADA devant la CCI': Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p.304
[593] See Article 31 of the UAA

its seizure. If at the end of this time limit the jurisdiction has not rendered its decision, the exequatur shall be presumed to have been granted. When the exequatur has been granted, or in the case of silence from the jurisdiction seized by the request for exequatur within fifteen (15) days as above-mentioned, the most diligent party may seize the head clerk or the competent authority in the Member State in order to fix the formal exequatur upon the original of the award. The exequatur procedure is not contradictory…"

The legislator introduced the automatic recognition and enforcement of arbitral awards which becomes effective fifteen days after the request in the case that the judge did not rule on the matter.[594] The effectiveness and pragmatism of this alternative method lie in the enforcement of its arbitral awards, and in this regard the UAA recognizes such award as final and binding on the parties with *res judicata* effect, therefore having the same status as the judgment of a domestic court within the OHADA zone. Although the UAA does not specify in what time limit the application requesting the exequatur must be introduced, it specifies, however, and, it is a novelty, that the State court seized shall decide within a time limit which cannot exceed 15 days from its referral. In the case where the court has not issued the award at the expiration of that period, the enforcement shall be deemed to have been granted.[595] An action is foreseen before the CCJA against decisions on the refusal of exequatur, nonetheless the decision granting exequatur cannot be challenged. This new provision was commended by several scholars[596] arguing that this new mechanism would help prevent dilatory practices from the States and contribute to the effectiveness of arbitral awards.[597]

This new and original mechanism is twofold. The introduction of silence-acceptance is likely to improve the speed of the procedures, implying that the judge adjudicates in a short period. Nevertheless, this could belittle the importance of the judge to substantiate his decision.

The introduction of a time limit for rendering decisions in recognition and exequatur proceedings under the new reform demonstrates the commendable intention of the OHADA legislator to address concerns of potential delays and dilatory tactics. By imposing

[594] See art. 31 of the revised Uniform Act on Arbitration
[595] Ibid.
[596] El Ahdab, J. '*L'efficacité des sentences arbitrales' : Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p.428 ; Yao, A. '*Les Etats Membres de l'OHADA dans l'arbitrage': Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p. 75
[597] Ibid.

a clear deadline, the legislator aims to encourage the competent jurisdiction to proceed expeditiously and refrain from unnecessary delays.

However, there are potential concerns regarding the practical implications of this time limit. It should be noted that the actual affixation of the enforcement formula is performed by the head clerk. The hierarchical relationship between the judge and the clerk may pose challenges in ensuring compliance with the time limit and preventing potential dilatory motions or tactics that may be employed to delay the process.

One observation is that the reform seems incomplete in the sense that it does not provide specific provisions to address situations where the enforcement formula is not appended within the prescribed fifteen-day period. This raises questions about the effectiveness of the reform in practice if no mechanism is in place to handle such instances.

To gain insight into the practical implications of this silence-exequatur issue, interviews were conducted with participants. The majority of participants expressed a positive view of the reform, emphasizing that it effectively encourages the court to render a decision within a reasonable timeframe. According to their opinions, granting exequatur within fifteen days appears to be a reasonable expectation and falls within the jurisdiction of the court president.

While the reform's intention is laudable, it is important to address the potential challenges that may arise in practice. Providing clear guidelines or mechanisms for handling situations where the enforcement formula is not affixed within the prescribed time limit would help enhance the effectiveness of the reform and mitigate concerns about potential delays or uncertainties in the process.

One participant, arbitrator welcoming the new time-limit, revealed that:

“Several exequatur requests were delayed by the judges without any option to object as long as the judge did not rule. Some judges delay the proceedings in order to delay the case which demonstrates how corruption is still spreading within the judicial system.”

On the flip side, some participants were pessimistic regarding this silence-acceptance, describing it as “the biggest delusion”. They argued that although the intention is extremely commendable, practical concerns arise. One participant stated:

“As a lawyer, the head clerk is under the command of the head of the court. The subordinate relationship between the judge and the clerk is an obstacle. Furthermore, the reform seems incomplete in the sense that there is no provision for the case where the

clerk seized fifteen days following the silence of the president of the court, does not affix the enforcement formula and without any sanction. The effectiveness of the reform in practice is questionable as no provision has been made in the case where the enforcement formula is not appended as if it was automatic which is not the case. For instance, the process of exequatur in Paris is more autonomous as the clerk is not accountable to the president of the tribunal. Hence, once the request is received with proof that it has been filed for more than fifteen days, the enforcement formula will automatically be affixed by the clerk. The silence-acceptance established through the reform of 2017 implies that first, the judges have not ruled within the time-limit while their role is to enforce the law. Fifteen days to examine the form of the request such as the original document of the arbitration clause or assessing whether the decision is not contrary to a decision is a considerable amount of time and would imply that the competent authority disregards the law but also does devalue its competence.[598] The participant pointed out the potential challenges arising from the subordinate relationship between the judge and the head clerk. In their view, the clerk's accountability to the head of the court may hinder the effective implementation of the time limit. They also noted that the reform seems incomplete in that it lacks provisions addressing situations where the head clerk does not affix the enforcement formula within fifteen days following the silence of the court president, without any specific consequences or sanctions.

This participant further highlighted a comparison with the process of exequatur in Paris, where the clerk operates autonomously and is not accountable to the president of the tribunal. In that system, once a request is received and proof is provided that it has been filed for more than fifteen days, the enforcement formula is automatically affixed by the clerk. The participant questioned the effectiveness of the OHADA reform, suggesting that the silence-acceptance mechanism implies that the judges have not fulfilled their duty to enforce the law within the prescribed time limit. They argued that fifteen days should be sufficient to examine the form of the request, including assessing the validity of the arbitration clause and determining if the decision is not contrary to existing decisions. The participant raised concerns that the reform may undermine the authority and competence of the competent authority if it appears to disregard the law or devalue its own competence.

These contrasting views highlight the ongoing debate surrounding the practical implications of the silence-acceptance mechanism introduced by the reform. While some

[598] See art. 31 of the UAA

participants see it as a positive step towards expediting the process, others question its effectiveness and raise concerns about potential shortcomings.

Regarding the time-limit under art. 31 of the revised UAA to grant exequatur, the participants were asked whether it would indeed prevent the sluggishness of the authority without affecting the judge's ruling. Most interviewees answered by the affirmative, arguing that no court has an interest in seeing its refusal to authorize enforcement as a tacit acceptation to grant exequatur owing to time constraints. This would undermine their responsibility and credibility. It is understood through their positions that such mechanism is an indirect way to put pressure on courts in order to prevent dilatory practices as the spirit of arbitration is celerity.

In contrast, one participant argues that:

"This addendum is not a bad idea, nonetheless it would be better to wait and see its practical implementation, as it is very likely that the time frame will not be met. When it comes to challenges of arbitral awards, the texts provide that the CCJA shall rule within six months. In practice, no sanction is laid down in case of breach or delays."

This highlights important aspects of this new mechanism that the OHADA legislator shall address in a forthcoming reform so as not to jeopardise the effectiveness of OHADA arbitral awards. Indeed, the lack of provision or sanction in cases where the clerk does not affix the enforcement formula may raise issues such as unnecessary expenses and delays at the expense of the prevailing party.

A suggestion to streamline the arbitration process is the partial exequatur. The possibility of a partial exequatur in France is expressly stipulated in the case where the arbitrator has ruled *ultra petita*.[599] Partial exequatur was also adopted by the Austrian Courts which inspired the English courts that, adopting an unusual and original position in *NNPC c/ IPCO*[600] granted a partial exequatur under conditions not provided for in the New York Convention.

The participants were asked whether the introduction of a partial exequatur as implemented in France could be a smart approach within the OHADA and for most participants, this option could be considered since it is aligned with OHADA arbitration framework which focuses on celerity. The aim was to assess the impact of the new reform

[599] See art. 1477 of the French Civil Code of Procedure
[600] [2017] UKSC 16

and provide recommendations in view of a forthcoming reform. In this regard, one interviewee, arbitrator and president of the tribunal at the CCJA indicated:

“I had proposed the idea of a partial exequatur as it would have been a good addendum to boost OHADA Arbitration. Indeed, the reform has some gaps in the sense that deadlines were implemented but no partial exequatur. There is first the issue with the suspensive effect of the action for annulment, although the timeframe for examination is defined. Unfortunately, the option of a partial exequatur does not prevent in some cases losing plaintiffs to use dilatory practices, knowing that partial exequatur is unstable since varying from one state to another but also in view of the unclear position of the CCJA. Hence, it might be appropriate to clearly establish in the texts the possibility to implement a partial exequatur as it would be a good idea in the search for an effective arbitration.”

Thus, it is understood that partial exequatur would streamline the arbitration process in the region. The participant expressed the concern that the absence of clear provisions regarding partial exequatur in the current OHADA texts may lead to confusion in CCJA rulings. To mitigate this risk, they hope that the OHADA legislator will consider incorporating the mechanism of partial exequatur in a forthcoming reform. This would provide clarity and guidance to the courts and parties involved in the arbitration process.

On the other hand, another participant noted that granting partial exequatur for specific parts of a decision is not a common practice and should be employed on a case-by-case basis. This suggests that while partial exequatur could be an option in certain circumstances, it should not become a frequent or routine practice. The viewpoints expressed by the participants highlight the need for careful deliberation and a balanced approach when considering the implementation of a partial exequatur mechanism.

Overall, it can be genuinely assumed that the UAA and CCJA provisions are, as of today, in line with generally accepted principles of international arbitration such as the New York Convention of 1958. OHADA arbitration appears to have a more structured approach since the reform. As to whether the legislator has achieved the desired outcomes, the perspectives are good. The outcomes will be assessed over time regarding the proceedings, the disputes brought before the jurisdictions as well as the difficulties encountered. Then, it would be possible to know whether the reform is effective or not. The legislator may have succeeded in terms of effectiveness but not enforcement, in the sense that since the reform was implemented in 2017, the proceedings initiated since the reform are still ongoing. Hence, it is soon to conclude for instance whether the reform

streamlined the procedure. There is a noticeable improvement, nonetheless, African institutions must have more confidence in African lawyers, elaborate a system which would involve more Africans in legal counsels or arbitration and less foreign practitioners. The next section discusses the evolution of OHADA arbitration since the implementation of OHADA texts.

### 5.3. OHADA objectives to restore trust with foreign investors: Almost 23 years later

The harmonisation of laws and legal practices is indeed crucial for creating a favorable business climate and ensuring legal and judicial security in developing countries. This security represents a *sine qua non* condition to attract an inflow of foreign investment, considering that investment itself represents a significant risk.

The first decade of OHADA arbitration was challenging.[601] In practice, few arbitration proceedings are conducted in the region,[602] adding to the fact that statistics with regard to the nationality of the arbitrators demonstrate a prevalence of French lawyers within the OHADA area.[603] As a matter of fact, OHADA received criticism from scholars arguing that African lawyers are not sufficiently requested or involved in the drafting of OHADA uniform acts,[604] especially the very first drafts of both the Uniform Act on Arbitration and the CCJA Arbitration Rules.[605] It is assumed through this low participation of African experts in the drafting of the texts that first, there is a preference from the OHADA leaders to resort to foreign experts and arbitrators instead of involving local experts. As a matter of fact, many OHADA experts are French practitioners. This demonstrates the failure of the CCJA to promote local arbitrators. Second, it is noted that the national bar associations do not invest in the training of their members. In this context, the UEMOA legislator initiated a rule consisting of including alternative dispute resolution as a mandatory module for the bar examination also known as CAPA.[606]

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[601] The CCJA became operational two years following the adoption of the CCJA Arbitration and UAA. From 2001 to 2011, the CCJA had only 37 requests. For further discussion, see Lendongo, P. 'Statistiques CCJA en matière contentieuse, consultative et arbitrale après dix ans de fonctionnement' accessible at www.ohada.com, Ohadata D-11-16. (Last accessed 12 June 2022)

[602] Ngwanza, A. 'L'essor de l'arbitrage international en Afrique sub-saharienne : les apports de la CCJA' (2013) 3 RE, p. 31, accessible at http://revue.ersuma.org/no-3-septembre-2013/doctrine-25/article/l-essor-de-l-arbitrage (last accessed 22 Octobre 2022) ; Meyer, P. 'Le droit de l'arbitrage dans l'espace OHADA dix ans après l'acte uniforme' (2010) RA p.58

[603] Soro, A. '*"La place des praticiens africains dans l'arbitrage CCJA": Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p.304

[604] Konaté, M. & Mekeu, Y. 'L'implication des professions juridiques et judiciaires dans le renforcement de l'application du droit OHADA', Jurifis n° 13 (2013), accessible at www.ohada.com Ohadata D-14-01

[605] See Bühler, M. 'Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform' JIA 35(5) (2018) p. 530

[606] Order n°001/20019/COM/UEMOA related to the bar examination within the UEMOA area.

Moreover, while the arbitration practice and improvement of the texts have been enriched by doctrinal proposals,[607] there are very few university textbooks on arbitration in the OHADA region. The publications are insufficient and there is a significant gap between the scholarly law of academics and the living law of practitioners. Indeed, unlike the OHADA legislator revising the texts in light of several controversial cases, the role of the literature in OHADA arbitration appears to be less relevant and visible.

Additionally, case law accessibility remains insufficient as indeed, despite the creation of a digital library with free access including several CCJA cases law,[608] the digital issue remains an obstacle urging the need to increase the circulation of cases law. Along the same lines, Ngwanza presented doubts regarding the CCJA's ability to fulfil its arbitral missions while remaining fully independent.[609] The CCJA developed a case law generally favourable to arbitration proceedings, although there is an extremely weak involvement from OHADA Member States in favour of the implementation of uniform acts, inconsistent with the willing to "*promote arbitration, an instrument for the settlement of disputes arising from contracts*"[610] as enshrined under the OHADA Treaty. It is noted that the States might have not yet measured the impact of the UAA and the CCJA Arbitration rules on the harmonization of the business climate as they acted relatively slowly in facilitating the implementation of the UAA, while at the international level the UAA is invoked before international courts such as the ICC[611] or the CIRDI[612] as a means to substantiate the competence of the arbitrators.

It is also noted the length of the procedures in the region likely to discourage the litigants. It is in that vein that the OHADA legislator introduced celerity in the new arbitration law[613] with the aim of addressing the sluggishness of domestic courts with a focus on the post-enforcement stage which now provides a time-limit for the grant of exequatur, with the aim to reduce enforcement of arbitral awards.[614] Yao argues that on several cases, the CCJA took a commendable position in disputes involving OHADA Member States through

[607] Hascher, D. 'L'influence de la doctrine sur la jurisprudence française en matière d'arbitrage', (2005) RA p.53
[608] Accessible at https://biblio.ohada.org/pmb/opac_css/ (Last accessed 12 May 2022)
[609] Ngwanza, A. 'OHADA entre adolescence et âge adulte : une crise existentielle !' (2008) Rapport général de l'Université d'été du Cercle Horizon Club OHADA d'Orléans', *Penant* n° 866
[610] See preamble of the OHADA Treaty
[611] Ngwanza, A. et Zuber, A. '*'L'arbitrage OHADA devant la CCI': Vingt ans d'arbitrage OHADA : bilan et perspectives''* (LexisNexis SA, 2019) p.304
[612] Le Cannu, P. et Toubiana, *'Droit OHADA et jurisprudence CIRDI : points d'intersection' Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p. 207
[613] Loquin, E. '*OHADA, l'accélération de la procédure d'arbitrage*', (JDI, 2019) p. 38
[614] El Ahdab, J. *'L'efficacité des sentences arbitrales' : Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p.428

enforcement of arbitral awards against these States.[615] It also addressed the silence of judicial organizations regarding the relevant authority in arbitration proceedings by stating that in the case a particular text remains silent on the determination of competence of a specific jurisdiction, it is up to the lower courts to determine the competent jurisdictions on the matter.[616]

Furthermore, it is submitted that since the creation of OHADA, there has been a relative exclusion of African countries in international arbitration,[617] supported by the fact that arbitration proceedings were never seated in Africa. This may be explained by the fact that arbitration in African countries is in its early development. Nevertheless, this has induced the CCJA to proceed with an objective and subjective "Africanisation" of international commercial disputes. The approach involves the determination of the arbitration and applicable law, while the subjective approach relates to the appointment of African arbitrators and counsels. [618]

Nonetheless, although most sentences have not been annulled,[619] the CCJA has issued controversial decisions including the well-known Getma saga[620] discussed in Chapter 4 which tarnished the reputation of the CCJA. Hence, it is submitted that there is a constant need for better visibility in order to promote the outreach of OHADA arbitration, which represents a challenge following the assessment of its effectiveness. Another factor of its low rate is that OHADA provisions are of most use when it comes to disputes within the OHADA area and not to govern disputes between foreign parties or when the seat is located outside the OHADA region. OHADA arbitration in this regard should be able to be included in the arbitration market,[621] the large family of arbitration law recognized internationally, but also the economic sector.

Practitioners and academics shall promote the attractiveness of OHADA arbitration, and in this context, the reform of 2017 is filled with innovative concepts such as the principle of celerity under the UAA and CCJA Arbitration rules[622], or the time-limit to challenge an arbitral award. OHADA aims through these amendments to make the region an attractive

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[615] Yao, A. '*Les Etats Membres de l'OHADA dans l'arbitrage': Vingt ans d'arbitrage OHADA : bilan et perspectives* (LexisNexis SA, 2019) p. 76

[616] *Société Africaine de Relations Commerciales et Industrielles dite SARCI SARL c/ Atlantique Telecom et Telecel Bénin S.A.*, CCJA N° 044/2008

[617] Ph. Leboulanger, P. 'L'arbitrage international Nord-Sud', LGDJ (1991)

[618] Ngwanza, A. 'L'essor de l'arbitrage international en Afrique sub-saharienne: les apports de la CCJA' (2013) 3 RE

[619] Ibid.

[620] *République de Guinée c/ GETMA International* CCJA n° 139/2015*op. cit.*

[621] Clay, T. 'The Role of the Arbitrator in the Enforcement of the Award', (2009) ICC ICAB, 20(1) p. 47

[622] Loquin, E. '*OHADA, l'accélération de la procédure d'arbitrage*' (JDI, 2019) p.203

place of arbitration, ensuring the prevention of delaying actions[623] hence aiming to emphasise celerity, the suspensive effect of the action for annulment likely to be bypassed through the waiver in respect of setting aside as the enforcement of the arbitral award is the main objective of the litigant.[624]

The major innovations in the reform are that the legislator provided further clarification and improvements as scholars have raised weaknesses that have been improved in the new reform. Nonetheless, since the reform is recent, it is yet to observe the outcomes, and the texts will improve with time in practice. Throughout the implementation, some gaps will emerge, and the legislator will attempt to remedy them. Another innovation concerns the harmonisation with regard to the wording. For instance, the appeals contesting the validity of arbitral awards have now become "the setting aside of arbitral awards" or "actions for annulment" pursuant to s.5 art. 25 to 29 of the Uniform Act on Arbitration. These amendments with regard to the wording aim to ensure that the claims are well drafted and by ricochet reduce all recourses during the arbitration proceedings.
Has also been harmonised the cases of appeal depending on the type of arbitration: Uniform act or CCJA rules. Indeed, both regulations provided different provisions to the extent that unlike the uniform act, a lack of reasoning under the CCJA rules was not subject to an action for annulment before the reform.

The OHADA legislator was also in the quest for a more effective arbitration and enforcement of arbitral awards. In this regard, the reform has streamlined the exequatur and reduced the deadline imposed on the CCJA to adjudicate. Pursuant to art. 27 of the UAA:

"*The competent jurisdiction shall render a decision within three (03) months of its seizure. When said jurisdiction fails to render a decision within this time period, it is discharged of the case and the action may be brought before the Common Court of Justice and Arbitration within the next fifteen (15) days. The latter must render a decision within a maximum time limit of six months of its seizure. In that case, the deadlines specified in the Rules of procedure of the Common Court of Justice and Arbitration shall be reduced by half.*"

[623] Bredin, J. 'La paralysie des sentences arbitrales étrangères par l'abus des voies de recours', JDI (1962) 638; Lecuyer, H. 'Exercice abusif des voies de recours contre les sentences arbitrales : de quelques manifestations de l'ire du juge judiciaire', RA (2006) p.156
[624] Perrot, R. *'Les enjeux de l'exécution des décisions judiciaires en matière civile'*: *Séminaire multilatéral*, (Editions du Conseil de l'Europe, 1998) p.36

The participants were asked about the gaps in the recent reform. They indicated first the appeal with suspensive effect which demonstrates that a provisional exequatur shall be considered if necessary, and in this context the legislator should clearly state the conditions of a provisional exequatur and not granting enforcement without restraint.

There is also the setback regarding the CCJA's award due diligence resulting in more criticism on the interference of the CCJA in the arbitral proceedings.

Moreover, the president of the tribunal shall adjudicate in cases where the tribunal fails to reach a majority decision under the Uniform pursuant to article 22.3 of the CCJA rules which is clearly detrimental to the transparency, neutrality and good conduct of the arbitration proceedings.

Finally, one participant argued that it is unfortunate that the small disputes have not been addressed in the reform. Indeed, this is important for the development of arbitration which shall cover any kind of disputes. Therefore, the participant suggested that it would be interesting to consider a simplified and fast procedure for small disputes and attract small businesses or individuals in arbitration as most of the time, the disputes involve States, implying huge amounts of money.

As to whether it can be expected OHADA to be a cornerstone of dispute resolution in Sub-Saharan Africa in a few years, some participants were optimistic arguing that there is certainly a significant breakthrough regarding arbitration law in Africa. The expansion of OHADA would happen only if given the necessary means. The CCJA in this regard should:

- Increase awareness and create an official website as the existing one is "ohada.org".
- Equip the institution with a room and a suitable connection for video-conference hearings mostly for cases of force majeure (COVID-19 for instance).
- The States should focus on education, awareness, and the CCJA incident with the Getma saga should be an isolated case. Then, OHADA would be a model.

A more concrete and practical recommendation was provided by one respondent with respect to the persistent corruption hindering the effectiveness of OHADA in the region and its expansion worldwide. The participant stated that:

"Owing to the dual function of the CCJA funded by the States, there is a reluctance to resort to the CCJA in case the party concerned in a dispute is against one Member State. Yet, in eight out of ten decisions, the States were condemned as no intimidation is allowed.

Benin has threatened to withdraw from OHADA in the case where it was condemned regarding the disputes against Patrice Talon, president of Benin. OHADA shall become extremely strict in the decisions especially since the recent reform has introduced investment arbitration, so as not to undermine what has been done well."

Another important issue affecting the expansion of OHADA law is the severe lack of writings and publications in arbitration compared to western or anglophone countries. The lack of qualitative writings and the barrier of language are key issues for the quest of harmonization of the laws and the expansion of OHADA to African common law countries. In this regard one participant stated:

"There has been awareness to promote OHADA law, nonetheless insufficient. The biggest issue in Africa is that there are few writings, and the few writings only mention the flaws instead of promoting. Hence, the writings published in international bulletins are not favourable insisting on the sluggishness."

Improvements and innovations through the reform have been made in the quest for a more effective arbitration and arbitral award. Yet, there is still more work to be done instead of improvements to celebrate. Following this reasoning, less optimistic participants argued that:

"It is not impossible, nonetheless there is much work to be done: the judiciary must be more effective in most countries as, since the creation of OHADA, when dysfunctions arise the issue does not derive from the texts but from the judiciary which experiences clogged up courts, corruption, lack of expertise and knowledge of the case law among the judges among others. It is not impossible for the OHADA to become a cornerstone of dispute resolution in Sub-Saharan Africa; however many requirements must be met."

After analysis of the recommendations above, it is submitted that the development of a generation of judges specialised in arbitration is a *sine qua none* condition for OHADA arbitration to be internationally recognized, and their expertise shall be assessed through an intellectual and close cooperation with scholars. As for now, OHADA arbitration does not yet occupy its legitimate place in the African economy while the geographical size of OHADA arbitration goes beyond the Member States. OHADA is not the first attempt to harmonize business law in Africa, failure having led to scepticism even from the OHADA pioneers.[625] Nonetheless, 23 years following the adoption of the UAA and the CCJA

[625] K. Mbaye, K. 'L'histoire et les objectifs de l'OHADA' (2004) accessible at https://www.labase-lextenso.fr/revue/LPA/2004/205 'Last accessed 28 August 2022)

Arbitration rules OHADA arbitration could undeniably be considered as a living and unique law, notwithstanding the existing gaps obstructing its rise.

Overall, arbitral awards appear to be theoretically effective and backed up by the texts in force with various provisions under the UAA including the waiver of the right to appeal or the grounds for the setting aside proceedings which are aligned with the grounds on which recognition and enforcement of an arbitral award may be refused.
On the other hand, it is undeniable that in practice many challenges obstruct the recognition and enforcement of arbitral awards. Yet, it is noted that the CCJA approach through cases law demonstrates a tendency to promote effectiveness of arbitral awards in the sense that the Supreme Court strives to adjudicate as not to undermine the parties' autonomy during the proceedings. Enforcing arbitral awards in sub-Saharan African states still presents challenges. Indeed, although the revision of the UAA and the rules of the CCJA has simplified a large number of measures, it has also left a feeling of incompleteness with regard to certain provisions. This includes the concept of "competent judge in the state-party"; the concept of "international public policy" which is not equally appreciated in the 17 Member States; or the relativity of time limits. A forthcoming jurisprudence providing further clarification will be welcome.

The analysis offers a mixed picture as indeed, it should be noted that the risk for an arbitral award to be set aside remains high in the OHADA region. In this regard, and owing to OHADA's civil law heritage, the legislator might draw on French arbitration practice and ICC provisions so as to apply the spirit of those provisions to OHADA texts. This suggestion is most welcome in the sense that the majority of African parties in the OHADA region mostly include their rules in their arbitration agreements, hence including those rules in OHADA rules and practice might be a good start to attract the resolution of African or foreign disputes in Africa. As an illustration, art. 35.6 of the ICC arbitration rules provides that every arbitral award shall be binding on the parties, which parties agree to carry out the arbitral award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Nonetheless, the fact that OHADA countries have mainly a civil heritage does not automatically imply that the provisions shall be solely based on French approach of arbitration, especially when African common law countries are far more advanced in terms of arbitration proceedings and institutions than civil law States but also with regard to the

United Kingdom which has London recognized as one of the major international hubs. In that vein, next section discusses whether OHADA may draw on English arbitration practice.

## 5.4. Lessons learnt from English law: Implementation of anti-suit injunctions under OHADA law, feasible?

### A. Anti-suit injunctions under OHADA law

According to Emmanuel Gaillard, the introduction of anti-suit injunctions into international arbitration is a recent trend.[626] Anti-suit injunctions, originated and developed in common law systems, are devices granted in order to lock proceedings in a specific form, thereby preventing a risk of parallel proceedings and conflicting judgments.[627] The Organisation for the Harmonization of Business Law in Africa (OHADA), influenced by civil law countries, does not provide such mechanism in its legal framework while it would be in many respects beneficial to the good conduct of the arbitration proceedings for facilitation of trade and foreign investment.

Under OHADA law, anti-suit injunctions are still sluggish, the different set of rules including the Uniform Act on Arbitration (UAA) and the Common Court of Justice and Arbitration (CCJA) Rules have still not addressed the doctrine. As of today, this mechanism has not been discussed yet by practitioners or academics regarding the potential advantages of anti-suit injunctions on OHADA arbitration proceedings and its potential impact on the jurisdictional issues prevailing among the Member States. This academic contribution aims to fill in this gap by discussing the potential advantages of this mechanism in the OHADA region, the potential drawbacks and assessing whether the issue of anti-suit injunctions could be feasible under OHADA law.

*Anti-suit injunction as a common law concept*

Anti-suit injunction is a procedural mechanism utilised by most common law courts to give effect to the choice of court or arbitration agreements, aiming to prohibit vexatious and

[626] Gaillard, E. "*Reflections on the Use of Anti-Suit Injunctions in International Arbitration*" Pervasive Problems in International Arbitration (KLI, 2006) at p.201

[627] Chukwudi Paschal Ojiegbe, "From *West Tankers* to *Gazprom*: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast" *Journal of Private International Law*, 2015, Vol. 11, No. 2, 267-297,268.

abusive manipulations of forum by malicious parties.[628] Invented by England courts in the fifteen century, anti-suit injunction has achieved widespread publicity in most recent years, impetus has been provided by two decisions of German Higher Regional Court Munich[629] and of the French Tribunal de Grande Instance[630] with issuance of anti-anti-suit injunctions.[631] Simply, anti-suit injunction is used as a means to prevent forum shopping – an order issued by a court or arbitral tribunal to prevent an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. Therefore, anti-suit injunctions help prevent dilatory strategies likely to be attempted by one party in order to obstruct the use of the valid existing arbitration agreement. In this regard, anti-suit injunctions aim at preventing the party to initiate parallel proceedings before an arbitral tribunal or another court, so as to preserve the good conduct of the ongoing proceedings and by ricochet "the binding force of the contracting parties' forum-selection clause."[632] To this end, the anti-suit injunction finds its justification in the general theory of contract – the consent agreement of private parties. As the arbitration agreement is a contact that binds two private parties, its non-performance by one of them constitutes a breach of contract.[633] *Tracomin S. A, v. Sudan Oil Seeds Co*[634] is the case in point. In this case, the litigant applied to the court in order to obtain an order of specific performance in relation to a particular contractual obligation. Given that the court was under no obligations to grant the jurisdiction owing to parties' consensual arbitration agreement. Common law systems consider the breach of an anti-suit injunction granted by a Court as a "contempt of court".[635] This breach may lead to sanctions including fines, penalties, or imprisonment in very rare cases.[636] Nonetheless, the effectiveness of the sanctions relies on the place of residence of the party who breached the agreement. Such sanctions will be effective in the case where the party or its assets are located in the country where the Court is to enforce the

[628] Hueske, W. 'Rules, Britannia! A Proposed Revival of the British Antisuit Injunction in the EU Legal Framework' (2009) GWILR pp.433–34.
[629] *Nokia v Continental-Munich Higher Regional Court.* LG Munchen I, decision of 2 October 2019, case no. 21 O 9333/19.
[630] LG Munchen I, decision of 2 October 2019, case no. 21 O 9333/19.
[631] For discussion, see next session of Anti-suit -injunction vis-à-vis anti-anti-suit injunction: implication for international commercial arbitration?
[632] Watt, H. 'La procedure d'anti-suit injunction n'est pas contraire à l'ordre public international' [2010] RCDIP 158.
[633] José Carlos Fernández Rozas, 'Anti-suit Injunctions Issed by Nationao Courts Measures Addressed to the Paries or to the Arbitrators', in Anti- Suit Injunctions in International Arbitration (E. Gaillard, General Editor), Berna, Staempfli Verlag AG, 2005, ISBN 1-929446- 60-8, pp. 73-85. https://eprints.ucm.es/id/eprint/9257/1/Anti-suit_Injunctions.pdf.
[634] *Tracomin S.A. v. Sudan Oil Seeds Co*. 1983] 1 W.L.R. 1026.; the adoption of the measure was increased during the last years, as it was held by Bankers Trust Co. v. P.T. Jakarta Int'l Hotels & Dev., [1999] 1 Lloyd's Rep. 910.
[635] Delebecque, P. 'Anti-suit injunction et arbitrage : quels remèdes?' (2007) 12 GC 1
[636] Levy, L. 'Anti-Suit Injunctions issued by arbitrators' Gaillard (ed.), Anti-suit injunctions in international arbitration, (2005), p.127.

sanctions.[637] For instance, courts in South Africa were to issue anti-suit injunctions in the case where the respondent is a resident and the judgment can effectively be enforced."[638] Hence, in the case where the concerned party is outside the territory where the jurisdiction granted the anti-suit injunction and where enforcement is sought, failure to comply with injunctions will remain unpunished and the second proceeding that was initiated despite the arbitration agreement [could][639] be pursued.[1] The above assertion best illustrated in Article 13 of the UAA and Article 10.3 of the CCJA Arbitration rules, providing that there is an important possibility that the foreign court decides at the parties' request to decline jurisdiction and end the parallel proceeding. Consequently, "the decision rendered at the end of the proceedings would not be recognized in the state where the anti-suit injunction was issued" [640] as illustrated in *RiverRock Securities Ltd v International Bank of St Petersburg.*[641]

It is submitted that the party attempting to prevent the normal procedure might benefit from abiding by the decision since the non-compliance would also prevent the court to recognize the decision made in breach of the arbitration agreement in the State where the anti-suit injunction was issued.[642] English courts have for years been favourable to anti-suit injunctions on the grounds that firstly they have authority for granting anti suit injunctions *in personam* whilst the place of residence of the defendant is in England and secondly, because the defendant has to be compensated for any damage that incurred due to the breach of a pre-existing legal duty.[643] In practice, when a breach of the arbitration agreement occurs between parties to a contract and consequently one party initiates proceedings before another arbitral tribunal or court, the other party is likely to automatically request an anti-suit injunction in order to prevent the party to pursue its claims initiated before a foreign jurisdiction.

Anti-suit injunction is traditional absent from civil law jurisdictions. However, in more recent years, many jurisdictions have placed a high standard to obtain an anti-suit injunction. It is worth mentioning that "anti-suit injunctions under the English law are used as a fault

[637] Rozas, J. 'Anti-suit injunctions et arbitrage commercial international : mesures adressees aux parties et au tribunal arbitral', in Soberania des Estado yDerecho internacional, Homenaje alprofesorJuanAnotnia Carrillo Salcedo (Seville : Secretariado de Publicaciones de la Universidad de Sevilla, 2005), at p.9.
[638] Werksman Attorneys: Des Willams, "South Africa", ICLGIA (London: Global Legal Group, 2014), at p.473.
[639] Pursuant to art.13 of the UAA and art.10.3 of the CCJA Arbitration rules, there is an important possibility that the foreign court decides at the parties' request to decline jurisdiction and end the parallel proceeding.
[640] Rozas, J. 'Anti-suit injunctions et arbitrage commercial international : mesures adressees aux parties et au tribunal arbitral', in Soberania des Estado yDerecho internacional, Homenaje alprofesorJuanAnotnia Carrillo Salcedo (Seville : Secretariado de Publicaciones de la Universidad de Sevilla, 2005), at p.9.
[641] [2020] EWHC 2483 (Comm)
[642] *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm)
[643] Clavel, S 'Anti-suit injunctions et arbitrage' [2001] Rev. Arb. 669'

remedy which requires the defendant to prove his actions are *inter alia* unconscionable, an abuse of justice, vexatious or oppressive, in the eyes of English law".[644] Emphatically, in proceedings up until the landmark decision in *Gazprom* case,[645] anti-suit injunction was considered inapplicable in litigation [646] or arbitration[647] among EU member States, stating that the power of courts of a Member State can refuse to recognise the arbitral award under the Brussels Convention. The question arises as to whether anti-suit injunction applied to arbitration, being excluded from the Brussels Convention.[648] This was resolved in *Gazprom* case and the exclusion specifics were included in recital 12 of Brussels recast.[649] It is thus submitted that anti-suit injunctions can be issued by EU arbitration tribunals and upheld by Courts of Justice of EU member States on the ground that anti-suit injunctions are "granted on the basis of the courts *in personam* jurisdiction over the party enjoined" and "their grant has no direct effect on the foreign proceedings, but the defendant will be personally liable for contempt of court if they breach the terms of the order."[650]

Importantly, the aim of issuance of anti-suit injunctions is to prevent a party from commencing or continuing a suit in another forum in order to enforce an arbitration agreement effectively. To achieve this, the arbitral tribunal needs protection mechanisms in place against risks that threaten the integrity of arbitral proceedings. One of those risks is parallel proceedings. Courts or arbitral tribunal can issue an anti-suit injunction to protect parties from such a risk.

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[644] Liu, M. 'The Impact of the UK's BREXIT on Anti-suit Injunctions'(chapter 3), 13 Oct 2020, *EU & CARICOM: DILEMMAS versus Opportunities on Development, Law and Economics*. Roberts, A. E., Hardy, S. & Huck, W., (eds.). Routledge Taylor & Francis Group, p. 24-37.
[645] Gazprom OAO v Lietuvos Respublika. Judgment of the Court (Grand Chamber) of 13 May 2015.
[646] *Turner v Grovit* (C-159/02) A AC 101; *West Tankers Inc v RAS Riunione Adriatica Di Sicurta ApA* (*The Front Comor*) [2005] EWHC 454 (Comm); [2005] 2 Lloyds's Rep. 257; and [2007] UKHL 4; [2007] 1All E. R. (Comm) 794.
[647] Sebastiano Nessi, "Anti-suit and Anti-arbitration Injunctions in International Commercial Arbitration: The Swiss Approach", in SAA Series on International Arbitration, Vol. 3, Selected Papers on International Arbitration, Bern, Stämpfli, 2013.
[648] Recognition and enforcement of judgments in civil and commercial cases was originally accomplished within the European Communities by the 1968 **Brussels Convention**: a treaty signed by the then six members of the Communities.[1] This treaty was amended on several occasions and was almost completely superseded by a regulation adopted in 2001, the Brussels I regulation.
[649] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[650] Liu, M. 'The Impact of the UK's BREXIT on Anti-suit Injunctions'(chapter 3), 13 Oct 2020, *EU & CARICOM: DILEMMAS versus Opportunities on Development, Law and Economics*. Roberts, A. E., Hardy, S. & Huck, W., (eds.). Routledge Taylor & Francis Group, p. 24-37.

*Implementation of anti-suit injunctions in common law and civil law countries*

This section appreciates the arising trend of anti-suit injunction in EU countries for arbitration friendly countries especially under French legal system which has mainly influenced the OHADA region and has for long been reluctant to such mechanism.

Countries of common law systems have for many years demonstrated a favourable approach to anti-suit injunctions.[651] In this regard, these countries have developed in their jurisprudence a set of requirements to meet before issuing antisuit injunctions.

These requirements are developed into four principles established for the first time in the *Aerospatiale* case.[652]

- The court which hears the case must have jurisdiction *in personam* over the defendant;
- The issued injunction shall not target a foreign court but only the defendant;
- The issuance of the antisuit injunction shall aim at preventing an injustice;
- The judges shall proceed cautiously when deciding to grant such injunctions.

In a situation where two courts, a foreign court and the court that has been requested to issue the injunction appear to have jurisdiction, the latter must comply with strict conditions. First, the pursuance of the proceedings from the foreign court must be oppressive; the grant of the anti-suit injunctions shall not result in injustice and the English court shall be the natural and lawfully forum of the continuance of the proceedings. Regarding the last requirement in the case law perspective, the interpretation of natural forum has been narrowed in the *Airbus* case[653] by the English court which held that such injunction could not be issued unless it is fully convinced that it is itself the natural forum to decide on the case.

English courts would not issue an anti-suit injunction where it is not appropriate to do so even if the seat of arbitration is London, which accentuated in the *U & M Mining*[654] case. In this case, undoubtedly, the agreed seat of arbitration was London, and thus the claimant sought an anti-suit injunction in the English court to stop Zambian proceedings started

[651] Discours, M. 'Est-il interdit d'interdire a un plaideur d'intenter ou de poursuivre une action en justice devant une cour etrangere ? La, est la question soulevée par la pratique de l'anti-suit injunction ", Revue libre du droit : accessible at: http://www.revue-librede-droit.fr (Last accessed 20 November 2021)
[652] *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] A.C. 871
[653] [1998] 2 W.L.R. 686 HL
[654] *U & M Mining* [2013] 2 Llood's Rep. 218; [2013] 1. CLC 456 at [72].

against it by the defendant. However, upon careful consideration of the facts, Blair J refused to grant an anti-suit injunction because this dispute concerned the operation of a copper mine in Zambia between two Zambian companies.[655] The rationale behind this decision of the English court is clearly justifiable as it is commercially sound and pragmatic.[656] It is because in certain circumstances, practical factors may make it more convenient and effective to proceed in another jurisdiction, although the seat of arbitration is the natural forum for seeking an anti-suit injunction in ordinary circumstances.[657]

Pursuant to s. 4477D of the Trade Practices Act 1974, a restrictive two-step test for granting anti-suit injunctions was established in Australia, which best demonstrated in the landmark *CSR Limited* case.[658] In the case, the Court with the aim to limit the grant of anti-suit injunctions held that the issuance of these injunctions shall require compliance with the following conditions:

- A court may issue an injunction whenever new proceedings are initiated for the sole purpose of frustrating the ongoing proceedings;
- Courts shall have equitable jurisdiction in order to prevent unreasonable proceedings or the assertion of a right without any real or serious cause.

As such, Australian courts have powers to grant anti-suit injunctions at the commencement of any proceedings initiated to obstruct the ongoing proceedings, but shall have equitable jurisdiction in order to prevent the party initiating the new proceedings to assert a right without substantial ground.

To grant an anti-suit injunction, the court must determine if it has jurisdiction to hear the case; and to what extent the foreign proceedings amount to unreasonable proceedings or conduct. Although this approach appears to be consistent with the current trend worldwide, this judgment dismissing the implementation of anti-suit injunctions has been criticized by the majority of commentators owing to judges' failure to consider many factors in the case and their evident reluctance to grant such injunctions. This decision may result in negative outcomes in the long-term regarding fairness principle and public policy matters as the

[655] *Ibid.*
[656] Liu, M. 'The Impact of the UK's BREXIT on Anti-suit Injunctions'(chapter 3), 13 Oct 2020, *EU & CARICOM: DILEMMAS versus Opportunities on Development, Law and Economics*. Roberts, A. E., Hardy, S. & Huck, W., (eds.). Routledge Taylor & Francis Group, p. 24-37.
[657] A Singh, 'Supervisory Jurisdiction of the Courts of the Seat: Primary, Not Exclusive – A Comment on *U & M Mining Zambia Ltd v Konkola Copper Mines Plc* (2013) 16(3) Int ALR N23, N24.
[657] *CSR Ltd v. Cigna Insurance Australia Ltd* [1997] 146 ALR 402.
[658] *CSR Ltd v. Cigna Insurance Australia Ltd* [1997] 146 ALR 402.

judges failed to consider these aspects.[659] However, this two-step test is welcome in the sense that through this approach is enshrined the preclusive nature of anti-suit injunctions and is in accordance with foreign decisions and international practice.

When it comes to the US courts, they tend to adopt two types of approaches for implementation of anti-suit injunctions: a liberal approach and a conservative approach. Both approaches obey a single common principle upheld that the US courts shall have jurisdiction *in personam* over the defendant. The application of the principle of jurisdiction in *personam* best illustrated in *Allendale*[660] and *Laker*[661] decisions. In *Allendale* case, [662]following the liberal approach, the judge may grant an anti-suit injunction:

- where parallel proceedings are conducted in addition to those ongoing by the US courts;
- The parallel proceedings shall concern the same parties with the same object;
- The simultaneous resolution of these proceedings is likely to harm the good conduct and effective resolution of the dispute.

The conservative approach was discussed in *Laker* case,[663] which confirms the principle of international comity as the essence of this approach. Two-fold conditions were affirmed:

- The anti-suit injunction must be crucial in the protection of the US court's jurisdiction.
- The anti-suit injunction shall prevent a party from evading the country's fundamental principles.[664]

The conservative approach has been reconfirmed by the *Quaak* case[665] in which the Court required preliminary evidence as to the existence of ongoing parallel proceedings with the same parties and a similar object before different jurisdictions. In the case where the requirements are met, if the plaintiff meets that condition, proceedings for the issuance of the antisuit injunctions can begin.

[659] Vuong, E 'Anti-Suit Injunctions - A Development of Principles in CSR Limited v Cigna Insurance Australia Limited & Ors' (1998) 20(1) SLR 169.
[660] *Allendale Mutual Ins. Co. v. Bull Data Systems*, Inc, 10 F. 3d 425 (1993).
[661] *Laker Airways v. Sabena, World Belgian World Airlines*, 731 F. 2d 909 (1984).

[663] *Laker Airways v. Sabena, World Belgian World Airlines*, 731 F. 2d 909 (1984)
[664] Ibid.
[665] *Quaak v. Klynveld Peat Marwick Goerdeler*, 361 F. 3d 11 (2004)

Anti-suit injunctions are also found in civil law systems[666] although civil law countries are less favourable to this mechanism. Noticeably, EU law has for years debated the use of anti-suit injunctions, arguing that the issuance of anti-suit injunctions could be considered as a threat to the principles of mutual trust[667] and effectiveness of EU Regulations which originally promote the primacy of EU law. Interestedly, following the *Gazprom* case,[668] it was held that the recognition and enforcement of anti-suit injunctions would be left to the discretion of the Courts of EU Member States as long as the injunction concerns the jurisdiction of a specific court instead of an entire legal regime. In France, antisuit injunctions raised criticism as considered intrusive for both the concerned parties and the State where the antisuit injunction is sought or implemented.[669] Notwithstanding the fact that issues may arise while implementing anti-suit injunctions, French courts have gradually confirmed in the judicial practice that these injunctions were in accordance with French interpretation of international public policy in the well-known *Wolberg* case in 2009.[670] It is thus submitted that French courts since 2009 demonstrate more flexibility favourable to anti-suit injunctions when it comes to sanctioning the breach of a pre-existing contractual duty,[671] unlike anti-suit injunctions aiming at preventing the recourse to arbitration which is against French courts' conception.[672]

This new approach and flexibility from French may suggest the possibility that other jurisdictions which have been inspired and built their legislation through French law due to either their colonial heritage or the similar language such as most West African countries including Côte d'Ivoire or Senegal may be influenced by this new approach. Indeed, the majority of Ivorian regulations from the civil to the criminal codes are copies of French laws, it is thus not impossible that OHADA, the supranational organisation for the harmonization of business laws in Africa specifically in Sub-Saharan Africa follows the movement in the forthcoming reforms after assessment of the pros and cons of anti-suit injunctions. Nonetheless in order to achieve this, African systems still need to be aware of this mechanism.

[666] Gaillard, E. "*Reflections on the Use of Anti-Suit Injunctions in International Arbitration*" Pervasive Problems in International Arbitration (KLI, 2006) in International Arbitration (Alphen aan den Rijn : Kluwer Law International, 2006), p.201, para.1 0-2.
[667] CJCE, 10 fevrier 2009, Allianz SpA et Generali Assicurazioni Generali SpA ci. West Tankers Inc., C-185/07
[668] CJCE, 13 mai 2015, Gazprom OAO ci. Lietuvos Respublika, C-536/13
[669] Delebecque, Ph. 'Anti-suit injunction et arbitrage : quels remèdes ?' (2007) 12 GC.
[670] Cass. Civ. 14 octobre 2009, Wolberg ci. In Zone Brands Inc, n° 08-16369 et 08-16549
[671] Cass. Civ. 14th october 2009, *Wolberg ci. In Zone Brands Inc*, n° 08-16369
[672] *Republique de Guinee Equatoriale c. Societe Fitzpatrick Equatorial Guinea Ltd* [2011]

Noticeably, as Sub-Saharan Africa markets are increasingly growing with on-going use of arbitration when it comes to commercial disputes, the use of anti-suit injunctions in this growing and promising region might be observed. The rationale is that commercial litigation is often disputed in several jurisdictions simultaneously. In these circumstances, a party preferring to conduct its litigation in England would need to determine whether it might be possible and effective to obtain an anti-suit injunction to restrain the other party from conducting its proceedings in another jurisdiction.[673] It is noted that the OHADA Treaty does not include this mechanism within the framework of OHADA rules[674] including the UAA and the CCJA Rules which govern the enforcement of arbitral awards within the OHADA regime, while considering the implementation of such injunctions might be advantageous for the current arbitration practice in the OHADA region, hence align with OHADA principles and objectives of harmonization of the Member States' business law to address legal and judicial insecurities in the region especially through the promotion of alternative dispute resolution. In practice, the use of anti-suit injunctions in Sub-Saharan Africa could help domestic courts to prevent abusive proceedings which are likely to extend the cases such as dilatory tactics in the judicial processes., As parties usually file claims before other courts or arbitral tribunals in breach of an arbitration agreement in order to obtain a decision to allow them the seizure of assets, sometimes with expedited procedures. They attempt to thwart the normal procedure in order to avoid the other party to file a claim for breach of the agreement. In this perspective, the grant of anti-suit injunctions within the OHADA area might be a good option provided that the UAA and the CCJA Rules provide a clear framework with specific conditions for this mechanism which the Courts have to comply with.

### B. Could this mechanism turn the tide?

English courts usually grant anti-suit injunctions where there is a breach of an arbitration agreement or a choice of court agreement.[675] The Supreme Court in *Ust-Kamenogorsk Hydroppower Plant*[676] made it clear that the source of the power of the English senior

[673] Thomas Raphael QC, The Anti-Suit Injunction (2nd Edition), abstract. OUP, 2019
[674] See Le Bars, B. ''*International Arbitration and Corporate Law: An Ohada Practice*'' (The Hague: Eleven International Publishing, 2014) p.87 ; See also Martor, B. "*Le droit uniforme africain des affaires issues de l'OHADA*" 2nd ed (Litec, 2009) p.76
[675] Chatterjee, C 'The Legal Effect of the Exclusive Jurisdiction Clause in the Brussels Convention in Relation to Banking Matters' (1995) Journal of International Banking and Financial Law 334-40; *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 588.
[676] *Ust-Kamenogorsk Hydroppower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889; [2013] Bus LR 1357 at [48].

courts to grant anti-suit injunctions in support of arbitration agreements is enshrined in Section 37 of the Senior Court Act 1981. The prerequisite for anti-suit injunction to work well attributes to arbitration agreement, showing the English courts' willingness to grant anti-suit injunctions in order to safeguard an arbitration agreement.

This section thus discusses the extent to which anti-suit injunctions might be used to restrain breaches of an arbitration agreement under the OHADA regime.

*Implementation of anti-suit injunction under the OHADA Law: A thrust to support arbitration?*

Inherent incredulity of anti-suit injunction, the OHADA legislator was silent on the issue of anti-suit injunctions owing to the civil law heritage of the OHADA Member States, the domestic courts of the OHADA Member States are likely to be reluctant to grant anti-suit injunctions. However, the consequence of German and French court's decisions foster genuine impacts on anti-suit injunction for international arbitration, thereby have substantial influence on OHADA arbitration practice. This is a clear emerged that anti-suit injunctions will most likely become more common in the EU countries., This mechanism might be useful for the dispute resolution for the infant stage of OHADA arbitration owing to the following grounds.

Firstly, the arbitral tribunal might grant an anti-suit injunction in order to prevent a party from pursuing a claim before a foreign court or another arbitral tribunal,[677] the same as a judge might issue an injunction to safeguard an arbitration agreement for the same reasons. [678] Secondly, anti-suit injunctions are issued by a court in order to prevent a party from pursuing a claim based on the ground that an arbitration agreement is null and void. [679] It is stated that OHADA law is arbitration friendly as expressed in the OHADA Treaty, providing that "*Desirous of promoting arbitration as an instrument for the settlement of contractual disputes*".[680] The impacts of issuing an anti-suit injunction in favour of arbitration is accelerating in European countries upholding the primary of the arbitration

[677] Levy, L. 'Anti-suit Injunctions issued by arbitrators' E. Gaillard (ed.), IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration (Huntington NY: Juris Publishing, 2005), at p.127.
[678] Baum, A.'Anti-Suit Injunctions Issued by National Courts To Permit Arbitration Proceedings', in E. Gaillard (ed.), IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration (Huntington NY : Juris Publishing, 2005), at p.19.
[679] Lew, J. 'Anti-suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings', E. Gaillard (ed.), IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration (Huntington NY : Juris Publishing, 2005), at p.25
[680] Art. 1 of the OHADA Treaty states: "The object of the present Treaty is to harmonise business law in the States Parties by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and promoting arbitration as a means of settling contractual disputes."

agreements and declaring that there is nothing to prevent it from granting an injunction to restrain proceedings which are (or would be) in breach of an arbitration clause.[681]

Hence, anti-suit injunctions appear to be compatible with arbitration since an arbitral tribunal may issue such injunctions against parallel proceedings to ensure the good conduct of the arbitral proceedings as well as the effective enforcement of the arbitral awards. It is undeniable that anti-suit injunctions would benefit the arbitration practice within the OHADA area. Such injunctions would then act as a protective mechanism of the arbitration proceedings favourable to establish arbitration-friendly countries. Furthermore, Article 13 of the UAA provides:

"Where a dispute, pending before an arbitral tribunal in accordance with an arbitration agreement, is submitted to a national court, the latter shall, upon request of one of the parties, decline its jurisdiction…In any event, the national court shall not of its own motion decline jurisdiction."

This academic contribution accentuates the competence-competence principle as one of the backbones of arbitration. Inspired by the French interpretation of the binding force of the arbitration agreement, Article 13 of the UAA deals with a potential conflict of jurisdiction between domestic courts and arbitral tribunals. In this regard, the binding force of the arbitration clause in the French concept implies that parties shall be able to choose whether to rely on domestic courts or an arbitral tribunal for dispute resolution. Under OHADA law, the waiver of the right to arbitrate is admitted. The indication of this principle set out pursuant to art. 27.2 of the CCJA Arbitration rules is that one party to the arbitration clause may bring the dispute before a domestic court while the other party does not object.[682]T hen, parties by this principle impliedly renounce to the arbitration clause.[683] Nonetheless, in the case where the arbitration agreement is manifestly null and void, the domestic court that has been seized shall find jurisdiction since the void arbitration agreement annuls the arbitration proceedings and that justice still needs to be made.[684]

Togo as a member State of OHADA, its domestic courts are not empowered to grant anti-suit injunctions. Noticeably, the negative effect of the competence-competence principle

[681] See, for example, the Court Appeal's judgment in *Through Mutual Insurance Association (Eursia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* (No 1) [2005] 1 Lloyd's Rep. 67).
[682] CCJA, ch., n. 047, 16-7-(2010) *SNG SA c. SAFRICOM SA*, Ohadata J-12-95
[683] Ibid.
[684] See art. 13 of the UAA

preventing this implicit waiver is reinforced under what article, that inconsistent with the arbitration practice. Article 13 of the UAA provides:

“Where a dispute, pending before an arbitral tribunal in accordance with an arbitration agreement, is submitted to a national court, the latter shall, upon request of one of the parties, decline its jurisdiction.”

This article implies that unless parties say so, the domestic judge shall not decide on whether or not to decline jurisdiction. It is the Togolese court that shall decline jurisdiction and request the parties to pursue or initiate the arbitration proceedings in the existence of an arbitration agreement. [685]

Anti-suit injunctions appear to be effective in many regards, but by contrast it should be noted that parties may also face issues to claim their rights to waive the arbitration agreement or express their consent. Noticeably, Article 13 of the UAA covers disputes involving the seizure of a domestic court for an objection to jurisdiction which nonetheless finds jurisdiction, and the CCJA jurisprudence demonstrates strict supervision and control regarding the implementation of this provision.

However, difficulties may arise when a domestic court issues an unfavourable decision on the merits *ex parte* without having knowledge of the existence of an arbitration agreement. This proceeding improperly initiated obstructs the good conduct of the normal arbitral procedure before the lawfully appointed arbitral tribunal. This is one of the key situations where anti-suit injunctions would be the most compelling and effective mechanism to prevent one party from undertaking an abuse of arbitration process. This is because anti-suit injunctions would act as a shield to protect the arbitration proceedings and ensure the effective enforcement of the arbitration agreement by preventing parallel proceedings to be pursued. Anti-suit injunctions under OHADA law would be even more relevant when the improperly initiated proceeding is brought before a foreign court located outside the OHADA area. In this context, the party seeking to initiate these proceedings regardless of the ongoing procedure would be deterred in view of both the injunction and the sanctions applying.[686] It should be noted that despite the numerous advantages related to this mechanism, the implementation of anti-suit injunctions under OHADA law could also negatively impact on arbitral tribunals, although in very rare cases. The jurisdictional

[685] Akakpo M.K. and Degli, J.Y “Togo” in The International Comparative Legal Guide to International Arbitration 2014, (London: Global Legal Group, 2014), at p.484.
[686] Especially in the case where enforcement of an arbitral award is conducted within the OHADA area. In this case, the injunction assorted to the estoppel of the award could deter the party to pursue the parallel proceedings.

conflicts between two arbitral tribunals may arise, where both tribunals could consider that they have jurisdiction to decide on the case. This issue appears to be even more inappropriate on *lis pendens*[687] and the *res judicata* effect of arbitral awards as there is no *lis pendens* rule between arbitral tribunals."[688] In this context, the International Law Association (ILA) whose reports of its committees influence the development of international law provided recommendations on *lis pendens* and *res judicata* which was adopted in 2006 at the Toronto conference. These recommendations aim at facilitating consistency and uniformity when it comes to interpreting the implementation of principles and provisions related to parallel proceedings and the conclusive and preclusive effects of prior arbitral awards. The reports provide that an arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

- it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;
- it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;
- it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings;
- it has been rendered between the same parties.[689]

These recommendations refer to two different approaches: the issue estoppel and the cause of action estoppel through the “triple identity test.[690] These concepts appear to be relevant since in recent times, it is submitted that parties initiate various parallel proceedings for the same claim while having entered into an arbitration agreement, arbitration aiming at a final and binding decision between parties. Hence, this cause of action estoppel through the "triple identity test" requires that the same parties argue about the same issue but also the determination of the ground under which this cause of action is brought. In this context, Pr. Ngwanza states that due to the competence-competence principle, it is left to the discretion of the arbitral tribunal to disregard or not parallel proceedings insofar its jurisdiction appears to be established.[691] Furthermore, anti-suit

[687] The time during which an action or lawsuit is pending
[688] Ngwanza, A. ‘L'essor de l'arbitrage international en Afrique sub-saharienne : les apports de la CCJA’(2014) 4 Revue de l'ERSUMA, p.60
[689] Accessible at https://www.trans-lex.org/970070 (Last accessed 10th December 2021)
[690] *Germany v Poland* [1927] PCIJ Ser A No 9 (*The Chorzów Factory*)
[691] Ngwanza, A. ‘L'essor de l'arbitrage international en Afrique sub-saharienne : les apports de la CCJA’ (2014) 4 Revue de l'ERSUMA. p. 65

injunctions may also act as a solution to this jurisdictional issue that may arise between two arbitral tribunals.

In this regard, the Senegalese court ruled in favour of an anti-suit injunction attempting to frustrate an arbitration commenced in London in *Kallang Shipping SA v. Axa assurance Senegal and Ors*.[692] In this case, the Senegal court dismissed the application to set aside the anti-suit injunction and held that evidence was found that CCMN and Axa insurance attempted to frustrate an ongoing proceeding.

Kallang owned a vessel that delivered cargo to Comptoir Commercial Mandiaye Ndiaye ('CCMN') insured by Axa Assurance Senegal. The cargo was subject to 14 bills of lading and incorporated a charter party containing English law and London arbitration clause. Upon delivery, CCMN alleged that some 3,000 bags of cargo were missing. Axa Senegal demanded a provisional guarantee from Kallang, asserting that the arbitration clause in the charter party did not apply because Axa Senegal was not a party to that contract. Kallang refused Axa Senegal's demands for a guarantee, and CCMN applied to the courts in Senegal for payment of the amount of the guarantee or the arrest of the vessel as a guarantee and payment. The Senegalese court ordered the arrest of the vessel and the initiation of summary proceedings in Senegal. Kallang applied for and obtained an anti-suit injunction restraining CCMN and Ax Insurance from any proceedings other than arbitration in London. Kallang contended that CCMN and Axa Senegal invoked the jurisdiction of the Senegalese courts not merely to obtain security for their claim, but also for the purposes of payment. CCMN and Axa applied to set aside the injunction.

The Court dismissed the application to set aside the anti-suit injunction on the grounds that evidence demonstrated that CCMN and Axa Senegal were attempting to use the security proceedings in Dakar, and the requirements of a bank guarantee issued by a Senegal bank, as a means of avoiding or frustrating arbitration in London. CCMN and Axa Senegal notably refused to accept a Club letter of undertaking in relation to the cargo claim subject to English law and London arbitration. In light of subsequent undertakings by Axa Senegal, however, there was no need to continue the injunction.

This rare and unique decision demonstrates a favourable tendency to issue anti-suit injunctions in the region if necessary. Nonetheless, questions remain as to what grounds may be raised by the courts to grant anti-suit injunctions in order to restrain foreign court proceedings where these have been commenced in breach of an arbitration agreement.

[692] [2006]EWHC 2825. [2006] ArbLR 39.

With regard to such grounds, the next section will discuss whether domestic courts can refuse to recognize or enforce a judgment obtained in breach of an injunction on public policy grounds.

*Can judgments be refused to recognise or enforce in breach of public policy principle?*

There has been a shift in judicial attitude to encourage of disputes that are not traditionally arbitrable on public policy grounds. The term 'public policy' is an elusive concept as it is very open-textured in nature as it encompasses a broad spectrum of different legal issues.[693] Importantly, these laws limit the court's interference in arbitration practice and reduce the court's role to the supervision of arbitration practice on most cases whether there is a valid arbitration agreement on the one hand, on the other, courts can use the public policy principle to refuse to recognise and enforce arbitration agreements and award, for instance through declaring as a matter that public policy is not capable to be settled via arbitration.

Courts of different jurisdiction attempted to define an arbitration agreement or arbitral awards that are contrary to public policy resulted in its unpredictability. Consequently, the diversity of judicial interpretation of public policy is a manifestation, US courts would deny the enforcement of foreign arbitral awards on grounds of public policy "…where enforcement would violate the forum state's most basic notions of morality and justice'.[694] The Singapore High Court in *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd*[695] defined an arbitration agreement that is contrary to public policy as "Shock the conscience… clearly be injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public or violate the Singapore's most basic notion of morality and justice.'"[696] Despite the public policy principle being deemed as an elusive concept, it is notable that these courts have used fairly similar terms to describe it that is 'illegality', 'justice' and/or 'morality'. Undoubtedly, the public policy principle is a key concept for international arbitration, being both theoretically complex to explain or define and practically relevant.

[693] Tweeddale, A. 'Enforcing Arbitration awards Contrary to Public Policy in England' (2000) 17 ICLR 159, p. 160
[694] *Parsons & Whittemore Overseas Co Inc v Société Générale De L'Industrié Du Papier (*RAKTA) [1974] USCA2 836; 508 F 2d 969 (1974.
[695] [2014] SGHC 220.
[696] *Ibid* Belinda Ang Saw Ean J, at 162. (Interpreting judgement of Chan Sek Keong CJ, Andrew Phang Boon Leong JA and Belinda Ang Saw Ean J in *PT Asuransi JasaIndonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, at para 59) p. 19

This section therefore discusses the role of public policy in the implementation of anti-suit injunctions as well as the potential impact that the implementation of anti-suit injunctions may have on the quest to the region's economic development. In order to consider implementing anti-suit injunction within the OHADA regime, many factors might be considered. In this regard, the questions to be asked are whether this mechanism could fit into the legal environment, then will be examined the extent to which injunctions would be implemented and be in line with the existing laws such as the UAA and the CCJA.

OHADA law is mainly influenced by civil law due to its colonial heritage, hence was inspired by French interpretations of laws as the OHADA Treaty and regulations involved many French practitioners which have been the pioneers of this supranational organization. In this context, it should be noted that French courts are not hostile to the issue of anti-suit injunctions as manifested in *Wolberg v. In Zone Brands Inc*[697], which was held that anti-suit injunctions were not contrary to French international public policy since 2009.[698]

In theory, it could be argued that anti-suit injunctions are not contrary to international public policy as set out pursuant to the OHADA Treaty[699] and the CCJA arbitration rules.[700] As Article 25 of the OHADA Treaty provides:

"Arbitral awards made in compliance with the provisions of this Part shall be final and binding in the territory of each State Party, in the same manner as decisions delivered by their national courts. Such awards may be forcefully enforced by virtue of exequatur.

*The Common Court of Justice and Arbitration has exclusive jurisdiction to grant such exequatur*

*Exequatur shall only be refused in the following cases:*

*…4) where the award is contrary to international public policy."*

On the other hand, the CCJA provides:

"Exequatur may only be refused in the following cases:

d) if the arbitral award is contrary to international public policy."

[697] *Wolberg v. In Zone Brands Inc* Cass. Civ. 14 octobre 2009
[698] Antisuit injunctions are compatible with French international public policy since Cass. Civ. 14 octobre 2009, no 08-16369;
[699] See art. 25 of the OHADA Treaty
[700] See art. 30(6) of the CCJA Rules

Evidently, the CCJA in numerous decisions has ruled on the concept of international public policy to set aside an arbitral award[701] or to adjudicate on a conflict of jurisdiction.[702] Under OHADA Treaty, violation of the principle of *res judicata* is considered as a violation of international public policy which is enshrined in Articles 29(2) and 30 (5) of the CCJA Arbitration Rules. It was held in *Planor Afrique v Atlantique Telecom*[703] that the arbitral tribunal making a ruling regarding the same case and the same parties violates international public policy, thus the arbitral award must be annulled.[704]

Another decision on the setting aside of an arbitral award contrary to the international public policy has been interpreted controversially by the CCJA in its first case. It was held in *SONAPRA* that since the applicable law was the Beninese law, the dispute opposing two Beninese companies relative to internal trade, falls within domestic arbitration; hence, violation of international public policy was wrongly invoked to set aside the arbitral award.[705] This reasoning was criticized as it bypasses OHADA legal system which prevails over domestic systems for the implementation of OHADA law[706] under which international public law is the common ground of mandatory rules of OHADA Member states.[707] The implementation of the UAA to a setting aside procedure supersedes the recourse to mandatory domestic rules non recognized by the other states, as the contrary would lead to legal insecurity in view of the differences between the legal systems. Hence, the CCJA in view of the controversies readjusted its position in the second case SONAPRA where it held that "violation of public policy considered as related to international public policy, the claimant does not indicate in what way the arbitral award is contrary to international public policy. This waited decision demonstrates that that only international public policy may set aside an arbitral award. Consequently, it could be argued that anti-suit injunctions are compatible with public policy that is a key tool for courts when assessing whether anti-suit injunctions shall be granted or not.

With regard to the aforementioned cases and in view of the French interpretation of international public policy, anti-suit injunctions which appears not to be contrary to the country's public policy principle, it might be considered that the CCJA court may by ricochet

[701] CCJA, ass. plen. no 45, *SONAPRA v. SHB*, (2008) Ohadata J-09-83
[702] CCJA, 1 e ch., n'03, Ass. Plen., (2011) : *PlanorAfrique SA c/. Atlantique Telecom SA*, Ohadata J-12-136.
[703] *Planor Afrique v Atlantique Telecom*, N. 03/2011.
[704] ibid.
[705] CCJA, arrêt n° 045/2008, 17 Juillet 2008, *Société Nationale pour la Promotion Agricole dite SONAPRA c/ Société des Huileries du Bénin dite SHB*, op. cit.
[706] Issa-Sayegh, J. « L'ordre juridique OHADA », www.ohada.com, Ohadata D-04-02. p. 24
[707] Douajni, G. 'La notion d'ordre public international dans l'arbitrage OHADA' (2005); Ehongo, B. 'L'ordre public international des Etats parties à l'OHADA' (2006), RCA 34 p.26

of this analysis adopt the same approach and implement anti-suit injunctions as compatible with international public policy with regard to OHADA regulations. OHADA aims at harmonizing business law in the region based on the principles of direct applicability and the primacy of OHADA law,[708] the CCJA has therefore become the "architect" of this harmonization and standardisation of the laws.[709] The OHADA Treaty provides that "The Common Court of Justice and Arbitration shall ensure the uniform interpretation and application of the Treaty, its rules of enforcement as well as Uniform Acts and decisions."[710]

This provision legitimates the powers of the CCJA in ensuring harmonization and unification of the laws under the OHADA treaty in various ways within its scope of competence. It is noted that the CCJA has a dual function as it operates as both an institutional arbitration and supranational Court acting both as a supervising court appointing the arbitrators and at the same time as a judicial court approving and reviewing arbitral awards. Importantly noticed, the CCJA as the supreme Court of the entire area, it is wise to assume that besides the hope for a forthcoming reform which could include such injunctions, it is also for the CCJA as the community supreme court to decide on whether or not to grant anti-suit injunctions in the region on the grounds that the Supreme court hearing cases of the whole OHADA member States appeals are heard exclusively before the CCJA. Therefore, the CCJA may take the opportunity of an action for annulment to provide an innovative interpretation of international public policy for anti-suit injunctions promotion. This also applies to ad hoc arbitration except where there is a motion to set aside an arbitral award and the court has ruled on. In this case the CCJA is not entitled to rule and no appeal can be requested before it. Consequently, the Court may only validate or invalidate when the matter is brought before it. Although the importance of anti-suit injunction in the international arbitration, its adoption may also give rise to potential issues.

Firstly, waiting for the CCJA to consider the option of anti-suit injunctions could take years. Also, the lack of a clear and uniform legal framework in some respects could impede the proper implementation of this mechanism.

Secondly, there is an important risk that domestic courts be reluctant to this new mechanism that could be considered detrimental to OHADA legal tradition and regime.

[708] See art. 10 of the OHADA Treaty
[709] See art. 14 of the OHADA Treaty
[710] Ibid.

With regard to the positive and negative outcomes of the potential implementation of anti-suit injunctions in the OHADA area, the question remains: whether it would be fully beneficial to consider the inclusion in a forthcoming reform of a text on the issue of antisuit injunctions? In other words, could it have been foreseen potential drawbacks regarding such implementation?

Following the existing UAA and CCJA governing arbitration, a future reform could be an opportunity to reflect on the implementation of a judicial cooperation agreement between the OHADA Member States, as such cooperation which does not exist yet under the OHADA Regime would facilitate and support the idea of implementing anti-suit injunctions, and would create steadily trust among member States to promote OHADA arbitration practice with the aim of attracting foreign investors for economic prosperity. Therefore, for OHADA there is a fundamental imperative to act on mutual assistance with concrete judicial harmonization and support between the different States as "The Antananarivo General Convention for Judicial Cooperation" on 12th September 1961 failed to achieve it (1961 Convention).[711]

Moreover, the 1961 Convention had not been signed by all the OHADA Member States, hence did not appear appropriate and constructive for relationships among the OHADA member States as the different countries evolve separately in different conventions. However, although implementing such an agreement within the region could be beneficial for the region and the various judicial issues it faces, it would be utopic to confirm that implementing this kind of agreement grouping the whole OHADA member states would be easy. Therefore, it would be more pragmatic to consider the option of a reflection to include this mechanism in the existing texts such as the Uniform Act on Arbitration which has the advantage to be effective under the OHADA Treaty and would facilitate the discussions between the different institutions.

The question may arise as to whether anti-suit injunctions should be considered under the UAA or the CCJA case law, this could be debated by scholars and practitioners. Nonetheless, regarding the principles and conditions to grant anti-suit injunctions in the different legal systems, it is undeniable that public policy would be at the core of the

[711] "The Antananarivo General Convention for Judicial Cooperation" was signed by many OHADA Member States such as Côte d'Ivoire and Senegal on 12th September 1961, which no mutual assistance had been engaged thus far under this Convention. Noticeably, the member of the then OHADA were 12 former French colonial countries including Chad, Cameroon, Congo, Côte d'Ivoire, Benin, Gabon, Central African Republic, Senegal, Niger, Mauritania Burkina Faso and Madagascar in Antananarivo.

requirements to the applicability of anti-suit injunctions under OHADA arbitration. OHADA public policy is governed by the UAA and domestic laws. The UAA provides:

"*The recognition and exequatur shall be refused only where the arbitral award is manifestly contrary to a rule of international public policy of the States Parties*."[712]

Indeed, public policy used as a safeguard aims at thwarting any decision or arbitral award that would be contrary to the public policy of the State where enforcement is sought. On the other hand, an anti-suit injunction prevents through an order of either a court or an arbitral tribunal a party from commencing or continuing proceedings in a jurisdiction or a forum other than the contractually agreed forum. In this regard, anti-suit injunctions can be used to restrain foreign court proceedings in breach of an arbitration clause, or in other words in the case where the parallel proceedings have been commenced in breach of an arbitration agreement. Hence, public policy and antisuit injunctions having intrinsically the same objectives, it may be assumed that public policy might facilitate the adoption of anti-suit injunction under the OHADA regime.

The origins that have construed the principles of anti-suit injunctions under common law, give a priority concern to the need for a remedy to any potential breach of the arbitration agreement, which may suggest that inherent to such injunctions are public policy considerations when assessing the admissibility of anti-suit injunctions. Truly, public policy may have an influence on the Court's ruling regarding whether it shall grant an anti-suit injunction. By contrast, in the case where the domestic court refuses to issue such injunction, this would not affect the forum's public policy. Therefore, both concepts appear to be intrinsically linked in the sense that public policy acts as a key tool to gauge the relevance of anti-suit injunctions, and also facilitates their issuance after assessment by the relevant authority. In this respect, OHADA Member states' public policy provisions consist of both the UAA provisions and the domestic laws.

In the event of the silence of the domestic laws, it is left to the discretion of the court "if it considers that compliance with that provision is necessary to safeguard the society's interests."[713] In order to decide on the issue and define what public policy represents, the domestic judge will have to draw on all legal texts[714] before adjudication which represents a complex task. In this regard, it should be noted that anti-suit injunctions are not contrary to any OHADA regulations, thus domestic courts could reflect on the question as to

[712] See art. 31.4 of the OHADA Treaty
[713] Douajni, G.K 'La notion d'ordre public international dans l'arbitrage Ohada' (2005) 29 RCA p. 14
[714] Ibid.

recognise the compliance of this mechanism with public policy as this would not only participate in the consolidation of the judicial system but also would protect foreign investors and African economic actors. Nevertheless, it should be noted that there are rare cases indicating to which extent to consider public policy in order to assess the admissibility of the issuance of anti-suit injunctions.

In order for this mechanism to be effective in Sub-Saharan Africa, many aspects should be considered. First, the elaboration of this implementation should draw on the foreign laws that have originally implemented it such as English law. Emphatically, the injunctions should not target a foreign court that would have the effect to jeopardize its sovereignty, but on the contrary, should be targeted the party which has initiated the parallel proceedings before another jurisdiction in breach of an arbitration agreement.

*Granting anti-suit injunction under OHADA law: is it plausible?*

Given that there are potential advantages likely to arise for furtherance of arbitration, it might be plausible for arbitral tribunals or courts to grant anti-suit injunctions under the supervision of CCJA to facilitate arbitral proceedings with OHADA area. Thus, will be discussed both cases succinctly.

First, the arbitral tribunal in an OHADA arbitration benefits from the competence-competence principle allowing the tribunal to rule on its own jurisdiction pursuant to the UAA and enshrined in the OHADA Treaty,[715] implying that no other jurisdiction is entitled to hear the same case. In this regard, the arbitral tribunal with a valid arbitration agreement may issue an anti-suit injunction to prevent parallel proceedings and conflict judgments as long as it is necessary for the good conduct of the arbitral proceeding.[716] This would protect the arbitral tribunal in the exercise of its power to adjudicate cases efficiently and fairly for arbitration friendly countries.

When it comes to the domestic courts, the negative effect of the competence-competence principle prevents a judge from deciding a dispute when an arbitration procedure has already been agreed with contractual arbitration agreement. Consequently, this principle could be used by a court to issue anti-suit injunctions against the party attempting to initiate parallel proceedings before a foreign court or another arbitral tribunal, especially in the

[715] The competence-competence principle laid down in art. 11 of the UAA; See also art. 23 of the OHADA Treaty
[716] See Art. 13(4) of the UAA

case where the foreign court is located outside the OHADA zone. This would ensure that the domestic judges promote the primacy of international arbitration and ensure its compliance with arbitration standards as the OHADA Treaty aims to promote arbitration as the preferred tool for legal and judicial securities and to facilitate trade and the business practice throughout the region.[717] Nonetheless, the sole condition for this mechanism to be effective is that both the party against which the anti-suit injunction has been issued and the domestic judges which are the legal guardians of the compliance with international public policy respect such injunctions. In this regard, the NY Convention is an international instrument governing the recognition and enforcement of arbitral awards of its Signatories which includes 12 out of 17 OHADA Member States. Indeed, the Convention pursuant to art. V(2)b provides that recognition and enforcement may be refused in the case where the competent authority in the country where recognition and enforcement is sought finds that either the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or the recognition or enforcement of the award would be contrary to the public policy of that country. Hence, the role of the judicial courts comes into the process to either enforce or set aside arbitral awards.

Overall, anti-suit injunctions appear to be an appropriate tool that would benefit OHADA legislation. This mechanism could help strengthen the existing texts as well as their application while contributing to the good conduct of the arbitration proceedings in the region. Undeniably, there exist some uncertainties in the inclusion of anti-suit injunctions in OHADA arbitration. Arbitration practice needs to figure out possible steps and responses to mitigate risks in these uncertainties.

There is an irresistible tendency that the increased popularity of arbitration in Sub-Saharan Africa due to the growing market would lead practitioners to consider anti-suit injunctions in the proceedings. It is therefore hoped that the OHADA legislator would consider a forthcoming reform to reflect on the potential inclusion of antisuit injunctions through the existing texts or a renewed judicial cooperation agreement. This would help address key issues detrimental to effective justice in the OHADA region. The CCJA could also take the initiative for instance in the event that a case involving the setting aside of an arbitral award is brought before it, so as to use the opportunity to consider the use of anti-suit injunctions through an innovative interpretation of the international public policy. This would reduce

[717] See the preamble of the OHADA Treaty

the work of the OHADA domestic courts and contribute to the OHADA objectives of harmonization.

# Chapter VI

# Recommendations and conclusion

The chapter highlights the current issues undermining OHADA arbitration effectiveness, and suggests recommendations for the effectiveness of arbitral awards and by ricochet the achievement of OHADA objectives. To this end, the chapter assesses first whether OHADA whose framework has been mainly inspired by civil law jurisdictions can expand to African common law countries. Second, the chapter moves on to analyse the concrete effects of the new reform and the persistent flaws inherent to the texts. This would help assess whether the OHADA legislator achieved its objectives of harmonization for greater efficiency in the enforcement of arbitral awards.

## 6.1. Can OHADA expand to common law jurisdictions?

### A. Background

Originally, fourteen States signed the OHADA Treaty forming the OHADA supranational organization,[718] then three more countries adhered.[719] The vision behind the OHADA pioneers' motives to sign the Treaty was to harmonize the business laws in Africa in an effort to create a more favourable business climate in the region and increase the flow of foreign investments.

It is submitted that both the term "Africa" expressed in the Treaty and the name of the supranational organisation indicate a clear intention to extend the OHADA framework across the entire continent. From a geographical perspective, the organisation only covers

[718] Côte d'Ivoire, Togo, Chad, Mali, Guinea Bissau, Niger, Burkina Faso, Cameroon, Benin, Senegal, Central African Republic, Comoros, Niger and Congo
[719] Democratic republic of Congo, Guinea and Equatorial Guinea

part of Sub-Saharan Africa[720] and is mostly composed of civil law countries. The exception is Cameroon, which stands as the sole Member State with a bi-jural system, encompassing both English common law in its two Anglophone regions and French civil law in its eight francophone regions.[721] Notably, Ghana, which operates under a common law system, has also expressed interest in joining the organization. Thus, the reference to "Africa" in the text might suggest that although the OHADA treaty has not been ratified and implemented across the majority of African countries, OHADA envisions encompassing the entire continent, including non-UA (Union Africaine) members that are willing to adhere to its framework. This is confirmed under art. 53 of the OHADA Treaty which provides as follows:

"*The present Treaty, as soon as it becomes enforceable, is open to all members of the O.A.U*[722] *not signatory of the Treaty. It is equally open to the adhesion of any State not member of the O.A.U. invited to adhere to it, upon unanimous agreement of all contracting States.*"

The Treaty aims to attract foreign investments following the weak economic performance and development of the continent. This urged the Head of States' needs to modernise their business laws, in an effort to improve the business environment and by ricochet increase the economic growth. To this end, the OHADA legislator granted a key place to arbitration in its preamble[723] demonstrating the desire to promote alternative dispute resolution within the continent, inherent to a more favourable business climate.

This section delves into the essential aspects of OHADA arbitration and emphasises the reasons that make this system appealing. It examines the potential for OHADA arbitration framework to attract African States that have not yet joined the unification vision initiated by the OHADA pioneers, specifically common law countries. Moreover, it identifies the driving factors that could lead common law countries to adopt OHADA arbitration. Additionally, it evaluates the challenges that might undermine the attractiveness of OHADA arbitration and explores strategies for OHADA to enhance awareness and actively promote its arbitration system, enabling it to be exported to common law countries.

[720] See the preamble of the OHADA treaty. The treaty in the text refers to its members as "Contracting states" demonstrating the desire to converge towards a single framework
[721] See Ndifor, B. 'The Politicization of the Cameroon Judicial System' (2014) JGJPP 1(1), pp. 27-58
[722] The O.U.A which stands for the Organisation for Africa Unity was dissolved on 9th July 2002 and replaced by the African Union (AU)
[723] See the preamble of the OHADA Treaty

### B. OHADA arbitration to the anglophone world

African countries are composed of civil law, common law, Shariah law and Roman Dutch legal traditions.[724] This rich array of legal traditions reflects the continent's historical, cultural, and colonial influences, contributing to a complex and varied legal landscape across different African nations. Notwithstanding the fact that most States have been colonised by civil law countries and influenced by the French civil legal system, the impact of the legal tradition comes as a natural outcome in the current state of OHADA arbitration framework.[725] This also explains the substance of all the Uniform Acts which draws significant influence from civil law regimes. These Uniform Acts covering areas such as secured transactions or general commercial law appeared in the early years as a substantial advantage in the sense that according to Onyema, this shared legal heritage played a pivotal role in establishing the foundations of the OHADA legal system, contributing significantly to its successful stability and ongoing development.[726] Nonetheless, over time, it has become evident that the OHADA framework has certain deficiencies that need to be addressed in order to fully achieve its objectives. These shortcomings highlight the limitations imposed by the colonial heritage on the legal system and emphasise the necessity of adopting a more contemporary and progressive approach.

In an effort to meet the international standards of best practices, crucial for building a strong reputation worldwide and be renowned as a reliable organisation with arbitration-friendly jurisdictions, OHADA adopted the UNCITRAL Model Law and signed the New York Convention, which both aim to facilitate uniformity of the arbitration laws and practices as well as recognition and enforcement of arbitral awards worldwide. 38 African countries have currently ratified the New York Convention including 12 out of 17 OHADA member states[727] demonstrating a willingness from OHADA Member States to comply with the international standards, facilitate enforcement of arbitral awards in the region and expand their laws outside the OHADA area.

Moreover, notwithstanding the key role played by the Model Law in the uniformity of the laws, it is submitted that each State drafts and implements its own laws. Hence, it is left to the discretion of the States to adapt the Model law to their legislation by adding, removing

[724] Tall, S. ''*Droit du contentieux international africain: Jurisprudences et théorie générale des différends africains*'' (Editions L'Harmattan, 2018) p.36
[725] Out of 54 African States, 35 are under civil law, 15 are under common law, 9 States have a mixed legal system and 3 operate the Roman Dutch system
[726] E. Onyema; 'Regional arbitration institution for ECOWAS: Lessons from OHADA Common Court of Justice and Arbitration' (2014) IALR p.89
[727] The five OHADA Member States that are yet to ratify the Convention are: Republic of Congo, Guinea Bissau, Togo, Chad and Equatorial Guinea

or amending provisions. This entails issues owing to the fact that this flexibility is likely to reduce the chances of a smooth process to uniformity, since each jurisdiction operates under its own provisions and interpretation of the law. For instance, in certain common law countries including Nigeria the misconduct of the arbitrator has been established as a ground for the setting aside of arbitral awards while such restrictive provision is neither provided under the Model Law nor is present in the arbitration framework of most civil law countries. Nonetheless, this is where OHADA stands out as the OHADA legislator sets out of a uniform set of arbitration rules through the Uniform Act on Arbitration and the CCJA Arbitration Rules, the whole 17 member States that have ratified the Treaty operate under the same set of rules as the Uniform acts apply within the whole Member States pursuant to art. 10 of the OHADA Treaty, ensuring uniformity and legal security.

Admittedly, common law countries that show interest in adhering to OHADA would need to familiarise first with the OHADA uniform acts which are mainly influenced by the civil legal regime, and secondly to the legal environment in the region. Nonetheless, OHADA arbitration stands out as a more convenient and flexible option irrespective of its legal system owing to its key features.

First, the law acts to regulate arbitration as an alternative dispute settlement and does not confer substantive legal rights on the parties. Hence, owing to the party autonomy that arbitration confers to the parties, there are no specific rights or duties imposed on the parties for common law jurisdictions to familiarise with.

Secondly, the international character of arbitration makes civil law and common law jurisdictions abide by the same international rules. Pr. Gaillard states in this regard that international arbitration remains autonomous to transnational rules,[728] hence the difference of jurisdictions shall not significantly impact arbitration. Nonetheless, both systems have some specifics that are not recognised in each other's provisions. For instance, and as stated above, an arbitral award under common law may be set aside for any misconduct of the arbitral tribunal, unlike civil law systems which do not have such ground. In Nigeria which operate under the common law system, the Arbitration and Conciliation Act (Hereinafter AC Act) governing the arbitration framework provides pursuant to arts s. 29 and 30[729] that an award can be set aside if there is misconduct by the arbitrators. Nonetheless, although the Act set out misconduct as a ground for setting

[728] Gaillard, E. 'International Arbitration as a transnational system of justice', in Albert Jan van der Berg; "*Arbitration - The Next Fifty Years (ICCA Congress Series 16): Best Practices (International Council for Commercial Arbitration)*" (Kluwer Law International, 2012) p. 26

[729] See Laws of the Federation of Nigeria 2004

aside arbitral awards, the term is not defined leaving Nigerian courts to resort to English law cases in order to fill the gap. In *Kano State Urban Development Board v Fanz Construction Company Limited,*[730] the Nigerian Court of Appeal relying on various English cases provided several procedural irregularities likely to constitute a misconduct including when the arbitral tribunal exceeds its jurisdiction. Nonetheless, in *Taylor Woodrow of Nigeria Limited v Suddeutsche Etna-Werk Gmbh*[731] the Supreme Court held that it is difficult to provide an exhaustive definition of what irregularities may amount to misconduct, leading to various unfounded use of the term misconduct as a ground for setting aside an arbitral award such as the case *Triana Ltd v UTB Plc*[732] where the losing party Triana applied to set aside the arbitral award on the grounds that one of the arbitrators failed to disclose that he had acted against Globus, one of the parties, in a different matter. The Court held that the ground was not established since the previous matter was unrelated to the current dispute, added to the fact that during the proceeding, one of the lawyers to Triana was aware of this fact before the appointment of arbitrators. Hence, it is hoped that the legislator intervenes in order to clarify the term for a more effective procedure.

While it is true that OHADA arbitration framework has several benefits, questions remain as to what these advantages may imply for common law countries. In this regard, it is of relevance to highlight the potential issues likely to jeopardise its attractiveness.

### C. Potential pitfalls in the quest to attractiveness

In terms of raising awareness among non-OHADA Member States, it is noted that the arbitration services offered by CCJA are not widely recognised within the continent. This is especially notable as there is growing competition among various modern and active arbitration centers outside the OHADA region, specifically within common law countries. The most palpable example is the republic of Rwanda, one of the most developing and innovative countries in Africa ranked second in the 2016 World Bank's Ease of doing business rankings.[733] Rwanda has rapidly adopted a pro-arbitration legislative framework with the enactment of Law No. 005/2008 on Arbitration and Conciliation in Commercial Matters. In 2012, it implemented the Kigali International Arbitration Centre Arbitration rules

[730] (1986) 5 NWLR
[731] (1992) 24 NSCC
[732] (2009) 12 NWLR
[733] Accessible at https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf (Last accessed 20 August 2022)

(referred to as KIAC Rules) to govern arbitration proceedings. As a result, the Kigali International Arbitration Centre (KIAC) has successfully administered over 192 cases since its establishment.[734] This demonstrates Rwanda's commitment to providing a secure alternative mechanism for settlement to foreign investors and, in turn, fostering a favorable business climate. Initially operating under the civil law system, Rwanda transitioned to the common law system for commercial disputes, primarily due to the widespread use of French and English languages in the country.

The KIAC along with other arbitration centers, stands out as one of the top and most competitive in the field due to its extensive experience and expertise in administering numerous arbitration proceedings. A key distinction between these centers and the CCJA is their proactive approach of exporting their expertise by offering services beyond their geographic regions. This includes organising conferences and African arbitration events with the aim of promoting their arbitration centers not only across Africa but also globally. These centers are actively engaged in the arbitration community, offering specialised services and maintaining an arbitration-friendly approach. This level of engagement and specialisation is currently lacking in the OHADA arbitration approach. Thus, one of the primary reasons for the slow development and limited spread of OHADA law within the continent and globally is the lack of active engagement and promotion by OHADA member states, practitioners,[735] and specialists. To this end, addressing this issue requires careful consideration of various aspects and the implementation of specific actions to enable OHADA to effectively promote its arbitration framework and extend its influence to common law countries.

The initial step should involve increased engagement of the CCJA through hosting conferences and arbitration events in OHADA Member States, as well as participation in arbitration events beyond the OHADA region. This approach aims to contribute to the promotion of arbitration within the continent and foster discussions on challenges faced in arbitration practice. By doing so, it would raise awareness of the arbitration centers situated in the OHADA region and highlight the valuable services offered by these institutions. The potential outcome of these events could involve attracting more arbitration users, leading to greater utilization of OHADA arbitration centers. Additionally, it would facilitate the creation of a network comprising arbitrators and specialists, facilitating the

[734] See KIAC Annual report 2018, accessible at https://kiac.org.rw/new/IMG/pdf/kiac_annual_report_2018_2019.pdf (Last accessed 20 August 2022)
[735] Among the reasons we have the language barrier and the costs for attending these events that would require interpreters.

exchange of experiences and best practices. This networking could also provide an opportunity for African arbitrators within the region to gain recognition and be appointed for cases across the continent. Nonetheless, all of these objectives can only be achieved if OHADA member states fully commit to actively promoting OHADA law beyond the region. This includes attending arbitration-related events across the continent, especially in common law countries, as part of their effort to export OHADA law and its arbitration framework to a wider audience.

One of the significant impediments to OHADA's expansion within the continent is the language barrier that affects many member states. Due to their colonial heritage, French is the official and primary language in these countries, although several African nations also speak English, Arabic, or Portuguese, such as Ghana, Guinea-Bissau, and Mauritania, among others. In 1999, the OHADA treaty established French as its official language. In 2009, the treaty was revised to include English, Spanish, and Portuguese as working languages according to Article 42. This move was theoretically intended to make the treaty accessible to more countries beyond the OHADA region. However, in practice, significant challenges remain. As of today, there are no official translations of the OHADA texts available in these newly added languages. This issue hampers OHADA's engagement outside its area and its expansion to other jurisdictions. The translations provided on the official website appear to be mistranslated, making it difficult to find accurate versions. Additionally, most of CCJA's decisions published are in French, with no translated versions available in the official working languages established in the Treaty. This lack of translation poses difficulties for non-French speaking jurisdictions within the OHADA region. Consequently, this language barrier represents a significant setback, as the publication of court decisions in all official languages as outlined in the OHADA Treaty would significantly enhance the visibility of the OHADA arbitration framework in multiple respects.

First, accessibility to the texts and jurisprudence would attract and increase the interests of foreign arbitration users and arbitration centres across the continent. Most criticism towards OHADA mainly concern accessibility and reliability of CCJA cases law. Two well-

known cases *Planor Afrique S.A. v Atlantique Telecom S.A.*[736] and the Getma saga[737] as discussed in Chapter 4 raised debates and cast doubts on both the reliability of OHADA arbitration framework and the competence of the CCJA. Both decisions as well as the recent reform of 2017 gave rise to several comments from various scholars and practitioners.[738] While it is true that OHADA arbitration has been the subject of several domestic and international publications,[739] it is submitted that the existing body of literature still lacks the necessary consistency and accessibility required to achieve broader visibility and a more significant presence on the international stage. Despite the contribution of numerous theses on OHADA arbitration in recent years, there remains a practical issue. Some of these studies exploring the OHADA arbitration framework have not been published, significantly limiting their reach and impact. The primary purpose of conducting research on OHADA arbitration is to share insights, fill gaps in knowledge, and introduce novel ideas to the existing literature. Therefore, it is crucial that these theses are either published or presented in book form to make them more accessible to practitioners and scholars seeking specific answers or suggestions on various aspects of arbitration within the OHADA framework. Moreover, it is noteworthy that, as of now, there is no PhD thesis available in English that explores OHADA arbitration. This highlights the originality and significance of the research being conducted, as it will serve as a valuable academic contribution to the English-speaking world. With its specific focus on academics and practitioners, this research has the potential to bridge the gap and bring greater awareness to the English-speaking audience about OHADA arbitration.

Ebonhogo argues that, despite the lack of data, a notable observation is that the majority of theses on arbitration are not published, significantly limiting the OHADA literature.[740]

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[736] 11/07800 [2012]; This case involved several proceedings: in Paris through the ICC, Dakar through the CCJA and one domestic procedure in Burkina Faso. For more discussion, see Deboug, C. 'Les conséquences de la chose transigée dans l'affaire Planor.' Commentaire sous Cass. 1re civ., SA Planor Afrique Société de droit burkinabé c/ Société Emirates Telecommunications Corporation ''Etisalat' 2 (2014) LCA

[737] For more discussion on the Getma case, see De Brugière, M. 'A setback for OHADA Arbitration', KAB (2018) accessible at http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/ (Last accessed 11 August 2022) ; See also Loquin, E. 'La nature solidaire de l'obligation des parties au paiement des frais et honoraires d'arbitrage est une règle matérielle internationale', RTD (2017) p 849

[738] See Anou, G. 'Brèves notes sur la réforme des modes alternatifs des différends dans les pays de l'OHADA, JCP E (2017) ; Aka, N., Fénéon, A., Tchakoua, J-M. ''Le nouveau droit de l'arbitrage et de la médiation en Afrique'' (Collection droits africains, 2018) ; Bühler, M. 'Out of Africa : the 2018 OHADA Arbitration and Mediation Law Reform' JIA 35(5) (2018) p.68

[739] See Ngwe, M. 'Pratique de l'arbitrage OHADA: Bilans et perspectives' in Andrea Menaker, 'International arbitration and the Rule of law: Contribution ad Conformity, ICCA Congress Series, 10 ICCA & Kluwer Law International' (2017) p.34; See also Le bars, B. 'International Commercial Arbitration in Africa – The whole Nine Yards', in International arbitration and the rule of law: Contribution and Conformity, ICCA Congress Series, 19 ICCA & Kluwer Law International (2017); Penda, J. 'Chapter 8': Arbitration centres in French-speaking African countries', The transformation of arbitration in Africa: The role of arbitral institutions, in Emilia Onyema (ed.) (2016) p.23

[740] Ebonhogo, S. "L'arbitrage OHADA dans les publications internationales" in *''20 ans d'arbitrage OHADA : Bilans et perspectives''* (LexisNexis, 2019) p. 53

Nonetheless, there has been a slight increase in the number of arbitration agreements referring disputes to CCJA arbitration, indicating a growing reliance on the OHADA arbitration framework and its effectiveness in facilitating the enforcement of arbitral awards. Nevertheless, it remains a concern that jurisprudence and academic publications are largely inaccessible, particularly outside the OHADA region. This is a critical issue, considering that OHADA arbitration is gaining increasing significance due to the rise of international contracts in the region and their potential implications beyond its borders. The lack of academic writings and accessibility to jurisprudence and journal articles within the OHADA region can be attributed to the limited availability of commercial distribution networks for legal publications, which affects students, academics, and practitioners. To address this gap, there is a need for more publications and improved access to case law to keep arbitration users and foreign businesses updated on the ongoing developments in OHADA arbitration practice. Domestic court decisions should be widely disseminated, consistently commented on, and analyzed at the international level to provide more data for assessing the evolution of OHADA arbitration from a comparative perspective. Creating additional distribution channels, such as quarterly columns dedicated to OHADA arbitration, would help maintain consistency in publications at both regional and international levels. To maximize the impact of raising awareness about OHADA arbitration, it is essential to ensure that these publications are accessible to the primary stakeholders, including African students, academics, and practitioners. By doing so, OHADA can better foster a comprehensive understanding and engagement with its arbitration framework within its region and beyond.

Furthermore, promoting Abidjan, where the CCJA is located, would be a strategic step towards establishing the city as a major hub and preferred seat of arbitration in West Africa and across the continent in the future. Abidjan's significance extends beyond its role as the home of the CCJA. It has experienced remarkable growth and emerged as a cornerstone of regional and international commerce in West Africa. This economic performance has attracted a substantial flow of foreign investment, leading to significant growth in the region.

Given these developments, OHADA stands to benefit from actively promoting the CCJA as a prominent arbitration institution and the OHADA arbitration framework through appropriate reforms. By doing so, OHADA can foster the sharing of jurisprudence within a harmonized legal environment, encourage contributions to debates from scholars outside the region, and ultimately enrich the doctrine and academic materials related to OHADA

arbitration. This would not only bolster the reputation and influence of the CCJA but also elevate Abidjan's status as a preferred destination for arbitration in the region and attract more international businesses and investors seeking a reliable and effective arbitration mechanism.

As of today, only a few English-speaking scholars and academics, such as Emilia Onyema[741] and Michael Bühler,[742] have published or provided commentary on CCJA decisions. This supports the idea that that while the reform of OHADA arbitration law has granted legal legitimacy to the organization, there are practical challenges that hinder its effectiveness. Tameru argues that OHADA has the potential to be a valuable asset in fostering collaboration between civil law and common law jurisdictions if domestic courts' rulings take into account current trends in international commerce and if these decisions are readily accessible. This collaboration aligns with the aim of facilitating trade, as emphasized in the OHADA Treaty, given that international trade is a central aspect of transactions. To fulfill this potential role, OHADA must act diligently to ensure uniformity, transparency, and consistency with international best practices in its arbitration processes. By doing so, OHADA can create an environment conducive to collaboration between civil law and common law jurisdictions, enhancing trade and investment opportunities. Reducing transaction costs for both regions would be a positive step towards fostering such a beneficial collaboration, encouraging cross-border trade and investments and further strengthening OHADA's position as a facilitator of commerce and dispute resolution in the region and beyond.[743] These concerns raise important questions about the effectiveness of the OHADA arbitration framework in attracting foreign arbitration users to include a CCJA arbitration clause in their contracts or opt for OHADA arbitration services for their proceedings. Additionally, it brings to light the potential interest of foreign arbitration centers and practitioners in collaborating with the supranational organization to facilitate the enforcement of intra-African arbitral awards.

To attract interest from the anglophone region, OHADA must make efforts towards achieving convergence and coherence of rules related to commerce and investments. This includes adopting a more proactive role in facilitating the enforcement of arbitral awards across the continent, aligning with OHADA's pursuit of a harmonized and unified arbitration

[741] See Onyema, E. 'Arbitration under the OHADA regime' IALR (2008) pp 205-218; Onyema, E. 'Regional arbitration institution for ECOWAS: Lessons from OHADA Common Court of Justice and arbitration, ILR 17(5) (2014) p 99.
[742] Bühler, M. 'Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform' JIA 35(5) (2018)
[743] See Tameru, L. 'Publication and Access to arbitration related decisions from African courts' in 'Rethinking the role of African national courts in arbitration' E. Onyema KLI (2018) p.56

framework. By doing so, OHADA can create a more arbitration-friendly environment for dispute resolution within Africa. This harmonization and unification of rules would not only benefit intra-African trade and investments but also position Africa as an attractive destination for international businesses seeking reliable and efficient dispute resolution mechanisms. By striving towards these objectives, OHADA can enhance its appeal to foreign arbitration users, arbitration centers, and practitioners, fostering greater engagement and collaboration. This, in turn, would contribute to the growth of OHADA arbitration services and its reputation on the international stage, ultimately bolstering Africa's role as a preferred hub for arbitration and dispute resolution in the continent and beyond.

### D. OHADA legal framework as the "legal levier" of the African Continental Free Trade Area

This objective is aligned with the creation of the African Continental Free Trade Area (hereinafter AfCFTA) whose agreement came into force on May 30, 2019. The AfCFTA is an Africa-wide free trade agreement designed to boost intra-African trade and with the aim to establish in the future a continental customs union. The decision to create the AfCFTA dates from 2012, nonetheless negotiations were initiated in 2015. The agreement was signed in 2018 at the 18th Extraordinary Session of the African Union Summit in Kigali by 44 out of 55 States members of the African Union, positioning it as the largest free-trade area after the World Trade Organization.[744] The agreement aims at facilitating intra-trade and investments, which lines up with OHADA's vision to improve the business climate and facilitate enforcement of arbitral awards across the continent. The United Nations Economic Commission for Africa (hereinafter UNECA) estimates that the AfCFTA will boost intra-African trade by 52% by 2022 and intra-African trade in goods and services by up to 25% by 2040.[745] Furthermore, art. 27 of the Protocol on Rules and Procedures on The Settlement of Disputes governing the AfCFTA highlights the desire to embed arbitration in the African conflict resolution mechanisms and facilitate the enforcement of arbitral awards. It is hoped that over the years, the whole African union member states sign the agreement to entirely harmonize enforcement proceedings.

[744] Accessible at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Last accessed 10 September 2022)
[745] Accessible at https://hdl.handle.net/10855/43253 (Last accessed 20 August 2022)

The authors Kassa, Edjigu, and Still highlight that Africa encounters practical challenges including geographic and political fragmentation that need to be addressed for the AfCFTA to succeed. [746] This requires substantial efforts and commitments from the states, and these efforts must align with the harmonization of laws through regulatory cooperation. From this perspective, the AfCFTA motivates the perspective of expansion of OHADA which seeks to act as a shield against Balkanisation of the laws and isolation of the OHADA Member States. From this perspective, on 23rd February 2022 during the handover ceremony at the headquarters of the presidency of OHADA, M. Ikta Mohamed Abdoulaye, President of the Council of Minister of Justice of Niger expressed the desire of the republic of Niger to make OHADA the legal lever of the AfCFTA so that OHADA spans the entire continent for a more conducive legal integration.[747] This is supported by the fact that the ten OHADA uniform acts represent a unique and commendable experience in Africa, which may in the long-term result in OHADA emerging as a staple for legal integration and serving as a benchmark for other legal systems. In this respect, if negotiations prove successful, the organisation will cover the whole Union African States. Accession to this innovative instrument would extend the reach of OHADA law beyond the region and facilitate the promotion and enforcement of arbitral awards across the entire continent, while also preventing potential jurisdictional conflicts. To illustrate the impact of OHADA in Africa, the Caribbean countries have introduced the OHADAC project which stands for the Organization for the Harmonization of Business Law in the Caribbean.[748] This is a project of legal integration whose aim and principles are similar to OHADA's philosophy and perspective. On 27th September 2021, the OHADAC launched its services which demonstrates the attractiveness of the innovative features of OHADA provisions. The arbitration framework stands out from modern jurisdictions owing to the achievement of a more accessible codification of business despite the myriad of legal systems.

Overall, it is noted that the CFTA stands to gain from progressively increasing intra-African trade which would consequently increase cross-border transaction disputes. Negotiations between civil law and common law jurisdictions should be made to this effect so as to develop strong relationships, as harmonization would improve the quality of the services

[746] Kassa, W., Edjigu, H., Zeufack, A. 'The Promise and Challenge of the African Continental Free Trade Area' in Coulibaly, S. Kassa, W., Edjigu, H., Zeufack, A. "*Africa in the New Trade Environment: Market Access in Troubled Times*" (World Bank Group Publications, 2021) e-ISBN: 978-1-4648-1757-1

[747] Accessible at https://www.ohada.com/actualite/6199/ohada-en-prenant-officiellement-la-presidence-de-lorganisation-le-niger-ambitionne-den-faire-le-bras-juridique-de-la-zlecaf.html (Last accessed 10 September 2022)

[748] See Draft statutes of the OHADAC Caribbean Centre for Arbitration and Conciliation. Accessible at https://www.ohadac.com/textes/4/draft-statutes-of-the-ohadac-caribbean-centre-for-arbitration-and-conciliation.html (Last accessed 20 September 2022)

offered by the arbitration centers throughout the continent and offer greater visibility to OHADA arbitration centers.[749] OHADA offers modern and arbitration-friendly legislation that is in constant construction for its outreach. Although the advantages above can be cited as favorable, it is submitted that non-OHADA jurisdictions must also engage in the process of harmonisation and unification. Although they operate through successful and active arbitration centres owing to their top-management services, harmonisation and effective enforcement of arbitral awards across the continent require the creation of a strong network and community. Furthermore, a healthy and competitive approach helps improve the quality of services provided by the arbitration centres and offers greater visibility to African practitioners.

The longstanding aim of OHADA is to provide foreign investors with a favorable business climate that is replete with business opportunities in Africa guaranteed by a secured legal framework as well as an efficient dispute resolution offering. It is to this end that the Uniform Act on Arbitration as well as the Common Court of Justice and Arbitration Rules were revised in 2017 and the new texts entered into force on 15 March 2018. The reform represents a substantial shift in OHADA arbitration procedure as it seeks to comply with international standards and best practices. Nonetheless, there remain some insufficiencies undermining the efforts to clarify and strengthen the previous versions of the texts.

### 6.2. Overview of the reform and the persistent flaws

OHADA strives to ensure modernisation and harmonisation of its Member States' business laws in order to guarantee legal and judicial security in the region. Over twenty years later, the question remains as to whether the OHADA legislator has achieved its objectives. Many commentators including Ahdab[750] argue that despite notable progress in the arbitration framework, several crucial issues persist. These include inconsistencies in the wording of various articles, making them conflicting with different texts,[751] the determination of the competent jurisdiction responsible for granting exequatur for enforcing arbitral awards remains unaddressed by the legislator, and the concept of public policy exception lacking a standardized definition leading to variations from one state to another.

[749] See E. Onyema, 'Reimagining the framework for resolving intra-African Commercial disputes in the context of the African Continental Free Trade Agreement' (2019) WTR
[750] Ahdab, J. 'The effectiveness of arbitral awards': *Twenty years of arbitration: overview and perspectives*, Lexis Nexis, (2019); Kood, M' 'General overview of the current Ohada arbitration regime', ASAB, (2018), 36(4)
[751] Art. 34 of the UAA, art. 29.5 of the OHADA Treaty; art. 30.5 of the CCJA Rules

Furthermore, there is a lack of clarity regarding Article 34 of the UAA concerning arbitral awards rendered under rules different from those of the UAA.

To enhance the effectiveness of arbitral awards, it is essential to undertake refinements in the OHADA arbitration reform, necessitating amendments to the existing texts. Specifically, the provisions governing the fundamental principles of CCJA arbitration proceedings under the OHADA treaty must be reassessed to ensure alignment with the revised UAA of 2017. The key areas of focus for review are arts 10 and 14 of the revised UAA, which emphasise the principles of liberalism and flexibility in OHADA arbitration, encompassing both ad hoc and CCJA arbitrations. This implies that parties opting for OHADA arbitration have the freedom to select the type of arbitration that best suits their needs.

Nonetheless, art. 23 of the OHADA Treaty provides as follows:

"*Any national court of a State Party before which a dispute which the parties had agreed to settle by arbitration is brought shall upon the request of one of the parties declare it lacks jurisdiction and, where applicable, refers the matter to Arbitration, in accordance with the present Treaty*."

The wording of the article may suggest that the CCJA has exclusive rights over arbitration proceedings in the whole region, which is consistent with the UAA provisions which enshrine the party autonomy principle. The OHADA legislator shall address this issue by amending art. 23 of the Treaty and shall specify in this regard that if applicable, the court declining jurisdiction shall refer the parties to their preferred arbitration procedure.

Another issue is the contradiction regarding the requirements for recognition and enforcement of arbitral awards in the texts. The Uniform Act on Arbitration is the law governing arbitration within the OHADA area, which implies that the CCJA Rules as well as the arbitration rules governing the other arbitration centres in the regions shall align with the UAA. Nonetheless, the three texts provide different grounds to set aside an arbitral award and deny exequatur. Art. 25 of the OHADA Treaty provides that exequatur shall only be refused in the following cases:

*1) where the Arbitrator has ruled without an arbitration agreement or where the arbitration agreement was void or had expired;*
*2) where the Arbitrator has not ruled within the scope of the mission conferred upon him;*

*3) where the principle of an adversary process has not been respected;*
*4) where the award is contrary to international public policy.*

On one hand, the treaty provides three grounds to set aside an arbitral award while the UAA pursuant to art. 31.4 outlines only one ground to deny exequatur:

"*Recognition and enforcement shall be denied when the award is manifestly contrary to international public policy*."

On the other hand, the CCJA Rules in art. 30.5 provides four grounds to set aside arbitral awards which is inconsistent with the UAA provisions. The four grounds are as follows:

*a) if the arbitral tribunal has ruled without an arbitration agreement or on an agreement that is void or expired;*
*b) if the arbitral tribunal ruled without conforming to the mandate with which it has been entrusted;*
*c) if the principle of due process has not been respected;*
*d) if the arbitral award is contrary to international public policy*

The OHADA legislator shall address this issue through the amendment of art. 25 of the OHADA Treaty. The article shall remove the other grounds and state that recognition and enforcement of arbitral awards are denied if the award is manifestly contrary to international public policy so as to align with the UAA reform.

Finally, it is worth noting that the provisions concerning the initiation of new arbitration proceedings subsequent to the setting aside of an arbitral award seem to vary across all OHADA legal instruments. The CCJA Rules provide in art. 29.5:

"*If the Court denies recognition and res judicata effect of the award referred to it, the award shall be annulled. It shall re-hear the case and rule on the merits if the parties have requested it to do so. If the parties have not requested the Court to re-hear the case and rule on the merits, the proceedings are resumed at the request of the most diligent party, starting from the last step in the arbitral proceedings recognized as valid by the Court, as the case may be.*"

This provision shall align with the UAA which states in art. 29:

"*In the event of an annulment of the arbitral award and save when the said annulment is based on the fact that the tribunal ruled without an arbitration agreement or on a void or*

*expired one, it rests upon the most diligent party, if it so wishes, to initiate a new arbitration proceeding in accordance with this Uniform Act.*"

The rationale behind the proposal of amendment of art. 29.5 of the CCJA Rules is that the UAA provides flexibility to parties to request a new arbitration proceeding while under CCJA Rules, the court shall resume the previous arbitration proceeding based on the activities related to the proceeding, if applicable. To address this inconsistency, the OHADA Treaty and the CCJA Rules shall specify that in the event of the setting aside of an arbitral award and except in cases where the refusal is based on the fact that the arbitral tribunal ruled without an arbitration agreement or an agreement declared null, it is for the most diligent party to decide to commence a new arbitration procedure. This is to ensure to align with the UAA.

For these proposals to be effective, another issue shall be addressed. Indeed, amendment of the CCJA Rules requires prior the meeting of the Conference of the OHADA Head of States and government leaders who have exclusive discretion to amend the Treaty, which governs CCJA Rules under its Title IV. The issues encountered on this matter relating to the coordination of the agendas of the respective Head of state and government leaders in order to schedule the meeting of the Conference. This could lead to severe delays in the amendment of the CCJA provisions and significantly affect the effectiveness of the OHADA arbitration framework and enforcement of arbitral awards over the long run. Thus, it is suggested that another institution such as the Council of Ministers of Justice and Finance shall, if necessary, have the authority to amend the CCJA Rules without the need to hold the meeting of the Conference of Head of States and government leaders beforehand.

While it is true that the CCJA Rules shall align with the revised Uniform Act on Arbitration, it is submitted that the OHADA legislator also failed to address some inconsistencies contained in the UAA in the recent reform, which undermine enforcement of arbitral awards within the area and outside the OHADA zone. Indeed, two articles contained in the UAA raise concerns owing to their contradiction and lack of clarity, respectively arts. 1 and 34. Indeed, the legislator missed the opportunity to review the geographical scope of the UAA under art. 1 which states that the text shall be applicable when the seat of arbitration is located in one of the Member States. This represents a major concern and contradiction insofar as most arbitrations related to African disputes involving foreign investors are seated in countries outside the OHADA zone. In contrast, art. 34 provides as follows:

"*The arbitral awards rendered on the basis of rules different from those provided for in this Uniform Act shall be recognized in the Member States under the conditions provided for by international conventions possibly applicable and, in the absence thereof, under the same conditions as those provided in this Uniform Act.*"

This provision appears to be inconsistent with art. 1 and unclear in many respects. First, it refers to the recognition of arbitral awards and remains silent on the enforcement stage while chapter VI of the UAA is titled recognition and enforcement of arbitral awards. Thus, it is questionable whether the article applies to exequatur and is also directly applicable to arbitral awards rendered in third-party countries. Another concern is whether an OHADA member state which is also party to the NY Convention shall be prohibited from applying the requirements outlined in art. 31 of the UAA to grant exequatur owing to the subsidiarity principle enshrined under art. 34. Hence, questions remain as to whether this legal vacuum shall be regarded as an inadvertent or deliberate omission from the legislator.

Revising the texts would significantly contribute to the evolution of OHADA arbitration, greater efficiency regarding the enforcement of arbitral awards, and the achievement of the OHADA objectives of harmonization of the law. The desire to make the OHADA arbitration framework attractive seeks to boost regional and foreign investments in the OHADA region while establishing a favorable and secure business climate. By achieving this, the region aims to become a prominent destination for international arbitration. This strategic objective, in turn, would position Abidjan, the location of the CCJA, as a significant hub for dispute resolution.

Nonetheless, the effectiveness of the law cannot be measured solely with regard to the reforms made but instead to its appropriate implementation and enforcement of the decisions. In this regard, the CCJA in *Transrail SA v. Canac Sénégal SA et Canac Railway services Inc*[752] demonstrates a strict application of the law in both form and substance by accompanying the decision *de facto and de jure*, with a reasoned explanation of its legal, evidentiary, and factual basis. In this case, the CCJA highlights an important rule related to the validity of the arbitration agreement. The plaintiffs declined jurisdiction of the domestic court on the ground that the arbitration agreement was contained in a void contract. The Supreme Court held that the arbitration agreement contained in a forgery contract shall be deemed a forgery. Hence, this arbitration agreement shall not be made the basis for declining jurisdiction of the domestic court. The Supreme Court brilliantly

[752] CCJA, Arrêt N° 040/2020

gives reasons for its ruling and the admissibility of the appeal. This suggests that although there remain issues of enforcement and implementation of the laws, the CCJA is willing to make further efforts to implement the rules to facilitate enforcement of arbitral awards. This is evidenced by the increasing number of progressive decisions facilitating recognition and enforcement by the judiciary.[753]

With a view to further assess the persistent flaws undermining OHADA arbitrations such as judicial intervention and the dearth of literature and jurisprudence on the enforcement of arbitral awards in the region, survey questionnaires, and interviews were conducted with practitioners, academics, and experts in arbitration. The findings from both semi-structured interviews and survey questionnaires revealed that the revised OHADA texts stand out from the traditional French civil law tradition from which they are derived. The OHADA legislator aimed to balance the expeditiousness of arbitration proceedings and the effective enforcement of arbitral awards while allowing parties the flexibility of common law to tailor the procedure according to their specific requirements. Nonetheless, there are still significant inconsistencies that need to be addressed to fully achieve the objectives of harmonisation within the OHADA framework. The rationale behind the conduct of semi-structured interviews was to obtain further views and suggestions with regard to the several challenges pertaining to the enforcement of arbitral awards under OHADA law so as to achieve the aim of the study. The interviewees provided suggestions that could be adopted to address these challenges.

Among the participants, practitioners provided suggestions to the Common Court of Justice and Arbitration in order for the institution to be more efficient and meet both local and international standards. The responses helped assess the real impact of the reform of 2017 and its practical implications on the arbitration proceedings both ad hoc and institutional. Recommendations provided helped examine whether the reform contributed to the effectiveness of the arbitration proceedings and by ricochet the achievement of OHADA objectives of harmonisation of the laws, or whether a forthcoming reform is needed to fill the existing gaps still hindering harmonisation and the expansion of OHADA law outside the region.

Recommendations from the respondents include:

- Increase the number of judges and further facilitate its referral.

[753] See *Benin Control v. Etat du Benin*, N. 103/2015 ; *Etat du Bénin v. Société Commune de Participation*, N. 104/2015; *Etat du Mali v. ABS international Corporate*, CCJA, N. 011/2011; *Société Inter Africaine de Distribution v. Compagnie Malienne pour le Développement des Textiles*, N. 01/2015

- Substantially improve OHADA visibility through the creation of a website befitting an international arbitration centre, and ICT equipment including meeting rooms and videoconference equipment for virtual hearings and meetings must be improved.
- Allow the publication of extracts of awards and proceed to the dematerialization of the procedures so as to suppress the archaic method of work subsisting.
- Ensure the independence of the arbitration centre through a strict separation between the CCJA as a Supreme court and the CCJA as an arbitration centre, which is of the utmost importance for the reliability of OHADA arbitration practice.
- The OHADA legislator should review the system of majority in CCJA arbitration proceedings and return to the old system regarding due diligence of the arbitral awards.
- Strengthen the effectiveness of arbitral awards involving public authorities.
- Provide discounts on the arbitration fees.
- Improve the administration.
- Raise further awareness on OHADA arbitration across the region as the OHADA region shows a low rate of arbitrations compared to common law countries and North African countries
- Place emphasis on the training of Court members who are for the majority not specialized in the areas they adjudicate on.
- Provisions should be made for disputes where it is possible to bring proceedings directly before the CCJA.

Finally, some participants opposed to the dual capacity of the CCJA recommended:

- A strict separation between the arbitration centre and the CCJA'.
- Increase the CCJA resources in order to provide this institution with the means to achieve its ambitions.

Overall, arbitration practice within the OHADA area is constantly evolving. The innovations implemented through the reform strengthened the arbitration framework and increased its attractiveness as a secure place for investments. It is submitted that OHADA is in a good place to emerge as a cornerstone for alternative dispute resolutions in Africa if the identified gaps are addressed. Indeed, as discussed above, the AfCFTA represents an opportunity for African practitioners, jurisdictions, and arbitration centres owing to the fact that OHADA institutions need to be further promoted and obtain greater visibility so as to

increase reliance on African arbitral institutions and expand OHADA arbitration outside the region. Africa needs harmonisation and the opportunity for African scholars to make substantial contributions to the literature. This implies primarily emphasizing education through the training of the future generation of academics and practitioners. Courses with the appropriate materials on arbitration shall be delivered in the majority of universities, followed by the training at the Regional Training School of the Judiciary, one of OHADA institutions.

On a more theoretical aspect, clarity needs to be steadily made in the different texts including the OHADA Treaty, the Uniform Act on Arbitration, and the Common Court of Justice and Arbitration Rules through reform, jurisprudence, or doctrine in order to ease the process for the parties as there is an intrinsic link between transparency of rules and effectiveness of dispute resolution systems. This could be achieved through the internalization of the treaty provisions and the creation of proper legal infrastructures to implement them, as this would prevent the temptation of derogating from the provisions of the Treaty.

The main challenges jeopardising the harmonisation of the laws across the region are geopolitical tensions between the states, external influences, and the lack of resources. To these challenges, unprecedented levels of engagement from the states in ensuring the success of the AfCFTA are recommended given that a cross-border harmonization of legal rules is of the essence. Finally, one question remains as to how the OHADA regime may be able to retain and attract qualified arbitrators the fees are significantly low in contrast to African common law countries and international arbitration institutions. The urgent need to undertake all necessary measures for the effectiveness and outreach of the OHADA arbitration framework shall include the status of African practitioners, as the latters' turning their backs on the OHADA region all these efforts would be vain. The institution must then seriously address the issue.

Arbitration practice within the OHADA area is in permanent construction mostly owing to the growing number of disputes involving African interests and becoming a centre of exponential economic growth with large projects emerging all over the continent in the energy, natural resources, banking, and telecoms sectors. Hence, it is submitted that OHADA influenced in its own way the arbitration world through its innovative provisions, and this can be appreciated through the OHADAC project launched by the Caribbeans incorporating the OHADA framework and reproducing a similar arbitration centre. Since its creation through the Treaty of Port Louis, Mauritius in 1993 has been invaluable in

developing a solid legal framework in various areas among its Member States through its arbitration provisions including the Uniform Act of Arbitration which applies where the seat of the arbitration is in an OHADA contracting State, and the CCJA Rules which holds a dual function acting as an arbitral institution administering its own Arbitration Rules and a supreme Court ensuring the common interpretation and application of OHADA laws.

OHADA arbitrations have primarily been used for regional disputes, largely due to skepticism surrounding the effectiveness and credibility of the supranational organisation. As a consequence, parties often choose to opt for more established international arbitration institutions such as the LCIA or the ICC. One of the significant reasons for this preference lies in the setback experienced in 2015 during the Getma saga, as discussed in the Chapter. This incident raised doubts about the reliability of the CCJA as an arbitration centre and the overall OHADA arbitration framework. The decision made during the Getma case led to numerous concerns, negatively impacting the CCJA's credibility in several aspects. This incident has contributed to suspicions of corruption among arbitrators or governments, further eroding confidence in the OHADA arbitration system.

## 6.3. General conclusion

### 6.3.1. Limitations of the study and further research

The main limitations of the thesis concern the legal gaps and inconsistencies in the different texts as well as the shortage and the difficulty in gaining access to cases law. These limitations restricted the study to a narrow understanding of the practical implications of the reform of 2017. Therefore, the issues were explored through the conduct of semi-structured interviews with academics, experts, and practitioners. The empirical findings of the study could be strengthened through a collection of further data from African arbitrators and practitioners so as to obtain a broader range of practical views on OHADA arbitration practice and further suggestions for a speedier and more impartial mechanism. This research focused on the enforcement of arbitral awards, and thus did not address all the issues encountered in OHADA arbitration. Further research shall be conducted on other aspects of arbitration such as the issues arising in investor-state arbitrations or state immunities, so as to provide a full account of OHADA arbitration practice. The comparative study concerned the UK and the OHADA regime, nonetheless more comparative studies should be conducted with other jurisdictions so as to identify

potential shortcomings that can be addressed and draw on other arbitration-friendly jurisdictions in this regard such as France, the US, or Singapore.

### 6.3.2. Conclusion

This thesis has achieved its aim and objectives outlined in chapter I by filling in the gaps identified through a critical analysis of the enforcement of arbitral awards in developing and developed countries with specific emphasis on the UK and OHADA arbitration framework. The findings and hypothesis provided were assessed through the conduct of semi-structured interviews and survey questionnaires for the purposes of providing recommendations that have been detailed accordingly. Overall, OHADA has an innovative and promising legal framework, and it is hoped that the domestic courts will adopt a pro-arbitration approach by granting anti-suit injunctions in support of arbitration. The persistent flaws and lack of clarity following the reform of 2017 significantly undermine the enforcement of arbitral awards and their effectiveness in the region. Nonetheless, the CCJA demonstrated a pro-arbitration approach through recent cases which augurs well for the future of OHADA arbitration practice if the issues related to the texts are addressed. It is hoped that in the future, OHADA would reflect the international standards and best practices, and serve as a benchmark in Africa in terms of arbitration practice.

It should be recalled that the main aim of the study was to assess the effectiveness of the enforcement of arbitral awards through a comparative study of developing and developed countries with specific emphasis on the UK and the OHADA Regime. The rationale behind the choice of OHADA arbitration is that the researcher is from Côte d'Ivoire, one OHADA member state where is located the Common Court of Justice and Arbitration and aim to promote OHADA arbitration practice through this project while addressing the persistent flaws detrimental to the regime. It was discussed that OHADA has made significant efforts to harmonize the laws in the region and promote OHADA arbitration so as to attract foreign investors. The English legal system was chosen for this study because the UK is a top destination for commercial arbitrations and has an established legal framework for arbitration. Thus, this thesis examined the lessons that OHADA law could draw on the UK regime. To this end, research was conducted in two stages. First, secondary research was used in which doctrinal analysis and a comparative legal approach were employed. This led to the finding that in contrast with the UK regime, OHADA legal framework shows inconsistencies and a lack of clarity as to the enforcement of arbitral awards in the region. It also led to the hypothesis that notwithstanding the fact the OHADA regime has a civil

law system, there is substantial scope for implementation of anti-suit injunctions in the region. Thus, the feasibility of the domestic courts granting anti-suit injunctions is not negligible. Thus, it was suggested that domestic courts in the OHADA region should grant anti-suit injunctions if required to avoid parties from commencing vexatious foreign court proceedings in breach of an arbitration agreement. This would help ensure compliance with public policy.

The findings and hypothesis emerged using semi-structured interviews and survey questionnaires and it was explained that the rationale behind the choice of these research methods was owed to the consistency with the targeted sample, previous research on arbitration, and the nature of the questions. The questions were specifically designed to obtain further information on the arbitration practice from practitioners and experts of OHADA arbitration. The participants were composed of lawyers, arbitrators, magistrates, academics, the former president of the bar of Côte d'Ivoire, and one of the experts appointed member of the drafting committee in charge of the OHADA uniform acts in 1999. Their responses were analyzed and incorporated into the study.

As mentioned previously in the thesis, there are several legal issues undermining the enforceability of arbitral awards in the region, and OHADA stands to gain from learning from the UK in this regard, especially since the OHADA legislator has failed to address all the inconsistencies in the reform of 2017. Thus, the lawmakers shall amend OHADA texts namely the OHADA Treaty, the CCJA Rules, and the Uniform Act on Arbitration current Arbitration Act, and consider implementing antisuit injunctions in the arbitration framework. There are no literature and jurisprudence addressing the issue of antisuit injunction in contrast to the UK, limiting the comparative approach of the study. Conversely, the qualitative variety of English literature and cases law has enriched this study to critically assess the legal issues arising at the enforcement stage. From this comparative study, a new hypothesis of legislative approach emerged with the purpose of implementation in the OHADA legal framework. The study contributes to establishing a new theory for the implementation of antisuit injunctions in the OHADA regime so as to improve the effectiveness of the arbitration proceedings as suggested in Chapter VI through an analysis of antisuit injunctions in the UK and the US.

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# Appendix

## PARTICIPANT INFORMATION SHEET

You are being invited to take part in research on International arbitration. Yassine Sangaré, 2nd year PhD student at Coventry University is leading this research. Before you decide to take part it is important you understand why the research is being conducted and what it will involve. Please take time to read the following information carefully.

**What is the purpose of the study?**
The purpose of the study is to promote the expansion of arbitration as the best alternative for dispute resolution, especially in Sub-Saharan Africa. Indeed, the on-growing importance of arbitration in the business practice of many African countries requires priority attention and better clarification in order to address the legal and judicial insecurity which gave rise to the OHADA. Thus, this project intends to contribute to the development of OHADA law by highlighting the legal and judicial practices likely to obstruct the enforceability of arbitral awards and most important to raise public awareness of OHADA Arbitration.

**Why have I been chosen to take part?**
You are invited to participate in this study because you are a specialist/have extensive knowledge in International Arbitration and/or OHADA Arbitration, therefore could contribute to the completion of this project by providing your expert opinion to the research questions.

**What are the benefits of taking part?**
By sharing your experiences with us, you will be helping Yassine Sangaré and Coventry University to better understand the enforceability of arbitral awards within the OHADA area and the United Kingdom through a comparative study between developing and developed countries.

**Are there any risks associated with taking part?**
This study has been reviewed and approved through Coventry University's formal research ethics procedure. There are no significant risks associated with participation.

**Do I have to take part?**
No – it is entirely up to you. If you do decide to take part, please keep this Information Sheet and complete the Informed Consent Form to show that you understand your rights in relation to the research, and that you are happy to participate. Please note down your participant number (which is on the Consent Form) and provide this to the lead researcher if you seek to withdraw from the study at a later date. You are free to withdraw your information from the project data set at any time until the data are destroyed on the 21st July 2022 until the data are fully anonymised in our records. You should note that your data may be used in the production of formal research outputs (e.g. journal articles, conference papers, theses and reports) prior to this date and so you are advised to contact

the university at the earliest opportunity should you wish to withdraw from the study. To withdraw, please contact the lead researcher (contact details are provided below). Please also contact the Research Support Office (email researchproservices.fbl@coventry.ac.uk; telephone +44(0)2477658461) so that your request can be dealt with promptly in the event of the lead researcher's absence. You do not need to give a reason. A decision to withdraw, or not to take part, will not affect you in any way.

**What will happen if I decide to take part?**
You will be asked a number of questions regarding the semi-structured interviews and the online surveys. The questionnaires/interviews will take place in a safe environment at a time that is convenient to you. Ideally, we would like to audio record your responses (and will require your consent for this), so the location should be in a fairly quiet area. The questionnaires/interviews/ should take around 30 mins to complete.

**Data Protection and Confidentiality**
Your data will be processed in accordance with the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. All information collected about you will be kept strictly confidential. Unless they are fully anonymised in our records, your data will be referred to by a unique participant number rather than by name. If you consent to being audio recorded, all recordings will be destroyed once they have been transcribed. Your data will only be viewed by the researcher/research team. All electronic data will be stored on a password-protected computer file in the secured University's one drive. All paper records will be stored in a locked filing cabinet at the postgraduate researcher office where I have a locker. Your consent information will be kept separately from your responses in order to minimise risk in the event of a data breach. The lead researcher will take responsibility for data destruction and all collected data will be destroyed on or before the 21st July 2022.

**Data Protection Rights**
Coventry University is a Data Controller for the information you provide. You have the right to access information held about you. Your right of access can be exercised in accordance with the General Data Protection Regulation and the Data Protection Act 2018. You also have other rights including rights of correction, erasure, objection, and data portability. For more details, including the right to lodge a complaint with the Information Commissioner's Office, please visit www.ico.org.uk. Questions, comments and requests about your personal data can also be sent to the University Data Protection Officer - enquiry.ipu@coventry.ac.uk

**What will happen with the results of this study?**
The results of this study may be summarised in published articles, reports and presentations. Quotes or key findings will always be made anonymous in any formal outputs unless we have your prior and explicit written permission to attribute them to you by name.

**Making a Complaint**
If you are unhappy with any aspect of this research, please first contact the lead researcher, Ms Yassine Sangaré; e-mail: sangare2@uni.coventry.ac.uk. If you still have concerns and wish to make a formal complaint, please write to:
Dr Margaret Liu,
Director of Studies

aa9148@coventry.ac.uk

Yassine Sangaré
2nd year PhD student
Coventry University
Coventry CV1 5FB
Email: sangare2@uni.coventry.ac.uk

| Participant No. |
|---|
| |

# INFORMED CONSENT FORM:

## *Enforcement of international arbitral awards in developing and developed countries: A comparative study between the OHADA Regime and the United Kingdom*

You are invited to take part in this research study for the purpose of collecting data on *the legal and judicial practices likely to obstruct the enforceability of arbitral awards in developing and developed countries*.
Before you decide to take part, you must **read the accompanying Participant Information Sheet.**

Please do not hesitate to ask questions if anything is unclear or if you would like more information about any aspect of this research. It is important that you feel able to take the necessary time to decide whether or not you wish to take part.

If you are happy to participate, please confirm your consent by circling YES against each of the below statements and then signing and dating the form as participant.

| | | | |
|---|---|---|---|
| **1** | **I confirm that I have read and understood the Participant Information Sheet for the above study and have had the opportunity to ask questions** | **YES** | **NO** |
| **2** | **I understand my participation is voluntary and that I am free to withdraw my data, without giving a reason, by contacting the lead researcher and the Research Support Office at any time until the date specified in the Participant Information Sheet** | **YES** | **NO** |
| **3** | **I have noted down my participant number (top left of this Consent Form) which may be required by the lead researcher if I wish to withdraw from the study** | **YES** | **NO** |
| **4** | **I understand that all the information I provide will be held securely and treated confidentially** | **YES** | **NO** |
| **5** | **I am happy for the information I provide to be used (anonymously) in academic papers and other formal research outputs** | **YES** | **NO** |
| **6** | **I am happy for the interview to be audio recorded** | **YES** | **NO** |
| **7** | **I agree to take part in the above study** | **YES** | **NO** |

**Thank you for your participation in this study. Your help is very much appreciated.**

| Participant's Name | Date | Signature |
|---|---|---|
| | | |
| **Researcher** | **Date** | |
| **Yassine Sangaré** | **01/04/2020** | |

**PARTICIPANT INFORMATION STATEMENT**

The aim of this study is to promote the expansion of arbitration as the best alternative for dispute resolution, especially in Sub-Saharan Africa. Indeed, the on growing importance of arbitration in the business practice of many African countries requires priority attention and better clarification in order to address the legal and judicial insecurity which gave rise to the OHADA. Thus, this project intends to contribute to the development of OHADA law by highlighting the legal and judicial practices likely to obstruct the enforceability of arbitral awards and most important to raise public awareness of OHADA Arbitration. Inherent in the project's aim is the complex definition of the concept of public policy and its impact on the enforceability of arbitral awards, since public policy is a key aspect in the implementation of arbitral awards.

The study is being conducted by ***Yassine Sangaré*** at Coventry University. You have been selected to take part in this questionnaire survey because you are a specialist/have extensive knowledge in International Arbitration and/or OHADA Arbitration, therefore could contribute to the completion of this project by providing your expert opinion to the research questions.

***Questionnaire details***

Your participation in the survey is entirely voluntary, and you can opt out at any stage by closing and exiting the browser. If you are happy to take part, please answer the following questions relating to the enforcement of international arbitral awards. Your answers will help us to highlight and fill in the legal gaps existing in within the OHADA Legislation but also the UK Arbitration post-Brexit. The survey should take approximately 30 minutes to complete. Your answers will be treated confidentially and the information you provide will be kept anonymous in any research outputs/publications. Your data will be held securely in the University's one drive. All data will be deleted by the 21st July 2022.

***Data confidentiality***

The project has been reviewed and approved through the formal Research Ethics procedure at Coventry University. For further information, or if you have any queries, please contact the lead researcher ***Yassine Sangaré***, e-mail: sangare2@uni.coventry.ac.uk; tel: +447403567050. If you have any concerns that cannot be resolved through the lead researcher, please contact:
**Dr Margaret Liu,**
**Director of Studies**
aa9148@coventry.ac.uk

Thank you for taking the time to participate in this survey. Your help is very much appreciated.

I have read and understood the above information. ☐

I understand that, because my answers will be fully anonymised, it will not be possible to withdraw them from the study once I have completed the survey. ☐

I agree to take part in this questionnaire survey. ☐

I confirm that I am aged 18 or over. ☐

# Instructions

To complete the questionnaire please tick the relevant box and give details for your answer on the space provided.
You should be able to answer all questions based on your knowledge only.
Please note that if your company is a subsidiary or branch of a larger group, you should only answer for yourself only or company/subsidiary over which you have responsibility, rather than for the whole group.
All questions relate to the international commercial arbitration only.

Please contact ***Yassine Sangaré*** for any queries regarding the survey.

# Online surveys questions

(Please tick the appropriate response)

1) Are you male or female? M☐ F☐ Other☐

2) How old are you? 18-25 ☐ 26-35 ☐ 35-50☐ 51+☐

3) What is the name of your organisation?
**Type here…**

4) On a scale of zero to ten, how significant is arbitration in Africa for the resolution of disputes?
1☐ 2☐ 3☐ 4☐ 5☐ 6☐ 7☐ 8☐ 9☐ 10☐

5) OHADA is considered as a tool promoting the economic attractiveness of its Member States by addressing the legal and judicial insecurities prevailing in the region.

Strongly agree ☐

Agree ☐

Neither agree nor disagree ☐

Disagree ☐

Strongly disagree ☐

6) 26 years after the creation of OHADA, have major changes and significant improvements been made in the attempt to rebuild trust with foreign investors?
Yes ☐
No ☐

7) How satisfied are you with the recent reform of 2017 amending the CCJA Rules as well as the Uniform act of Arbitration?

Very Satisfied☐

Satisfied☐

Neither satisfied nor dissatisfied☐

Dissatisfied☐

Very dissatisfied☐

8) Has the OHADA increased awareness of commercial arbitration since its creation?
Strongly agree ☐
Agree ☐

Undecided ☐
Disagree ☐
Strongly disagree ☐

9) The diversity of legislation leads to a “balkanization” of the domestic rules over the OHADA legislation.

Strongly agree ☐
Agree ☐
Undecided ☐
Disagree ☐
Strongly disagree ☐

10) The myriad of legal systems under the Convention results in a variety of interpretations of the Treaty.

Strongly agree ☐
Agree ☐
Undecided ☐
Disagree ☐
Strongly disagree ☐

11) The New York Convention of 1958 and the OHADA Treaty facilitate the enforceability of international arbitral awards.

Strongly agree ☐
Agree ☐
Undecided ☐
Disagree ☐
Strongly disagree ☐

12) What’s your take on the approach of the legislator of the New York Convention of 1958 to leave the enforcement proceedings at the discretion of the domestic courts?

**Type here…**

13) Has the recent reform improved the promptness of the judges to adjudicate the requests for enforcement (exequatur) within the time limit set?

Yes, significantly ☐
Yes ☐
Hardly ☐
No ☐

It got worse ☐

14) Could the introduction of a partial exequatur as implemented in France be a smart approach within the OHADA area?

Yes ☐

Undecided ☐

No ☐

I don't know ☐

15) Could the suppression of the exequatur and the free circulation of decisions and titles in order to streamline the enforcement process be viable?

Yes ☐

Undecided ☐

No ☐

I don't know ☐

16) The fact that 5 out of the 17 OHADA member states have not ratified the New York Convention makes it more difficult for the OHADA legislator to harmonize the process of enforcement within the OHADA area.

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

17) Has the recent reform achieved the desired outcomes?

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

18) Which of the following best describes the rate at which the CCJA is seized?

Very often ☐

Quite often ☐

Not very often ☐

Not at all ☐

19) What are your thoughts on the silence-acceptance of the exequatur implemented by the legislator in the new reform?

**Type here…**

20) Does the silence-acceptance of the exequatur belittle the importance of the judge to substantiate his decision?

Yes☐
Undecided☐
No☐
I don't know ☐

21) What do you think of the approach of the OHADA legislator not to provide a clear definition of this concept, leaving it at the discretion of the domestic courts? The choice below does not reflect the question?

**Type here…**

22) Is there any conflict of jurisdictions between the domestic laws and the OHADA regulations?

Yes☐

No☐

23) If yes, how does/should the legislator deal with this diversity of legislation leading to a "balkanisation" of the domestic rules over the OHADA legislation?

**Type here…**

24) How effective is the CCJA since its creation?

Very effective ☐

Fairly effective ☐

Not very effective ☐

Not at all effective ☐

***UK Arbitration:***

25) London is a well-established seat for international arbitration

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

26) Is the enforcement of arbitral awards likely to be affected during the transition period?

Yes ☐

Undecided ☐

No ☐

27) Do you agree that Brexit will not affect the enforcement of arbitral awards after the transition period?

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

28) Can it be assumed that English arbitral awards will remain enforceable across the European Union under the New York Convention?

Yes ☐

Undecided ☐

No ☐

I don't know ☐

29) Under the New York Convention, English arbitral awards will remain enforceable in the Contracting States, therefore across the EU since all the EU Member States have ratified the convention

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

30) The key advantages of the English approach to arbitration is a strong presumption in favour of the confidentiality of the process.

Yes ☐
No ☐

31) Is London’s commercial notoriety as a preferred seat of arbitration likely to change to the benefit of other seats such as Paris?

Yes ☐

Undecided ☐

No ☐

32) Brexit might be advantageous to the UK in the sense that since anti-suit injunctions are prohibited under the EU provisions pursuant to the Brussels Regulations and UK domestic courts will no longer be bound by the CJEU jurisdictions.

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

33) English and Welsh's laws are likely to be considered as more secure and neutral since the rules of the Court of Justice of the European Union will not apply to any arbitral decisions have you consider the transition period of the UK.

Strongly agree ☐
Agree ☐
Undecided ☐
Disagree ☐
Strongly disagree ☐

34) One great advantage of using the Arbitration Act of 1996 is that pursuant to section 1.b, the Act confers this autonomy to the parties in order to resolve their disputes unless judicial intervention is required during the arbitral proceedings

Strongly agree ☐

Agree ☐

Undecided ☐

Disagree ☐

Strongly disagree ☐

35) There is an uncertainty regarding the concept of public policy since the English courts' will no longer be under EU's jurisdiction and might consequently take a different approach from that of the CJEU

Strongly agree ☐
Agree ☐
Undecided ☐
Disagree ☐
Strongly disagree ☐

36) Could the UK be an effective and suitable choice to enforce intra-EU arbitral awards?

Yes ☐
Undecided ☐
No ☐
I don't know ☐

37) Is the UK likely to be the top choice for enforcing foreign arbitral awards?

Yes ☐
Undecided ☐
No ☐
I don't know ☐

38) Would you like to receive the final survey report?

Yes ☐
No ☐

38.a) Please provide your email address below where you will receive the survey report

**Interview questions**

1) Nowadays, how important is arbitration in Africa?

2) Is the business climate in Africa open and receptive to Alternative dispute resolutions such as arbitration and mediation?

3) What are the main sources of OHADA regulations?

4) OHADA is considered as a tool promoting the economic attractiveness of its Member States by addressing the legal and judicial insecurities prevailing in the region. Therefore, 26 years after its creation what major changes and significant improvements have been made in the attempt to rebuild trust with foreign investors?

5) What are your views about the conflict of jurisdictions between the domestic laws and the OHADA regulations? How does the legislator deal with this diversity of legislation?

6) Before the reform of 2017, in the case where there was no majority among the arbitral tribunal regarding a dispute, the arbitral award shall be made by the president of the tribunal. What happens now in the event that the arbitral tribunal cannot decide despite several attempts, in view of the silence of the legislator?

7) The complexity of the scope of public policy has divided scholars attempting to provide a common definition to the term, leading to a myriad of interpretations undermining the domestic courts' approach when it comes to enforcing foreign arbitral awards.
For instance, the English Court in *Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)* held that the arbitral award has to violate or endanger the interest of the state's citizens to be considered as a bar to enforcing the arbitral award, adding the term "clearly injurious to the public good". What do you think?

8) The French Courts have a very restrictive approach to public policy. Indeed, in *SNF SAS v Cytec Industries BV,* the judge held that the violation is "flagrant, actual and concrete". What do you think?

9) Public policy varies from one state to another, therefore an arbitral award can be contrary to the public policy of the state of the arbitral seat and non-contrary to the public policy of the state where enforcement is sought. What are your thoughts on this matter, especially looking at the OHADA regime? How can you define public policy under the OHADA regime?

10) What do you think of the approach of the OHADA legislator not to provide a clear definition of this concept, leaving it at the discretion of the domestic courts?

11) Most commentators agreeing that it is to the CCJA to determine the scope of public policy, what do you think?

12) The CCJA, in *Société Nationale pour la Promotion Agricole (SONAPRA) c/ Société ADEOSSI et Fils* established a clear distinction between public policy and international public policy, while the existing legal texts in force does make any distinction between both policies, what are your views on this?

13) Has the recent reform, according to you, clarified the concept of international public policy within the OHADA area?

14) OHADA attributes a special status to the CCJA cases which benefit from the res judicata and are enforceable within the whole OHADA area grouping the 17 member states. However, the CCJA law cases constitute a very small percentage in the disputes coming from OHADA according to statistics from the 30th June 2012 demonstrating that the CCJA since its creation was seized 1172 times, adjudicated only on 563 disputes which of 485 cases and 78 orders. As a result, 51,96% of the disputes haven't been resolved. In your view, what can be the potential causes of this low rate in the CCJA's arbitral activity? Would it be possible that the "Getma saga" hast cast a dark cloud over OHADA arbitration?

15) What are your thoughts about the issue related to whether the exequatur can be granted in one Member State while enforcement is sought in another State party? Since the OHADA legislator has not provided any rule on the matter the CCJA has not ruled yet on that point

16) The grant of exequatur requiring the winning party to seek enforcement in each member states where the party has assets, what are your thoughts on this matter and in what aspects do you think that the legislator can remedy this issue?

17) Quid the arbitral awards initiated before and rendered following the implementation of the revised CCJA Rules in 2017? Would the new time-limit set for the grant of the exequatur apply to these awards?

18) What are your thoughts on the silence-acceptance of the exequatur implemented by the legislator in the new reform? Doesn't it belittle the importance of the judge to substantiate his decision?

19) Articles 30 to 33 and article 34 regarding the arbitral awards rendered outside the scope of the UAA have been subject to discussions among scholars who state that the legislator needs to make clear the distinction between them. Do you think that this issue could be considered in the forthcoming reform and improve the efficiency of the Uniform act on Arbitration since the CCJA has not ruled on the point yet?

20) Do you think that the time-limit provided in Article 31 of the revised UAA to the competent authority in order to grant the exequatur in the recent reform would indeed prevent the sluggishness of the authority without affecting the judge's ruling?

21) How can you define the exequatur regarding the law?

22) How should be addressed the domestic jurisdictions' sluggishness and lack of jurisdictions when it comes to the granting of exequatur according to you?

23) What is your take on the idea of a partial exequatur as applied in France?

24) What's your take on the suggestion to remove the exequatur process and allow free circulations of decisions and other titles?

25) The New York Convention of 1958 and the OHADA Treaty attempt to facilitate the enforceability of international arbitral awards. What do you think of the approach of the legislator leaving the enforcement proceedings at the discretion of the domestic courts by making no provisions regarding it?

26) Does the fact that 5 out of the 17 OHADA member states have not ratified the New York Convention makes it more difficult for the OHADA legislator to harmonize the process of enforcement within the OHADA area?

27) Can we genuinely assume that the UAA provisions are, as of today, in line with generally accepted principles of international arbitration such as the New York Convention of 1958?

28) In your view, can we expect the OHADA to be a cornerstone of dispute resolution in Sub-Saharan Africa in a few years?

29) In your view, what is likely to obstruct the creation of a new development pole in Africa?

30) What are the major innovations as well as the gaps in the recent reform?

31) Has the recent reform achieved the desired outcomes?

32) What substantial contribution would the OHADA be able to offer to the Continental Free Trade Area (CFTA)?

***UK Arbitration***:

1) What are the best attributes of the English legal system?

2) In your view, what are London's strengths as one of the world's most renowned centre for international dispute resolution?

3) In your view, what could be the potential long-term impact of the Brexit on UK arbitration? Is Brexit likely to undermine the status of London as one of the most preferred seats of arbitration in the world?

4) Can it be assumed that English arbitral awards will remain enforceable across the European Union under the New York Convention?

5) In your view, since the EU laws will no longer apply to the UK due to the UK's withdrawal from the EU, which rules are likely to be applied?

6) What could be the potential advantages of Brexit in London recognised as one of the most preferred seats of arbitration?

7) Will London's popularity as an arbitral seat last and what would it mean for insurers?

8) Commercially speaking, do you think that the global perception and notoriety of the UK as a commercial hub may suffer?

9) Various corporations have been 'Brexit proofing' and reconsidering their structures, establishing companies under EU law and offices in Europe. What are your thoughts on this matter?

10) Is London's commercial notoriety as a preferred seat of arbitration likely to change to the benefit of other seats such as Paris or Singapore?

11) Could Brexit be advantageous to the UK in terms of anti-suit injunctions?

12) What are your views about the uncertainty of the concept of public policy since the English courts' will no longer be under EU's jurisdiction and might consequently take a different approach from that of the CJEU? For instance, the English Court in *Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)* held that the arbitral award has to violate or endanger the interest of the state's citizens to be considered as a bar to enforcing the arbitral award, in other words for the court to set aside the arbitral award on the public policy exception basis adding the term "clearly injurious to the public good". What do you think?

13) Is the UK likely to be the top choice for enforcing foreign arbitral awards including annulled intra EU-awards?