



# ARBITRATION UNDER THE OHADA UNIFORM ACT.

***For further information contact:***

*The Nico Halle & Co. Law Firm  
B.P.: 4876 Douala - Cameroon  
Tel: + 237 342 64 79  
Fax: + 237 343 26 34  
Email: [hallelaw@hallelaw.com](mailto:hallelaw@hallelaw.com)*

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## DEFINITION.

Arbitration is a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. When entering into a contract for any significant value, the parties will generally want to ensure that any dispute that might arise under the contract in the future will be dealt with efficiently, rapidly and confidentially. If the parties are from different countries, each of them will generally prefer dispute to be dealt with by a neutral body rather than by the national courts of the other party. These considerations have led to the popularity of arbitration clauses, particularly in international contracts.

Arbitration allows parties to have their disputes settled by a private tribunal consisting of a sole arbitrator or a panel of arbitrators, who may be chosen by the parties concerned. The proceedings are confidential and may be more rapid than proceedings before the normal courts. They result in an arbitral award which as a general rule, will be final and binding, subject only to limited appeals and which on certain conditions will be easily enforceable if the losing party does not comply with it spontaneously.

There are two types of arbitrations; Institutional arbitration and ad hoc arbitration. The institutional arbitration is conducted under the auspices of an arbitration centre such as the London Court of Arbitration which administers the arbitration in accordance with its own rules, while the ad hoc arbitration is conducted without the assistance of an arbitration centre in accordance with any rules that the parties or the arbitral tribunal may choose to apply subject to any mandatory rules laid down by the applicable law.

Arbitration in Cameroon and member states of the OHADA Treaty is governed by the Uniform Act on arbitrations which lays down basic rules that are applicable to any arbitration where the seat of the arbitral tribunal is in one of the member states or which might also be chosen by the parties as the applicable procedural law even if the seat of the tribunal is not in a member state.

The Uniform Act on arbitration was signed on 11 March 1999 and entered into force 90 days later. Very few provisions of the Uniform Act are mandatory and many of them may be derogated from if the parties choose to apply different rules, either as may be advised between them or as a result of resorting to institutional arbitration. The Uniform Act must be interpreted as superseding the existing national laws on arbitration but

subject to any provisions of such national laws which do not conflict with the Uniform Act. Therefore depending on the country where the arbitration is to be held, it will be necessary to determine whether any other rules will apply in addition to the Uniform Act.

Article 1 states that the Uniform Act applies to all arbitrations where the seat of arbitration is located in one of the member states. This is analogous for example to the application of the Arbitration Act of 1996 to any arbitration whose seat is in England or of civil provision of the French Code of Civil Procedure to any arbitration having its seat in France.

Unlike many arbitration laws which contain different provisions for domestic and international arbitration, the Uniform Act makes no distinction between these two types of arbitration. As a result any Ad hoc arbitration taking place in a member state will be governed by the Uniform Act and by any other arrangements as may be agreed between the parties to the extent that such arrangements are permissible under the Uniform Act. If institutional arbitration has been provided for and the seat of the tribunal is in a member state, the Uniform Act will apply only where there are gaps in those rules.

Unlike many arbitration laws, the Uniform Act does not restrict arbitration to commercial matters. Article 2 states that arbitration may be resorted to with respect to any rights that may be freely disposed of. This means any dispute may be submitted to arbitration on condition that it does not relate to right where intervention of the public authorities is required.

Article 2 also provides that both individuals and corporate bodies may submit to arbitration and lays down the principle that the state and other territorial public authorities and public companies may also submit to arbitration. It adds that such entities may not rely upon their own national laws to argue either that the dispute is not arbitral, that they did not have the capacity to enter into the arbitration agreement, or that the arbitration agreement is invalid.

This will be an important provision for foreign investors, who may raise this type of defence where their contractual partner is a public body or company particularly in countries influenced by the French system of administrative law. It will be of interest to investors who are required to enter into joint venture or participate in a privatisation with a public authority or company since it should avert defences based on sovereign immunity from jurisdiction.

### **ARBITRATION CLAUSE.**

The most usual form of arbitration agreement is the arbitration clause which is inserted in the parties' contract at the outset of their contractual relationship. The Uniform Act provides that the parties may enter into

such an agreement even if they have already commenced proceedings before that court.

The arbitration clause must be made in writing or by any other means allowing its existence to be proven for example a reference to another document which itself stipulates an agreement to the arbitration clause. Article 3 states that other means of entering into an arbitration agreement might be possible, such as for example by oral agreement before witnesses, who could then attest to the existence of the agreement. It would be inadvisable since the Uniform Act itself requires a copy of the arbitration agreement to be produced in enforcement proceedings in the member states. In addition, if enforcement is sought in other countries the New York Convention may come into play and this also requires the arbitration agreement to be in writing.

The arbitration agreement is an autonomous agreement. This means that the arbitration agreement is independent from the main contract (even if it is contained in the clause in the main contract) and that its validity is unaffected by any finding that the contract is null and void. The other consequence is that the arbitration agreement is not necessarily governed by the same law as the main contract or any particular national law but that it is to be interpreted in accordance with the common intention of the parties.

The arbitral tribunal must be composed of either a sole arbitrator or three arbitrators. This is because article 8 has listed a hierarchy of methods that must be followed for the appointment of an additional arbitrator or if a previously appointed arbitrator can no longer sit on the tribunal for whatever reason.

The parties are free to determine by agreement the rules applicable to the appointment, dismissal or replacement of arbitrators. Failing such agreement or if the agreement is insufficient to cover all eventualities, the Uniform Act lays down certain rules.

As regard appointment, if there are three arbitrators each party is to appoint one arbitrator and those two arbitrators are to agree upon a third arbitrator or if there is to be a sole arbitrator, the parties are to agree upon an appointment. If there is a failure at any stage of this appointing process either through a failure of the parties or the arbitrator to agree as required or through a party's refusal to appoint an arbitrator, the appointment of an arbitrator is instead made by the local court in the member state where the seat of the arbitration is located. This provision is useful in particular since it prevents a party from frustrating the arbitration process by refusing to appoint its own arbitrator.

## **IMPARTIALITY OF ARBITRATORS.**

The requirement for all arbitrators is to be independent and impartial, as regard the parties. Any arbitrator, who may consider that there may be grounds for a party to challenge his independence or impartiality, is required to draw this to the attention of the parties. In such an event he may only accept the appointment if he obtains the unanimous written consent of the parties. An arbitrator may also be challenged during the course of the proceedings if he is perceived as lacking independence or impartiality. If the parties have not provided for a different procedure in such an event, the challenge is referred to the local court for final settlement.

## **PROCEEDINGS.**

The proceedings are basic rules which are designed to ensure that the parties receive fair and equal treatment as follows.

1. The parties have the burden of proving their respective claims, although the tribunal may direct them to provide the necessary explanation and evidence.
2. The tribunal may not rely its award on any grounds or documents with regard to which the parties have not had a proper opportunity to present their case during the proceedings. This applies both to grounds and documents that may have been relied upon by one of the parties or legal grounds which the tribunal might have raised at its own initiatives.
3. Any alleged irregularity in the proceedings must be raised as soon as a party becomes aware of it, failing which that party is deemed to have waived the right to raise it.

Notwithstanding the existence of an arbitration clause, it remains possible for a court to order provisional or conservatory measures in the event of a recognised situation of urgency or where the measures are to be taken in a country which is not one of the member states, but this is on condition that the ordering of such measures does not involve a review of the merits of the disputes.

## **AWARD.**

The act lays down the formal requirements that must be included in the award, such as the names of the parties and of the arbitrations. The awards must indicate the reasoning upon which it is based. The tribunal can order provisional execution subject to the request of one of the parties.

## **APPEALS.**

There is no right of ordinary appeal against an arbitral award. However, in certain limited circumstances a party may file setting-aside proceedings seeking annulment of the award. The filing of setting-aside proceedings suspends enforcement on the following grounds:

- There was no arbitration agreement or the arbitration agreement was null and void or had expired by the time the tribunal gave its award.
- The arbitral tribunal was improperly constituted.
- The arbitral tribunal failed to comply with its terms of reference.
- There was a lack of due process in the proceedings.
- The award does not contain reasoning.
- The arbitral tribunal has violated a rule of international public policy of the member state.

## **ENFORCEMENT.**

In order to be enforceable, the award must be submitted to the national court for an enforcement order (exequatur). This provision is rather ambiguous, since it does not specify whether the national court concerned is the court in the member state where the award was issued or the member state where the enforcement was sought which may not be the same. It should be assumed that it is the court in the state where enforcement is sought that is intended, since judgments of a national court in one member state cannot have extraterritorial effect in another member state.

The party applying for the enforcement order must produce an original of the award and of the arbitration agreement or certified copies; in French. The provision should have considered that the translation if necessary should be in the official language of the court where the enforcement is sought since there are member states with English, Portuguese or Spanish as their official language.

Article 34 of the Uniform Act makes provision for the recognition of arbitral awards based on rules other than those of the Uniform Act, that is, those where the seat of the tribunal was not in a member state. Such awards are recognised in accordance with any international conventions that may be applicable or following any such convention in accordance with the provisions of the Uniform Act.

Arbitration is a role model for adjudication. It is expeditious, as parties gain precious time and less expensive compared to the traditional method of litigations, thus should be encouraged.