

Regional Organisations and dispute settlement: court and arbitration institution at the same time?

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Regional organisations are on the increase as is the process of regional integration. While the European Community was for a long time rather peculiar, colleague organisations are increasingly in the making. An essential part of a regional organisation is its dispute settlement body. In order to achieve the goals of integration, (partial) harmonisation of laws, facilitation of trade and investment, etc, it is necessary that a tribunal guards over the organisation's policy and principles. There must be an effective mechanism to address disputes.¹ Without such mechanisms, the risks are that organisations lose the respect of their Member States or of individuals because they cannot enforce their policies; that the process of harmonisation of laws become flawed because harmonised laws are interpreted and applied differently in different Member States; plainly that the rules become ineffective due to the lack of effective remedies in the case of breach.

Most regional organisations seem to have some sort of tribunal. The functions and capacities of these bodies vary greatly, however. Some organisations have tribunals which function as appellate courts for the judgments of national courts. An example is the Caribbean Court of Justice.² The Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law in Africa (OHBLA, more commonly known by its French acronym OHADA³) also has this function, but only to the extent that disputes concern OHADA legislation, i.e. the application of their uniform acts.⁴

Some regional bodies also facilitate arbitration. An example is once again the OHADA Common Court of Justice and Arbitration, as its name suggests. This Court operates as an arbitration institution. Its functions and capacities are similar to those of the International Chamber of Commerce (ICC) regarding arbitration.⁵ Thus, it is a regional arbitration institution. This innovation has been praised.⁶ It indeed seems positive to arbitration.

¹ This experience has also emerged at the GATT-WTO level: an effective dispute settlement mechanism is essential.

² Established by the Agreement Establishing the Caribbean Court of Justice (2001). The Agreement has been signed by Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & The Grenadines, Suriname, and Trinidad & Tobago. See CARICOM website: <http://www.caribbeancourtjustice.org>.

³ OHADA was established by the *Traité relatif à l'Harmonisation du Droit des Affaires en Afrique* (1993, Port Louis). Its current Member States are Benin, Burkina Faso, Cameroun, Central African Republic, Chad, Comoros, Congo (Brazzaville), Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Ivory Coast, Mali, Niger, Senegal, and Togo.

⁴ OHADA passes uniform acts on various aspects of business law. These are directly applicable in the Member States.

⁵ M Lecerf & G Blanc, 'The arbitration in the Treaty for the Harmonisation of African Business Law (OHADA): a new common law for institutional arbitration', (1999) 16(2) *The International Construction Law Review*, 287-293 at 289.

⁶ R Boivin & P Pic, 'L'arbitrage international en Afrique: quelques observations sur l'OHADA' (2002) 32 *Revue générale de droit* 847-864 at 858.

Yet, without denying this, it might be useful to look into this dual function more carefully.

Before pursuing this analysis, it is probably useful to point out that one of OHADA's uniform acts concerns arbitration.⁷ This uniform act has the effect of unifying the arbitration laws of all the Member States. It applies when the seat of arbitration is in any of the Member States. An interesting feature is that it does not distinguish between national and international arbitration.⁸ This makes sense in this particular regional context, where the law is increasingly harmonised and there is a single currency, so that the distinction between national and international trade becomes blurred. Logically, the domiciles, nationalities, and habitual residences of the parties involved are irrelevant. Parties from outside this area may become subject to the uniform act by choosing arbitration in any of the OHADA States.

Function of arbitration institution

When drawing up an arbitration clause, parties can decide whether they would like to have their arbitration in the framework of an institution or rather by way of *ad hoc* arbitration.⁹ An arbitration institution has the advantages of containing a set of rules for the conducting of the procedure and possibly aiding with the administration of the arbitration and with the appointment or confirmation of the arbitrator(s).

Some institutions also have the power to review draft arbitral awards regarding their form. The OHADA Common Court of Justice and Arbitration has this capacity.¹⁰ Thus, before an award becomes final, it has to pass through the hands of the Court.

Normally the function of an arbitration institution would end here.

Function of court

The OHADA Common Court of Justice and Arbitration is also a court in the true sense of the word. It is the highest court of appeal when it comes to the interpretation of uniform acts, and thus also of the uniform act of arbitration. Furthermore, it also has a function in institutional arbitration.

Let us start with non-institutional, or *ad hoc* arbitration. Such procedures take place under the auspices of the national courts. This is determined by the Uniform Arbitration Act, which at various instances refers to the competent judge in a Member State.¹¹ However, as highest court of appeal, the Common Court of Justice and Arbitration has an important role. That is where the parties would appeal a national court decision refusing

⁷ *Acte uniforme sur le droit de l'arbitrage dans le cadre du traité OHADA.*

⁸ Many national arbitration acts do make this distinction, with the exception of Quebec; see R Boivin & P Pic, 'L'arbitrage international en Afrique: quelques observations sur l'OHADA' (2002) 32 *Revue générale de droit* 847-864 at 854.

⁹ See A Redfern, M Hunter, N Blackaby & C Partasides, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) para 1-100 – 1-120, discussing the advantages and disadvantages of these different types of arbitration.

¹⁰ Arts 2.2 and 23 of the *Règlement d'arbitrage de la Cour commune de justice et d'arbitrage.*

¹¹ For instance art 5 regarding the composition of the arbitral tribunal, art 12 on the determination of time limits, art 14 regarding evidence, art 25 on annulling the award, and art 30 on recognition and enforcement.

the enforcement of an arbitral award.¹² In the case of *ad hoc* arbitration, this capacity of the Court does not directly come in conflict with its role as arbitration institution. However, an arbitration institution might be more prone to grant enforcement than to refuse it. Whether the Court's function as arbitration institution would influence it in the fulfilling of its role as court of appeal, will have to be pointed out by practice.

Regarding institutional arbitration, a party wishing to contest the validity of the arbitration award, must do so by application to the Common Court of Justice and Arbitration. This provision,¹³ as well as the bases upon which the arbitral award can be annulled, are enumerated in the *Règlement d'arbitrage*, which is the instrument in which the procedure is regulated, including issues such as the appointment and confirmation of the arbitrator(s), and notification, communication, delays, confidentiality, seat of arbitration etc. Here the Court's dual role becomes apparent. Efficient, some would say. Indeed, but let us for a moment turn away from the gains for the process of arbitration to the losing party. If there were a real concern of invalidity, such party would be able to have recourse to a court to annul the award. This remedy in fact does not exist under OHADA arbitration: the losing party can only turn to the arbitration institution itself, even though the institution is clad in another set of robes.

The same can be said regarding the enforcement of an arbitral award. Normally a declaration is sought from a court in the country where enforcement should take place. In the OHADA system, this function is granted to the Common Court of Justice and Arbitration. This function is also found in the same *Règlement*.¹⁴ Moreover, enforcement is granted not only for one specific country, but simultaneously for the entire OHADA region. Once again, no second bite at the cherry, which is advantageous for the arbitration process in general, but not necessarily for an (rightfully) aggrieved party. When the award is given, it has effect throughout the region. Its enforcement is only dependent on the stamp of the arbitration institution, which has already checked its formal validity as a draft.

This efficiency might turn out to work well. On the other hand, the abundant power in the hands of a single institution might have the effect of turning potential arbitrators away from OHADA institutional arbitration. It is early days.

In conclusion, OHADA has set up an interesting way of dealing with arbitration, both national and international. Its Member States have unified arbitration legislation and an arbitration institution has been set up. The procedures enacted seem effective and to the benefit of arbitration generally. On the other hand, arbitration has had a fundamental history as separate from court systems. Hopefully the OHADA Common Court of Justice and Arbitration will be able to wear its two hats without confusion (to itself and to others).

¹² Art 32 of the Uniform Act. Note that a decision to enforce cannot be appealed. See also R Boivin & P Pic, 'L'arbitrage international en Afrique: quelques observations sur l'OHADA' (2002) 32 *Revue générale de droit* 847-864 at 855-856.

¹³ Art 29.

¹⁴ Art 30.

