

**UNCITRAL WORKING GROUP II**  
**COLLOQUIUM ON RECOGNITION AND ENFORCEMENT OF**  
**ELECTRONIC ARBITRAL AWARDS**

by

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As the other panellists, I thank the UNCITRAL for associating me to this reflection on the recognition and enforcement of electronic arbitral awards.

I have been asked to share with you my views on the pros and cons of the legislative proposals currently being formulated by the Working Group II (II) and to present the African perspective on the matter (I).

**I. The current situation in Africa**

The issue of the recognition and enforcement of arbitral awards is so important that it gave rise to the New York Convention, which we know, by facilitating the international circulation of arbitral awards, has greatly contributed to the promotion and development of international arbitration.

Indeed, among the 180 countries approximately that are currently parties to this Convention, 41 African countries out of the 54 that make up the African Union are members.

In other words, the New York Convention has been a remarkable success, including in Africa.

From an African perspective, I shall limit myself to presenting the current situation on the issue of recognition and enforcement of arbitral awards under OHADA arbitration.

Before this, I have to indicate that OHADA is the French acronym of the Organization for the Harmonization of Business Law in Africa. It is an Organization set up by the African States, of which there are now 17, with the aim of promoting the development of those States by providing legal and judicial security for economic activities and investments in those States.

The current OHADA contracting States are Benin, Bissau Guinea, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Ivory Coast, Mali, Niger, Senegal and Togo.

Arbitration is one of the areas covered by OHADA.

OHADA arbitration has a dualist nature, in that it is governed by the Uniform Act on Arbitration and by the Arbitration Rules of the OHADA Common Court of Justice and Arbitration.

OHADA arbitration having been partly inspired by the New York Convention as regards the recognition and enforcement of arbitral awards, it will come as no surprise to note that, like the New-York Convention, OHADA texts on arbitration require a written award as one of the documents to be provided to the competent State judge in order

to obtain recognition and enforcement of arbitral awards that have not been spontaneously enforced by the losing party.

With regard to the recognition and enforcement of arbitral awards, Article 31 of the Uniform Act on Arbitration states that : «*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 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 (...).*».

A close reading of this text clearly shows that the party relying on the award is required to establish its existence. The text specifies that the existence of the arbitral award is established « *by producing the original of the said award accompanied by the arbitration agreement or copies of these documents that meet the conditions required for their authenticity*».

Both the original and the copies of the award are necessarily in writing.

This requirement for written documents is also contained in the Arbitration Rules of the OHADA Common Court of Justice and Arbitration (CCJA).

Indeed, Article 30.1 of these Rules is related to exequatur and reads 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.».*

Article 31 of the said text, entitled «Enforcement certificate», stipulates that «*The Secretary General shall deliver to the requesting party a certified true copy of the original of the award filed in conformity with the provisions of Article 28 of these Rules, including the enforcement certificate. This certificate shall state that enforcement of the arbitral award has been granted (...).*»

For its part, article 31.2 stipulates that «*In view of the certified copy of the award with the certificate from the Secretary General of the Court, the national authority appointed by the Member State in which enforcement has been solicited shall grant formal exequatur to the award pursuant to the rules applicable in the above mentioned State.*».

This text requires, on the one hand, «*a copy of the award certified as being in conformity with the original...*» and, on the other hand, «*the certified copy of the award endorsed by the Secretary General of the Court...*».

As can be seen, in CCJA arbitration, the original award and the certified copy are also written documents.

Even though the COVID 19 pandemic didn't prevent the functioning of the OHADA arbitration considering that arbitration was administrated online with notification of arbitral documents through

electronical means, it is legitimate here to pose the question of whether an electronic award can be enforced in the OHADA region.

This brings me to the second part of my statement.

## **II. The pros and cons of the legislative proposals currently being made**

Among the disadvantages of the legislative proposals under consideration, there is one that I would like to focus on: the proposal to amend the New York Convention, in order to introduce provisions on the recognition and enforcement of electronic arbitral awards.

I am one of those whose opinion is that the New York Convention has been very successful and has, indeed, contributed to the expansion of international arbitration.

And even today, States around the world continue to adhere to it.

So, if we were to amend it today, it would be counter-productive, especially as such action would have the negative effect of casting doubt in the minds of its growing number of users and hindering its success, as mentioned above.

As a consequence, the other States that have not yet adhere to the Convention and are preparing to do so may question the advisability of becoming party to an instrument that is in the process of being amended.

On the other hand, just as the Singapore Convention on mediation was negotiated using the New York Convention as a model, a Convention on the recognition and enforcement of electronic arbitral awards could be drawn up, based on the New York Convention, which would, for professionals, be a realistic addition to the New York Convention.

It will also be necessary, in terms of benefits, to define in this new instrument what an electronic arbitral award is.

In this respect, the definitions proposed in paragraphs 21, 22 and 23 of Document A/CN.9/1190 seem to me to be judicious, as they cover *«awards in the form of data messages»* and *«awards made on paper but subsequently converted into electronic form and delivered to the parties via electronic means»*.

In any event, a multilateral instrument dedicated to the recognition and enforcement of electronic arbitral awards would be welcome, including in the OHADA area.

On this subject, I must stress that the jurisdictional control of the award rendered according to the CCJA Rules of Arbitration is exclusively entrusted to the OHADA Common Court of Justice and Arbitration in its judicial function.

Otherwise said, parties looking for an exequatur of the CCJA arbitral award will do it in accordance of the CCJA Rules of Procedure.

Article 24 of the said Rules allowing the parties to use fax or other electronical means, a multilateral instrument on the recognition and enforcement of the electronic arbitral awards will be well received even in the OHADA space.

I thank you for your attention and remain at your disposal, should you have any questions.