

Organisation pour l'Harmonisation en Afrique du Droit des Affaires
Organization for the Harmonization of Business Law in Africa
Organizacion para la Armonizacion en Africa de la Legislacion Mercantil
Organizaçao para a Harmonizaçao em Africa do Direito dos Negocios

COUNCIL OF MINISTERS

UNIFORM ACT ON ARBITRATION

The Council of Ministers of the Organization for the Harmonization of Business Law in Africa (OHADA),

- Having regard to the Treaty for the Harmonization of Business Law in Africa, signed on 17 October 1993 in Port Louis, as amended on 17 October 2008 in Quebec, in particular its articles 8, 21, 26 and 39 ;
- Having regard to opinion No. 04/2017/AU dated 5 and 6 October 2017 of the Common Court of Justice and Arbitration ;
- After deliberation,

Adopts by unanimous vote of the Member States present, the Uniform Act set out below:

CHAPTER 1: SCOPE OF APPLICATION

ARTICLE 1

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

ARTICLE 2

Any natural or legal person may resort to arbitration with respect to any rights on which she has the free disposal.

States, other public territorial bodies, public entities and any other legal person under public law may also be a party to an arbitration, regardless of the legal nature of the contact, without being able to invoke their own laws to object to the arbitrability of the dispute, to their capacity to submit to arbitration or to the validity of the arbitration agreement.

ARTICLE 3

An arbitration may be based on an arbitration agreement or on an instrument regarding an investment, in particular an investment code or a bilateral or multilateral investment treaty.

ARTICLE 3-1

The arbitration agreement may be in the form of an arbitration clause or of a submission agreement.

The arbitration clause is an agreement whereby the parties agree to submit to arbitration disputes which may arise out of or result from a contractual relationship.

The submission agreement is an agreement whereby the parties to an existing dispute agree to settle it through arbitration.

The arbitration agreement must be made in writing, or in any other form evidencing its existence, in particular, by reference to a document containing the agreement.

ARTICLE 4

The arbitration agreement shall be independent from the main contract.

Its validity shall not be affected by the nullity of the contract, and it shall be interpreted in accordance with the common intention of the parties, without reference to a national law.

In any case, the parties may, by mutual agreement, resort to arbitration, even when proceedings are already pending before a state jurisdiction.

CHAPTER 2: CONSTITUTION OF THE ARBITRAL TRIBUNAL

ARTICLE 5

The duties of an arbitrator may only be performed by a natural person.

The arbitral tribunal shall be composed of a sole arbitrator or of three arbitrators. Absent agreement of the parties, the arbitral tribunal shall be composed of a sole arbitrator.

ARTICLE 6

Arbitrators shall be appointed, revoked or replaced pursuant to the parties' agreement.

When the parties have agreed to appoint two arbitrators despite the provisions of Article 5, paragraph 2 of this Uniform Act, the arbitral tribunal shall be completed by a third arbitrator mutually chosen by the parties.

Absent any such agreement, the arbitral tribunal shall be completed by the appointed arbitrators, or, absent any agreement between them, the competent jurisdiction in the Member State.

The same procedure shall be followed if an arbitrator is challenged, becomes incapacitated, dies, resigns or is revoked.

Absent agreement between the parties on the appointment procedure, or in the event that their agreement is insufficient:

- a) in case of an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator; if one party fails to appoint an arbitrator within thirty (30) days of the receipt of the request for arbitration from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days (30) of their appointment, the appointment shall be made, upon the request of one party, by the competent jurisdiction in the Member State;
- b) in case of an arbitration with a sole arbitrator, if the parties are unable to agree on the choice of the arbitrator, the latter shall be appointed, upon the request of one party, by the competent jurisdiction in the Member State.

The decision to appoint an arbitrator by the competent jurisdiction shall be made within fifteen (15) days from when it was seized, unless the laws of a Member State foresee a shorter time period. This decision shall be subject to no appeal.

ARTICLE 7

The arbitrator who accepts his mandate shall communicate his acceptance to the parties by any means in writing.

The arbitrator undertakes to complete his mandate until the end, unless he justifies of an impediment or legitimate reason for abstention or resignation.

The arbitrator shall enjoy full exercise of his civil rights and shall remain independent and impartial vis-à-vis the parties.

Any prospective arbitrator shall inform the parties of any circumstance likely to create in their minds a legitimate doubt about his independence and impartiality, and may only accept his appointment with their unanimous and written consent.

From the date of his appointment and during the course of the proceedings, the arbitrator shall reveal any such circumstances to the parties.

ARTICLE 8

In case of disagreement, and if the parties have not agreed on the challenge procedure, the competent jurisdiction in the Member State shall decide the challenge no later than thirty (30) days, after the parties and the arbitrator have been heard or duly summoned. If the competent jurisdiction fails to render a decision within this above-mentioned time period, it shall be discharged, and the challenge application may be brought before the Common Court of Justice and Arbitration by the most diligent party.

The decision of the competent jurisdiction dismissing the challenge application may only be challenged before the Common Court of Justice and Arbitration.

Any ground of challenge must be raised no later than thirty (30) days after the fact having motivated the challenge has been discovered by the party seeking to invoke it.

The challenge of an arbitrator shall only be admissible for reasons which have become known after his appointment.

When the mandate of an arbitrator is terminated, or when he resigns for any other reason, a replacing arbitrator is appointed according to the applicable rules to the nomination of the replaced arbitrator, unless otherwise agreed by the parties. The same procedure shall be followed if the arbitrator's mandate is revoked by mutual agreement of the parties or any other case when his mandate is terminated.

CHAPTER 3: ARBITRAL PROCEEDINGS

ARTICLE 8.1

In case of an agreement imposing upon the parties to follow a preliminary phase for the settlement of the dispute prior to any arbitration, the tribunal shall, upon the request of one of the parties, examine if this condition has been met and as the case may be, shall mandate the completion of this preliminary phase.

If this preliminary phase has not been initiated, the arbitral tribunal shall suspend the procedure for a time period which it deems appropriate, to allow the most diligent party to initiate this phase.

If this preliminary phase has effectively been initiated, the arbitral tribunal shall take note, as the case may be, of its failure.

ARTICLE 9

The parties shall be treated equally and each party shall be given full opportunity to present its case.

ARTICLE 10

Where the parties have agreed to refer to an arbitration institution, they shall be deemed to have agreed on the application of the arbitration rules of this institution unless they have expressly agreed to exclude specific provisions in agreement with this institution.

The arbitral proceedings shall start at the date when one of the parties initiates the procedure of the constitution of the arbitral tribunal.

ARTICLE 11

The arbitral tribunal alone is competent to rule on its own jurisdiction, as well as on any issues concerning the existence or validity of the arbitration agreement.

Any objection to arbitral jurisdiction shall be raised before any defense on the merits except where the facts on which it is based have been disclosed later.

The arbitral tribunal may rule on its own jurisdiction in the award dealing with the merits or in a partial award subject to the annulment action

ARTICLE 12

Where the arbitration agreement does not set a time limit, the mandate of the arbitral tribunal may not exceed six (06) months from the date on which the last appointed arbitrator accepted his appointment.

The legal or contractual time limit for the arbitration may be extended, either upon agreement of the parties, or, upon request of one of the parties or of the arbitral tribunal, or by the competent jurisdiction in the Member State.

ARTICLE 13

When a dispute, for which an arbitral tribunal is seized pursuant to an arbitration agreement, is brought before a state court, the latter must, if one of the parties so requests, declare that it lacks jurisdiction.

Where the arbitral tribunal is not yet seized, or if no arbitral request has been filed, the state 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 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 state court, at the request of a party and in the event of a recognized and reasoned emergency, to order 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.

ARTICLE 14

The parties may, directly or by reference to arbitration rules, determine the arbitral procedure. They may also make it subject to a procedural law of their choice.

Absent such agreement, the arbitral tribunal may conduct the arbitration as it deems appropriate.

In support of their claims, the parties bear the burden of alleging and adducing evidence to prove the facts thereof.

The parties shall act quickly and with loyalty in the conduct of the proceedings, and shall refrain from any dilatory actions.

If, without raising a legitimate reason:

- a) the claimant does not submit its claim, the arbitral tribunal shall terminate the arbitral proceedings;
- b) the respondent does not submit its defense, the arbitral tribunal shall continue the arbitral proceedings without, however, considering this failure *per se* as an acceptance of the claimant's allegations;
- c) one of the parties fails to appear at the hearing or to produce documents, the arbitral tribunal may continue the proceedings and decide on the basis of the evidence before it.

The arbitral tribunal may invite the parties to provide it with factual explanations and to submit to it, by any legally admissible means, the evidence it believes will be necessary for the solution to the dispute.

It may not retain in its ruling, the arguments, explanations or documents submitted by the parties, unless both parties have been in a position to discuss them.

It shall not base its ruling on evidence established on its own motion without previously inviting each of the parties to submit its comments.

Where the assistance of judicial authorities is necessary for the taking of evidence, the arbitral tribunal may, on its own motion or upon request, seek the assistance of a competent jurisdiction in the Member State.

A party who knowingly abstains from invoking, without delay, an irregularity and yet proceeds with the arbitration, is deemed to have waived its right to object.

The arbitral tribunal shall, unless otherwise agreed by the parties, be empowered to decide any incidental claims concerning the verification of the authenticity of documents or forgery.

If necessary, the arbitral tribunal may, after consulting the parties or upon their request, appoint one or more experts to report on specific issues it determines and hear them at the hearing.

The arbitral tribunal may also, upon the request of either party, order interim or conservatory measures, with the exception of conservatory seizures and judicial sureties which remain within the jurisdiction of state courts.

ARTICLE 15

The arbitral tribunal shall rule on the merits of the dispute pursuant to the rules of law chosen by the parties. Absent such choice by the parties, the arbitral tribunal shall apply the rules it deems the most appropriate, by taking into consideration, as the case may be, international trade practices.

It may also decide as *amiable compositeur* when the parties have authorized it to do so.

ARTICLE 16

The arbitral procedure shall end with the rendering of a final award .

It may also be terminated with a closing order.

The arbitral tribunal may issue a closing order when :

- a) the claimant withdraws its request, unless the respondent objects and the arbitral tribunal acknowledges that there is a legitimate interest in finally settling the dispute;
- b) the parties agree to terminate the proceedings;
- c) the arbitral tribunal finds that pursuing the proceedings has become, for any other reason, unnecessary or impossible;
- d) the initial or extended arbitral time limit has expired;
- e) there is an acknowledgement of the claim, withdrawal from the proceedings, settlement.

ARTICLE 17

The arbitral tribunal shall set the date on which the matter shall be deliberated.

After this date, no other claim may be introduced or arguments raised.

No remarks may be presented; nor may any document be submitted unless at the express and written request of the arbitral tribunal.

ARTICLE 18

The deliberations of the arbitral tribunal shall be confidential.

CHAPTER 4: THE ARBITRAL AWARD

ARTICLE 19

The arbitral award shall be rendered in accordance with the procedure and the forms agreed upon by the parties.

Absent any such agreement, the award shall be rendered by a majority vote when the tribunal is composed of three arbitrators.

If the parties come to an agreement during the course of the arbitral proceedings, they may ask the arbitral tribunal to issue an award by consent.. Such award shall have the same status and shall have the same effects as any other award bringing the dispute to an end.

ARTICLE 20

Apart the holding, the arbitral award shall contain:

- a) the first and last names of the arbitrators having rendered the award;
- b) its date ;
- c) the seat of the arbitral tribunal;
- d) the last and first names and trade names of the parties, as well as headquarters or registered office ;
- e) as the case may be, the last and first names of counsel or any person having represented or assisted the parties; and
- f) the statement of the respective claims of the parties, their pleas and arguments, as well as the procedural history.

The arbitral award must state the reasons on which it is based.

If the arbitral tribunal has been empowered by the parties to decide as *amiable compositeur*, this shall be mentioned.

ARTICLE 21

The arbitral award shall be signed by the arbitrator or arbitrators.

However, if a minority of them refuses to sign the award, mention shall be made of such refusal, and the award shall have the same effect as if all the arbitrators had signed it.

ARTICLE 22

The award discharges the arbitral tribunal of the dispute.

The arbitral tribunal shall nevertheless have the power to interpret the award or to rectify material errors and omissions affecting it.

Where it has omitted to rule upon a head of claim, it may do so by rendering an additional award.

In one or the other events mentioned above, a request must be made within thirty (30) days from the date of the notification of the award. The tribunal shall have a period of forty-five (45) days to render a decision.

If the arbitral tribunal cannot be reconvened it will fall upon the competent jurisdiction in the Member State to decide.

ARTICLE 23

As soon as it is rendered, the arbitral award has *res judicata* effect regarding the dispute it settles.

ARTICLE 24

The arbitral tribunal may grant provisional enforcement of the award if this has been requested, or may reject the request through a reasoned decision.

CHAPTER 5: RECOURSE AGAINST THE ARBITRAL AWARD

ARTICLE 25

The award shall not be subject to any opposition, or appeal on factual or legal grounds.

It may be subject to an annulment action, which must be lodged before the competent jurisdiction in the Member State.

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

The decision of the competent jurisdiction in the Member State regarding the annulment action may only be appealed on points of law before the Common Court of Justice and Arbitration.

The arbitral award may become the subject of opposition by any third party before the jurisdiction of the Member State which would have been competent if there was no arbitration and when that award is prejudicial to its rights.

It may also be subject to a request for revision before the arbitral tribunal due to the discovery of a fact likely to have a decisive influence on the settlement of the dispute and which, before the rendering of the award, was unknown to both the arbitral tribunal and the party requesting the revision. When the arbitral tribunal may no longer be reconvened, the request for revision is brought before the jurisdiction in the Member State which would have been competent in the absence of arbitration.

ARTICLE 26

The annulment action shall only be permitted:

- a) if the arbitral tribunal has ruled without an arbitration agreement or based on an agreement that is void or expired;
- b) if the arbitral tribunal was irregularly composed, or the sole arbitrator was irregularly appointed;
- c) if the arbitral tribunal ruled without conforming to the mandate with which it has been entrusted;
- d) if the principle of due process has not been respected;
- e) if the arbitral award is contrary to international public policy; or

f) if the award fails to state the reasons on which it is based.

ARTICLE 27

The annulment action shall be permitted as soon as the award is made. It shall cease to be admissible if it has not been made within one month from the notification of the award having received the exequatur.

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.

ARTICLE 28

Except where the provisional enforcement of the award has been ordered by the arbitral tribunal, the exercise of the annulment action shall stay enforcement of the award until such time that the competent jurisdiction in the Member State, or the Common Court of Justice and Arbitration, as the case may be, has rendered a decision.

That jurisdiction shall also be competent to rule on a dispute concerning the provisional enforcement.

ARTICLE 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.

CHAPTER 6: RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

ARTICLE 30

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

ARTICLE 31

The recognition and enforcement of the arbitral award presume that the party relying on it establishes the existence of the arbitral award.

The existence of the arbitral award shall be established by the production of its original award accompanied by the arbitration agreement or copies of these documents meeting the conditions required to establish their authenticity.

Where those documents are not written in one of the original language(s) of the Member State where the exequatur is demanded, the party shall submit a translation certified by a translator registered on the list of experts established by the competent jurisdictions.

The recognition and the exequatur shall be denied when the award is manifestly contrary to a rule concerning international public policy.

The national jurisdiction, seized by a request for recognition or exequatur, shall render a decision within fifteen (15) days from the day of 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.

ARTICLE 32

The decision which rejects the exequatur shall only be subject to appeal on points of law before the Common Court of Justice and Arbitration.

The decision granting the exequatur shall not be subject to any appeal.

However, the annulment action of the arbitral award shall automatically entail an appeal against the decision granting the exequatur within the limits of the referral of the competent jurisdiction of the Member State.

ARTICLE 33

The dismissal of the annulment action shall automatically validate the award as well as of the decision having granted the exequatur.

ARTICLE 34

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.

CHAPTER 7: FINAL PROVISIONS

ARTICLE 35

This Uniform Act shall be the arbitration law in the Member States.

It shall apply only to arbitral proceedings commenced after its entry into force.

ARTICLE 36

This Uniform Act, which abrogates the Arbitration Uniform Act dated 11 March 1999, shall be published in the OHADA Official Gazette within sixty (60) days from its approval. It shall also be published in the Official Gazette of the Member States.

It shall enter into force ninety (90) days after its publication in the OHADA Official Gazette.

Conakry, 23 November 2017