



The Arbitral Tribunal, the Force of its Decisions in the Ohada System: Critical Analysis of the Authority and Enforcement of Arbitral Awards through the Lens of CCJA

P.hd jean Bruno CEPPA

Permanent Lecturer and Dean of the Goudji Faculty of EMI KOUSSI University of N'Djamena, Chad

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ABSTRACT

Recourse to arbitral tribunals is experiencing a boom within the OHADA space. The advantages offered by this method of dispute resolution make it the preferred choice for many individuals seeking swiftness in the management of their disputes.

The OHADA legislature therefore deemed it important, for the benefit of the business world, to establish a Uniform Act on arbitration: **the Uniform Act on Arbitration Law, adopted on November 23, 2017, in Conakry¹, and entered into force on March 15, 2018.**

It should be noted that this UAA constitutes the common law of ad hoc arbitration. It coexists with the CCJA Arbitration Rules of November 23, 2017, which govern institutional arbitration administered by the Court itself.

However, the procedural rules are identical and result in a decision known as an arbitral award. Does this award, at the enforcement stage, carry the same force as decisions rendered by state judges?

In light of the texts and practice, it must be said that the force of the arbitral award lies in its res judicata authority and its subsequent enforceability². We may confidently state that there is a consecration of an enhanced force of the OHADA arbitral award, and by extension, of the authority of the arbitral tribunal notwithstanding the restrictive enumeration of grounds for recourse before state courts, which may even refuse to grant exequatur.

Keywords: Arbitral Tribunal, Award, Enforceability, Exequatur, Annulment, CCJA, OHADA

Résumé

La recours au tribunal arbitral connaît une embellie dans l'espace OHADA. Les avantages qu'offre ce mode de règlement de conflit, fait de lui, le choix de plusieurs personnes en quête de célérité dans la gestion de leur contentieux.

Le législateur OHADA a de fait penser qu'il était important de mettre en place pour le bien du monde des affaires un acte uniforme sur l'arbitrage : Acte uniforme relatif au droit de l'arbitrage adopté le 23 novembre 2017 à Conakry³, entré en vigueur le 15/03/2018.

Il faut préciser que cet AUA est le droit commun de l'arbitrage ad hoc. Il cohabite avec le Règlement d'arbitrage de la CCJA du 23 novembre 2017, qui est l'arbitrage institutionnel administré par la Cour elle-même.

¹ OHADA OJ n° Spécial du 15/12/2017

² Art 23 UAA

³ JO OHADA n° Spécial du 15/12/2017



Mais les règles de procédure sont les mêmes et aboutissent à une décision appelée sentence arbitrale. Cette dernière a-t-elle au plan de l'exécution la même force qui est connue aux décisions des juges étatiques?

Au regard des textes et la pratique, il faut dire que La force de la sentence arbitrale réside dans l'autorité de la chose jugée et la force exécutoire subséquente⁴. Nous pouvons dire sans crainte qu'il y'a consécration d'une force renforcée de la sentence arbitrale OHADA et par ricochet la force du Tribunal arbitral. Malgré l'énumération restrictive des cas d'ouverture du recours devant le juge étatique qui peut même refuser de donner l'exequatur.

Mots-clés : Tribunal arbitral, Sentence, Force exécutoire, Exequatur, Annulation, CCJA, OHADA

INTRODUCTION

The slowness of proceedings before ordinary courts has the effect of discouraging people seeking justice. Business does not accommodate well with such slowness. It is undoubtedly to resolve this state of affairs that the OHADA legislator attempted to make arbitration a preferred solution for resolving conflicts in the business environment.

OHADA revolutionized the settlement of commercial disputes in Africa in 1999. Art. 23 UAA establishes a fundamental principle: "The arbitral award, as soon as it is rendered, is binding on the parties". This "force" is the foundation of the attractiveness of arbitration. But the sovereignty of States and public policy still resist.

Is this force acquired with regard to CCJA arbitral awards not threatened by state control?

The deductive method makes it possible to establish the principle and the limits. Thus, within the framework of this work, the reference text is the 2017 UAA which has been supplemented with major CCJA judgments from 2003-2022.

The arbitral award since the advent of the OHADA text in this area, has been strengthened (I) despite the persistence of certain constraints (II).

THE CONSECRATION OF A STRENGTHENED FORCE OF THE OHADA ARBITRAL AWARD

The force of the arbitral award lies in the authority of res judicata (A) and the subsequent enforceability (B).

Res judicata authority: an immediate and absolute effect

Res judicata is a principle of law that prohibits bringing again before a judge a case that has already been decided by a final decision. Its application is however conditioned by the meeting of three conditions: the same claim, the same parties and the same cause. This legal principle is based on a text of law (1) and has important effects (2).

Textual Basis

According to Art. 23 para. 1: "The arbitral award has, as soon as it is rendered, the authority of res judicata with respect to the dispute it decides."⁵ That is to say, as soon as it is rendered, the arbitral award is binding on the parties. No exequatur is needed for the binding effect between the parties. This is the difference from a state court judgment. This is a specificity of the arbitral award; the parties who have accepted this means for

⁴ Art 23 AUA

⁵ This is similar position in Gorsement court decision



the settlement of their dispute are, from the pronouncement of the award, subject to the operative part of the decision. It may even, in case of request and acceptance by the tribunal, give rise to provisional enforcement⁶.

The consequences of the binding force of the arbitral award.

They are negative and positive⁷: Under Article 13(1) of the OHADA Uniform Act on Arbitration of 23 November 2017, when a dispute subject to arbitration proceedings under an arbitration agreement is brought before a State court, the latter must, upon request of a party, declare itself incompetent. This mandatory incompetence applies a fortiori when the arbitral tribunal has already been seized. If the arbitral tribunal has not yet been seized, Article 13(2) provides that the State court must also declare itself incompetent, unless the arbitration agreement is manifestly void or manifestly inapplicable. In any event, the State court cannot raise its incompetence of its own motion (Art.13 al.3)⁸. The Common Court of Justice and Arbitration (CCJA) has consistently enforced this principle, holding that the State judge's incompetence must be raised before any defence on the merits, failing which there is an implied waiver of the arbitration clause (CCJA, 1st Ch., No.09 of 29 June 2006, Ohadata J-07-23; CCJA, No.020/2008 of 24 April 2008)⁹. However, this does not preclude State courts from ordering provisional or conservatory measures in case of recognized urgency, provided such measures do not imply an examination of the merits reserved to the arbitral tribunal (Art.13 al.4)¹⁰.

Regarding the Positive Effect, there is a prohibition of review on the merits¹¹. Indeed, the cardinal principle is that the judge cannot review the merits of the award. An illustration comes from Gabon where the Gabonese Judge refused exequatur by revising the calculation of damages. The CCJA was merciless: "The exequatur judge cannot modify, reform, nor supplement the award. «The clear conclusion is that of the force of the award. It benefits from immunity against substantive review. Only formal control is possible.

Textual Basis According to Art. 23 para. 1: "The arbitral award has, as soon as it is rendered, res judicata authority with respect to the dispute it decides."¹² That is to say, as soon as it is rendered, the arbitral award is binding on the parties. No exequatur is required for the binding effect inter partes. This is the difference from a state court judgment. This is specific to the arbitral award; the parties who have accepted this means for the settlement of their dispute are, from the pronouncement of the award, subject to the operative part of the decision. It may even, upon request and if accepted by the tribunal, give rise to provisional enforcement.

The major effect of the award: Enforceability, quasi-automatic exequatur¹³

Exequatur is a judicial procedure that makes it possible to give enforceability to a court decision, an arbitral award or an official act rendered abroad¹⁴. It is a simplified procedure (1) whose control of compliance with public policy is relative (2).

Simplified procedure

It is possible within 15 days after filing a petition with the competent authority to obtain exequatur¹⁵. The petition must be accompanied by an authenticated copy of the award and the arbitration agreement. The purpose here is to prove the existence of this award. In Cameroon, jurisdiction in this matter lies with the

⁶Article 24, ACTE UNIFORME RELATIF AU DROIT DEL' ARBITRAGE, du 23 Novembre 2017.

⁷ Article13, ibis

⁸ Uniform Act on Arbitration, adopted on 23 November 2017, Art. 13(1): "When a dispute subject to arbitral proceedings under an arbitration agreement is brought before a State court, the latter must, if one of the parties so requests, declare itself incompetent."

⁹ CCJA, 1st Ch., Judgment No. 09 of 29 June 2006, Ohadata J-07-23; CCJA, Judgment No. 020/2008 of 24 April 2008, ohada.com, Ohadata J-09-31.

¹⁰ Uniform Act on Arbitration, Art.13(4) - exception for provisional measures in case of urgency.

¹¹Art. 30.2 ibidem

¹² Arrêt CCJA n°062/2007 du 02 août 2007, Société TROPIC vs Etat du Gabon

¹³ Art. 31-32 AUA

¹⁴ <https://www.google.com/url?sa=i&source=web&rct=j&url=https://www.dictionnaire-juridique.com/definition/exequatur.php&ved>

¹⁵ Art. 31.2 AUA



President of the High Court of the place of enforcement of the award¹⁶. This procedure is faster than the exequatur under ordinary law.

Control limited to international public policy and the non-suspensive effect of remedies¹⁷

The judge seized by a request for exequatur is bound by his jurisdiction and the possible areas of verification. Remedies have no suspensive effect here. Indeed, on the first point, the judge verifies only 4 points: the existence of the award, public policy, arbitrability, and respect for the rights of the defense. This was ignored by the Ivorian judge when he refused exequatur because he considered the contract to be "lesionary". But the CCJA shattered his illusions by holding that "Lesion is not a ground of international public policy." For the court of cassation there was a violation of Art. 30.2 by reviewing the merits. This is a locking of control; the public policy violation must necessarily be flagrant, not a simple error¹⁸.

On the second point, namely Immediate Enforcement despite recourse. The action for annulment is not suspensive. One party may request exequatur while the other brings an action for annulment. This is the pro-creditor choice of OHADA. This was the case in a matter where Guinea obtained a partial annulment but the award had already been enforced. The CCJA confirmed the enforcement and said in fact that annulment has effect only for the future. This shows the enforceable force of the award, which is a security for the investor and the business world.

THE SHORTCOMINGS OF THE POWER OF THE ARBITRAL TRIBUNAL: RESIDUAL JUDICIAL CONTROL

The autonomy of the arbitral tribunal constitutes the foundation of arbitral justice, but it is threatened by the survival of state control. This is manifest through the action for annulment which is a privileged legal remedy allowing the state judge to exercise supervision, albeit limited, over the arbitral award. It is reflected first in the restrictive enumeration of the grounds for annulment and then in the variable intensity of the control exercised by the judge (A). The refusal of exequatur also constitutes a non-negligible limit (B).

Action for annulment: the safety valve

The French legislator, like the OHADA legislator¹⁹, has taken care to exhaustively enumerate five cases in which an action for annulment can be exercised. This limitation reflects the desire to preserve the effectiveness of arbitration while guaranteeing a minimum of legality. The law provides for five possible grounds for recourse (1) but limited by a variable intensity (2).

Delimitation of possible grounds for recourse

Of the five grounds, the fifth allows for annulment of the award when its recognition or enforcement would be contrary to international public policy. This ground, whose content remains evolving and shaped by case law, constitutes the preferred terrain for often more in-depth judicial control. The other four grounds seem more concrete. These are the irregularity relating to the jurisdiction and constitution of the arbitral tribunal which constitutes the first and second (a) and the third and fourth cases are non-compliance with the arbitral mission and Violation of the adversarial principle (b).

Irregularity relating to the jurisdiction and constitution of the arbitral tribunal

Under Article 1520-1° of the Code of Civil Procedure, the award may be annulled when "the arbitral tribunal

¹⁶ Articles 37 et 38 of civile and commercial procedure code of Cameroun

¹⁷ Art. 32 AUA

¹⁸ Judgment of AJCC n°066/2009 of 26 nov 2009, Société ATLANTIC BANK vs Société IVOIRE TRADING

¹⁹ Article 26 of UAA of 23 novembre 2017



wrongly declared itself competent or incompetent"²⁰. This ground allows the judge to verify the existence, validity and scope of the arbitration agreement, without however calling into question the principle of competence-competence, according to which it is in the first place for the arbitrator to rule on his own jurisdiction. Case law has enshrined this principle²¹.

The second ground, provided for in Article 1520-2°, sanctions defects affecting the composition of the arbitral tribunal, whether it is a lack of independence or impartiality of an arbitrator, or a violation of the rules agreed by the parties relating to its appointment²².

Non-compliance with the arbitral mission and Violation of the adversarial principle

Article 1520-3° of the CPC targets the hypothesis where the arbitral tribunal "has ruled without complying with the mission entrusted to it". This grievance covers in particular cases of ultra petita, infra petita, or the application by the arbitrator of rules of law different from those chosen by the parties²³.

The fourth ground protects the fundamental rights of the defense by sanctioning any violation of the adversarial principle, an essential procedural guarantee even within the framework of private justice.

Judicial control confined but of variable intensity

The control exercised by the state judge over the arbitral award does not authorize him to go into the merits of the dispute (a) and his control remains variable (b).

The principle of prohibition of review on the merits and a variable intensity of control

It is a constant principle, both in French and OHADA case law, that the annulment judge is not an appellate judge. It is not for him to re-examine the merits of the dispute decided by the arbitrator, nor to substitute his own assessment for that of the arbitral tribunal on questions of fact or law falling within its mission. This principle, enshrined in particular by the French Court of Cassation, aims to preserve the effectiveness and finality of arbitration: to offer the parties definitive and rapid justice.

If control remains in principle restricted²⁴, there is a heterogeneity in its intensity depending on the grievance invoked. Regarding the jurisdiction of the arbitral tribunal or the regularity of its constitution, the judge's control tends to be relatively comprehensive, as he may re-examine the relevant elements of fact and law. But the enforceable effect of acts already done remains. This allows the award to retain its force²⁵.

Manifestations of an in-depth control in matters of international public policy

It is in matters of international public policy that the jurisprudential evolution is most notable. Long confined to a so-called "minimalist" control or simple "flagrancy" control, the French judge has gradually adopted a more in-depth control, as illustrated by the Thalès rulings (Cass. civ. 1st, 2005) and then, more recently, the Belokon case (Cass. civ. 1st, 2017), in which the Court admitted the possibility of re-examining the factual elements at the origin of an allegation of corruption, thus going beyond strict control of apparent conformity. This evolution demonstrates a persistent tension between two contradictory imperatives: on the one hand, the need to preserve the effectiveness and attractiveness of arbitration by limiting state interference; on the other hand, the requirement to guarantee respect for the fundamental values of the legal order, particularly in the presence of suspicions of fraud, corruption or money laundering.

²⁰ Article 1520-1° of civil procedure code (from décision n° 2011-48 of 13 janvier 2011)

²¹ Civ.Cass. 1re, 6 octobre 2010, n° 09-10.530

²² Cass. civ. 1re, 20 février 2007, Cubic, arrêt de référence en la matière.

²³ Article 1520-2° CPC. On exigence obligation of indépendance and impartiality.

²⁴ Arrêt AJCC n°038/2010 du 15 juillet 2010, Société CAMRAIL vs Société SITARAIL

²⁵ Art. 30.4



Refusal of exequatur: the ultimate bulwark of the State

Beyond the action for annulment, OHADA arbitration law enshrines a second mechanism of judicial control, distinct but complementary: the refusal of exequatur. This mechanism intervenes at a different stage, that of the recognition and enforcement of the award, and constitutes, as such, the last lock available to the State to prevent an award contrary to its fundamental values from producing effects on its territory. Four grounds are then provided (1), an analysis of statistics will complete this study (2).

Strict grounds for refusal

Article 32 of the Uniform Act on Arbitration (UAA, as revised on November 23, 2017) sets out the cases in which the competent judge may refuse to grant exequatur to an arbitral award, whether rendered on the territory of a Member State or abroad. This text largely reproduces the grounds for annulment provided for in Article 26 of the same Act, thus establishing a structural parallelism between the two avenues of control. This parallelism is not, however, complete. Indeed, refusal of exequatur has a functional autonomy in relation to the action for annulment: it can be invoked even in the absence of a prior action for annulment, and above all, it allows the requested State to control awards rendered abroad, over which it exercised no jurisdiction during the arbitral procedure itself. If all the grounds provided for the action for annulment can, *mutatis mutandis*, justify a refusal of exequatur, it is undeniably the ground based on contrariety to international public policy that constitutes the most frequently invoked and most delicate to handle. The Common Court of Justice and Arbitration (CCJA), the supreme court in matters of OHADA arbitration, has had the opportunity to clarify the contours of this notion through case law whose coherence remains improvable. The CCJA protects the force of the award against the budgetary specificities of States²⁶. The refusal of exequatur takes on a symbolic and political dimension that goes beyond the strict technical framework of judicial control. It reflects the persistence of a residual sovereignty of the State over its territory, even though it has consented, through ratification of the OHADA Treaty and its uniform acts, to a system of arbitration that is largely internationalized and de-judicialized. This protective function explains the reluctance of certain national courts of Member States to grant exequatur to awards whose enforcement could clash with considerations of economic public policy, particularly in matters of investment regulation, exchange control, or protection of public assets. It should however be emphasized that the use or misuse of refusal of exequatur as an instrument of state resistance may directly contradict the objective of attractiveness of the OHADA area for international arbitration. Too extensive a control at the exequatur stage would risk emptying of its substance the autonomy of the arbitral tribunal nevertheless enshrined upstream, thus creating a structural insufficiency: that of a system where the award, although final in theory, remains in reality subject to the vagaries of its reception by the enforcement state courts.

Practice of refusal of exequatur

The theoretical analysis above finds empirical confirmation in statistics relating to the contentious activity of the CCJA over the period 2003-2023. According to the table Statistics CCJA 2003-2023: 78% exequatur granted. 12% total annulment. These data reveal a significant asymmetry between the doctrinal discourse, often centered on hypotheses of annulment or refusal of exequatur precisely because they raise the most complex legal questions, and the statistical reality of litigation, which shows a clearly pro-enforcement trend. This quantified observation makes it possible to usefully nuance the analysis developed above regarding the function of refusal of exequatur as a "bulwark". If this function undeniably exists on the level of principles, it must be noted that it remains, in practice, of residual and exceptional application: in nearly eight cases out of ten, the CCJA favors recognition of the award, thus confirming its role as a jurisdiction favorable to the effectiveness of international arbitration, in accordance with the spirit of the OHADA Treaty and its declared objective of attractiveness for investment.

²⁶ Jugement CCJA n°088/2022 of 13 octobre 2022, state of Sénégal vs Société SONAC



CONCLUSION

The joint analysis of the mechanisms examined above reveals that the OHADA legislator did not make a neutral technical choice, but rather an assumed political and normative option: that of endowing the arbitral award with a quasi-jurisdictional force, to the point of assimilating it, in its effects, to a state judgment. This option unfolds through a coherent normative architecture, which can be described as the trinity of force: As soon as it is pronounced, the arbitral award benefits from the authority of *res judicata* with respect to the dispute it decides, without the need to await any judicial homologation. This immediate recognition constitutes a break with the classical conception of arbitration as purely contractual justice, devoid of its own enforceability. The *exequatur* regime, as organized by the UAA, is characterized by its speed and its non-adversarial nature at the initial stage, the procedure resembling a simple formal verification rather than a substantive re-examination. This procedural architecture reflects a presumption of validity attached to the award, a presumption confirmed, moreover, by the statistical data previously mentioned (78% of *exequatur* granted).

Finally, the exhaustive enumeration of the grounds for annulment, combined with the absence of automatic suspensive effect of this recourse on the provisional enforcement of the award in certain hypotheses, completes the consolidation of this architecture of force. We can indeed say that the OHADA arbitral award, while formally remaining a decision of private justice, borrowing its legitimacy from the will of the parties, is vested with procedural attributes that bring it structurally closer to the state judgment, to the point that doctrine can legitimately question the very relevance of the traditional categorical distinction between private justice and public justice in the OHADA area. The joint study of the grounds for annulment, the mechanism of refusal of *exequatur*, and the constant jurisprudence of the CCJA reveals a remarkable systemic coherence: that of a legal order having deliberately chosen to privilege the effectiveness and force of the arbitral award over the extent of residual judicial control. This "trinity of force" – immediate authority, facilitated *exequatur*, limited recourse – finds in the jurisprudence of the CCJA its vigilant and constant guardian. It remains to be determined whether this architecture of force, however coherent and statistically verified, does not contain within itself the seeds of a qualitative insufficiency of judicial control – insufficiency which, failing to result in numerous annulments, could nevertheless prove worrying in the cases, statistically minority but substantially significant, where serious infringements of the fundamental values of the legal order would escape any effective sanction. The study of residual judicial control exercised over the arbitral award reveals an irreducible tension between two competing logics. On the one hand, a logic of normative and jurisprudential consolidation, assumed by the OHADA legislator and rigorously implemented by the CCJA, which tends to bring the arbitral award closer to the state judgment through the attribution of immediate authority, facilitated *exequatur* and strictly confined annulment recourse.

On the other hand, a logic of residual resistance, which manifests itself both through the possible instrumentalization of international public policy in disputes with a strong state connotation, and through the structural obstacle of immunity from execution when the State is a party to the dispute. This last observation naturally invites us to question, in the continuation of our analysis, the possible ways of overcoming this persistent insufficiency, whether it be conventional mechanisms of advance waiver of immunity, substitute bank guarantees, or normative reforms specifically dedicated to this issue.

Thus, the "trinity of force" forged by the OHADA legislator and consolidated by the CCJA does not constitute only a successful regional model: it outlines, in the context of continental economic integration driven by the AfCFTA, the lineaments of a possible pan-African standard for commercial arbitration – provided, however, that the challenges of legal harmonization are overcome and, upstream, the structural insufficiencies identified, notably that of the effective enforcement of awards against sovereign States, are resolved.

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