THE ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER THE OHADA UNIFORM ACT ON MEDIATION

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Abstract

On 23 November 2017, OHADA member states adopted the Uniform Act on Mediation. The Act lays down rules relating to mediation of disputes which, if successful, ends in a settlement agreement. Settlement agreements that are not freely respected by the parties will have no effect unless they are forcefully executed. Forceful execution is made with the help of a court or notably public who are empowered to insert an executory formula on the agreement after verification of its regularity. These local authorities involved in the enforcement process rely on domestic laws of member states which vary from state to state. This has the effect of tainting the harmonization process intended by the OHADA lawmaker and may be inimical to investors. This raises the problem of the suitability of the Act to dispute settlement as regards enforcement of settlement agreements. With the help of qualitative and comparative analysis, this article brings to limelight the intricacies of the enforcement of settlement agreements under OHADA. It concludes that enforcement of settlement agreements is rendered simple and rapid but faces serious drawbacks which could be alleviated by setting up OHADA mediation institution to oversee the entire mediation process, besides other recommendations.

Keywords: agreement, enforcement, exequatur, mediation

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1. INTRODUCTION

Disputes are commonplace and when disputes arise parties often try to settle them amicably. In case the parties are unable to settle their dispute amicably, they could request the help of a third party, the mediator, who will try to establish a favorable climate for a settlement in an informal and relatively cost-conscious manner (Niek 2019). Compared with many other forms of alternative dispute resolution, mediation allows for flexible solutions and settlements. If a settlement is reached and complied with, mediation may help to preserve the relationship of the parties. These perceived advantages of mediation justify its exponential growth in the past twenty years. It has become the most privileged means of dispute settlement in the world recently and legislation promoting mediation has been enacted in a budding number of jurisdictions within and outside the territory of the Organisation for Harmonisation of Business Law in Africa (OHADA).

Within the OHADA region, the enactment of mediation legislation was seen in Burkina Faso[1], Senegal[2] and Ivory Coast[3]. Mediation centres were also created such as CAMC-O[4], CAMeC[5], CENACOM[6], and CECAM[7]. As to mediation rules outside the OHADA region, we have for instance, World Intellectual Property Organisation Mediation Rules 2002; European Union Mediation Directive 2008; The International Bar Association Rules for Investor-State Mediation 2012; International Chamber of Commerce Mediation Rules 2013; ICSID Mediation Rules 2018; UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018.

To ensure harmonisation of mediation rules from regional blocks and some international institutions, the UN through UNCITRAL negotiated and adopted the Convention on the International Settlement Agreements Resulting from Mediation (Singapore Convention) which was adopted by the General Assembly on 20 December 2018 and the signing ceremony took place on 7 August 2019 in Singapore. Three members of OHADA (Benin, Congo, and Democratic Republic of Congo) were amongst the original signatories of the Convention in 2019 and others (Chad, Gabon, and Guinea Bissau) signed subsequently. With the above trends, all member states of OHADA joined the train; they adopted the Uniform Act on Mediation (UAM) on 23 November 2017, hereinafter referred to as the Act.

Mediation as per Article 1(a) of the Act is *any process, regardless of its name, whereby the parties request a third person to assist them in their attempt to reach an amicable settlement*

[1] « Loi n° 052-2012/AN portant médiation en matière civile et commerciale ».
[2] « Décret n° 2014- 1653 relatif à la médiation et à la conciliation ».
[3] « Loi n° 2014-389 relative à la médiation judiciaire et conventionnelle ».
[4] « Centre d'Arbitrage, de Médiation et de Conciliation de Ouagadougou ».
[5] « Centre d'Arbitrage, de Médiation et de Conciliation du Benin ».
[6] « Centre National d'Arbitrage, de Conciliation et de Conciliation de la République Démocratique du Congo ».
[7] « Centre de Conciliation et d'Arbitrage du Mali ».

of their dispute, adversarial relationship or disagreement ("the dispute") arising out of a legal or contractual relationship, or related to such relationship, involving natural persons or legal entities, including public bodies or States. A successful mediation ends with a settlement agreement which is binding and enforceable (article 16(1). This agreement is essentially a contract between the parties obliging them (Kefimmabuh 2020). As such, the agreement should wilfully be executed. A settlement reached and complied with, helps to preserve the relationship of the parties (Niek 2019) and produces according to Payne (1986), a sense of fairness which is frequently not as readily apparent in the judicial arena.

A mediated agreement should be complied with wilfully since it ensues from mutual assent of the parties and thus a contract between them. Payne (1986) argues that a mediated agreement is enforced as a contract and elements of a valid contract should be present. If a settlement agreement is not voluntarily complied with, the party who wishes specific performance may proceed to forceful execution, in which case the agreement should be endowed with an executory force. For the settlement agreement to obtain executory force, it has to go through the procedure for approval (recognition) and enforcement resulting in the issue of an exequatur as laid down in the Act. The approval and enforcement of the agreement are crucial and integral parts of the mediation process. Following the grant of an exequatur, the settlement agreement becomes a writ of execution[8] and receives the assistance of the State given its forceful execution in favor of the party seeking specific performance (Munemeka 2019; Ilboudo 2012; Anoukaha & Tjouen 1999; Assi-Esso & Diouf 2002).

The terms recognition and enforcement are usually used interchangeably but they have different meanings. Recognition is when a state court is requested to acknowledge the existence, authenticity, and validity of an award or a mediated agreement. It can be sought as proof that a dispute has been determined and is no longer subject to litigation or adjudication. Such proof acts as a defense and prevents the losing party from bringing a second allegation before a local court or arbitral tribunal. If a party were to bring an action against the other about the subject matter of the dispute, based on the same cause of action, the court would dismiss the action on the basis that the issues had been disposed of and was *res judicata* (Daradhek 2005).

Enforcement, on the other hand, entails taking a step further after recognition to force the other party to execute the award or settlement agreement. The court in this situation is expected to take action against the assets of the unsuccessful party to implement the settlement by way of seizure (Tsetsa 2021). The successful party uses enforcement as a sword where the unsuccessful party refuses voluntary compliance with the agreement. In practice, both processes are usually undertaken together because enforcement necessarily involves

[8] Article 33 of of the Uniform Act on Simplified Recovery Procedure and Measures of Enforcement 2023.

recognition. They are usually sought from a state court because a foreign award, agreement or judgment cannot be enforced without being recognized (Amas et al 2022).

The Federal Court of Australia in *Eiser Infrastructure Limited v. Kingdom of Spain*[9], made the following distinction between recognition and enforcement; 'Simplistically, recognition refers to the formal confirmation by a municipal Court that an arbitral award is authentic and has consequences under municipal law. Enforcement goes a step further. It refers to the process by which a successful party seeks the Municipal Court's assistance in compliance with the award (as recognized) and obtaining redress to which it is entitled. The same distinction holds for recognition and enforcement of mediated agreements.

The Act has laid down rules relating to the enforcement of settlement agreements, with a preponderant role placed on local authorities. This raises concerns as local authorities involved in the enforcement processes rely on domestic laws of member states which vary from state to state. This has the effect of tainting the harmonization process intended by the OHADA lawmaker and may be inimical and less attractive to investors. Enforcement may also encounter difficulty when the agreement has international elements. These raise the problem of the suitability and effectiveness of the Act in dispute resolution as regards compliance with settlement agreements. Employing qualitative and comparative analysis and with most examples drawn from Cameroon[10], this article sets out to bring to the limelight the intricacies of enforcing settlement agreements under OHADA. The article demonstrates that to ensure forceful compliance with settlement agreements, conditions for recognition must be met before enforcement is commenced. It also shows that a party could seek enforcement under the Singapore Convention where the settlement agreement has international elements even though challenges abound.

2. CONDITIONS FOR ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

Conditions for enforcement are imperative because when they are not met, a settlement agreement cannot be forcefully executed. A settlement agreement that is not complied with produces no effects. Such an agreement may be ignored, renegotiated, or enforced by judicial authorities. The enforcement will require an exequatur – a decision by which a court gives an executory force to an arbitral award or a decision from a private judge (Cornu 2016). According to Article 16 of the Act, for a settlement agreement to receive an exequatur, it must be in writing and not contrary to public policy.

[9] (2020) FCA, 157.
[10] Cameroon is chosen not only because the author masters its judicial system but also because it operates a bi-jural system with different procedural rules, though with harmonised judicial organisation.

2.1 The settlement agreement must be in writing

The requirement of writing is necessary as evidence of the existence of the settlement agreement as well as for the control of its authenticity. It equally enables the judge to verify the content of the agreement to establish its conformity with public policy. The Act does not recognize settlement agreements that are not evidenced in writing, and approval and enforcement would not be granted to such.

The Act does not prescribe the form of writing. In any case, a settlement agreement is in writing if its content is recorded in any form. Writing of any form including a private deed is permitted, especially as the agreement needs to be deposited with the notary public for authentication and insertion of the executory formula. The Act does not explicitly address electronic communications, which raises questions about their admissibility. According to Article 2(2) of the Singapore Convention, electronic agreements are valid if they are accessible for future reference (Niek 2019). It is suggested that it should be the same for electronic communications under the Act. It is also questioned whether writing is a substantial or formal requirement. Mukuamu (2023) opines that whether it is a substantial or formal requirement, imposing such a requirement tempers the will of the parties.

In some jurisdictions like the USA, enforcement of oral settlement agreements is permitted. This is consistent with the standard contract law principle which recognizes the validity of oral contracts (except for contracts where writing is required by statute, for example, contracts for transfer of land). Courts in the US enforce mediation settlement agreements in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound[11]. Nevertheless, Sussman (2018) observed that a Uniform Mediation Act is in the process of being passed in the US which exempts unwritten mediation settlements and they will henceforth be inadmissible in court if the Act is adopted throughout the USA.

2.2 The settlement agreement must conform to public policy

Public policy refers to principles and standards regarded by the legislator or by the courts as being of fundamental concern to the state and the whole of society. Settlement agreements have to conform to public policy. The requirement is very important as it is a ground not only of refusal of exequatur but also of appeal to the CCJA where an agreement is automatically homologated, that is, confirmed or approved (article 16 UAM). It is equally provided for in the Uniform Act on Arbitration (UAA) where it is sometimes couched as international public policy. Its Article 25(3) provides that '…parties may agree to waive the annulment action against the arbitral award if it is not contrary to international public policy'.

[11] *White v. Fleet Bank of Maine,* 875 A.2d 680 (Me. 680); *Standard Steel, LLC v. Buckeye Energy, Inc.,* 2005 WL 2403636 (W.D. Pa. 2005); *Harkader, supra,* 2005 WL 1252379; *Ford, supra,* 68 P.3d 1258.

By virtue of article 26(e), 'the annulment action shall only be permitted…e) if the arbitral award is contrary to public policy…' and finally that 'The recognition and the exequatur shall be denied when the award is manifestly contrary to rules concerning international public policy' (Article 31(4).

Neither the UAM nor the UAA define the scope and content of the notion of public policy or international public policy. In terms of scope, it has been held that the term refers to the public policy of OHADA as a community and not the individual public policy of member states or that of all the States in the world. This position seems reasonable because appeals for breach of such public policy are heard by the CCJA whose main role is to ensure harmonious application of regional law (Sassou 2022).

In terms of content, public policy has been held as 'designating all the principles written or not, which are considered in a given legal order as fundamental, and the respect of which is therefore imperative' (CREDIMI 2013). A distinction has been made between procedural public policy and substantive public policy. Breach of procedural public policy consists of violations of certain cardinal principles of the Act such as equality and impartiality, the right of all parties to be heard as well as the composition of the tribunal. Substantive public policy on its part will be violated where the award or agreement upholds an illegal activity such as corruption, racial discrimination or human trafficking (Kenfack 2021).

The notion of public policy has equally been held to encompass the fundamental principles of justice within the OHADA member states (Diakite 2016). A notable case where the CCJA annulled an arbitral award for breach of public policy was *Etat du Benin c/ SCP et Patrice Talon*[12].The apex court held in this case that: 'considering that while an arbitral tribunal is competent to entertain disputes arising from the exercise by the State of its prerogatives, its competence is limited to reparations due to private persons and does not extend to acts carried out by the State in the exercise of these prerogatives. In the present case, the tribunal instead of limiting itself to pecuniary awards, declared Decree nº 2013-485 null and void, and in so doing, this award is in breach of international public order.'

Case law holds that the principle of *res judicata* is a fundamental principle of international public policy. In *Société Planor Afrique SA c/ Société Atlantic Telecom*[13], the CCJA stated that; 'considering that the principle of *res judicata*, a fundamental principle of justice insofar as it ensures legal certainty, is part of international public policy within the meaning of articles 29(2) and 30(4) of the arbitration Rules of the CCJA, and precludes the arbitrator from ruling in the same cause between the same parties; that consequently, by ruling

[12] CCJA-Ohada, Ass. plén., arrêt nº 104/2015 du 15 oct. 2015.
[13] CCJA-Ohada, arrêt nº 03/2011 du 31 janv. 2011.

again on the request…, the award of the arbitral tribunal which thus undermines international public policy must be annulled.'

Case law equally holds that acts of corruption and other illicit practices are a violation of public policy. In the *République du Kirghizistan c/ Valéry Belokon*[14], the Paris Court of Appeal said, 'considering that the recognition or execution of the arbitral award which would have had the effect of making M. Belokon benefit from the product of illicit activities, manifestly, concretely and effectively violates international public policy, it is necessary to grant the applicant annulment…' The above cases, though not related to mediation, illustrate when settlement agreements would be contrary to public policy. Even though of considerable importance about the enforcement of settlement agreements, public policy consideration is uncertain in scope and its application may be inimical to enforcement.

3. THE PROCEDURE FOR ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

The procedure of enforcement is important because it determines if the party seeking compliance is satisfied. Satisfaction is attained if the procedure is simple and swift. The Act achieves this through diversification of the methods of obtaining an exequatur as well as a considerable reduction of the time limits and grounds of appeal. The enforcement is by either the notary or the competent court.

a) Enforcement by the notary

A principal innovation of the Act is the possibility of authentication and enforcement of the settlement agreement by a notary. The parties or the most diligent party can deposit a written copy of the settlement agreement with the notary who registers the same and issues an exequatur for execution (Article 16(2) UAM). This procedure enables the parties to bypass the national courts and simplifies the enforcement process. The copy issued by the notary bearing the executory formula constitutes a writ of execution (Article 33(5) UASRPME).

Notaries are common in all the member states of OHADA except the English-speaking regions of Cameroon. The English-speaking regions of Cameroon are the only part of OHADA territory with the common law tradition. The rest of the territory practices civil law which has dominantly influenced the OHADA uniform acts. In this part of Cameroon, the homologation is done by lawyers since they equally perform the functions of notary public as per the transitional provisions of Law nº 90/059 of 19 December 1990 Organizing Practice at the Bar and Article 155(1) of Decree n° 95/034 of 24 February 1995 on the Status and Organisation of the Profession of Notary.

[14] CA Paris, pôle 1, ch. 1, 21 févr. 2017, nº 15/01650.

The Act does not place any obligation on the notary to control the conformity of the settlement agreement with public policy as is the case with the court. However, enforcement by the notary has the advantage of guaranteeing the confidentiality of the agreement which is one of the main goals of mediation (Aka, Feneon and Tchakoua 2018). Another advantage is that there is no appeal against homologation by the notary, especially as most often it is done at the joint request of the parties.

b) Enforcement by the court

According to Article 16(3) of the Act, the parties can seize the competent court for enforcement of the agreement. The Act gives a very limited and passive role to the court seized. The court verifies the authenticity of the agreement without the possibility of modifying the content (Article 16(4). This is obvious because the court is not seized to decide on what has been decided by the parties consensually but to recognize its regularity and order that it should be enforced (Tchakoua 2013). What is imperative here is the *imperium* (power to give orders) and not the *jurisdictio* (power to decide on merit) of the judge. The court equally ensures that the settlement agreement is in compliance with public policy, failure of which it will refuse to enforce it (article 16(5). The judge has a deadline of 15 working days after being seized, to rule on the application for approval and enforcement. Where this time limit expires, the approval is automatically granted and the most diligent party applies to the registrar-in-chief of the court to affix the executory formula on the settlement agreement (article 16(6). The implicit grant of exequatur works against any delays by the courts which could be a procedural irritant in the execution of settlement agreements. The decision of exequatur whether explicit or implicit is not subject to appeal before any national court; it can only be brought before the CCJA for judicial review and the court has six months to rule (article 16(7).

The restriction of instances of appeal against the decision of exequatur or homologation of a settlement agreement as well as the competent jurisdiction to entertain such appeal, guarantees celerity. Mukuamu (2023) observes that the use of the terms homologation or exequatur creates the impression that there are two procedures and questions why institute two procedures to achieve the same purpose. In any case, exequatur or homologation all lead to the forceful execution of the settlement agreement. The parties can appeal where the approval or enforcement of the settlement agreement is automatic due to the failure of the court to rule within the prescribed time limits. The aggrieved party in this case can object to such approval or enforcement within 15 days of being notified, on grounds that the agreement is contrary to public policy. In such a case, the appellant has to specify how the settlement agreement offends public policy as was held by the CCJA in *Sonapra c/ SHB*[15]. The appeal is heard and decided by the CCJA within 6 months and all other time limits provided by the rules of the CCJA are reduced by half. The appeal suspends the execution of the settlement agreement (article 16(6).

[15] CCJA-Ohada, Ass. plén., arrêt nº 04/2011 du 30 juin 2011.

The parties can equally file an appeal where the court refuses to grant approval or enforcement of the award. The aggrieved party, in this case, makes an appeal to the CCJA within the same conditions as above (Article 16(7).

Where the settlement agreement is concluded while arbitral procedures are still pending, the parties rather than seeking judicial or notarial enforcement, can request the arbitral tribunal to include the agreement into a consent award (article 16(8). The award will then be executed according to the normal procedure for enforcement of arbitral awards as provided by the UAA. This also enables it to be enforced even in other jurisdictions under the New York Convention on enforcement of foreign awards. Even though the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties, it should be assumed that consent awards also fall under the scope of the Convention (Niek 2019).

The Act does not designate the competent court to issue exequatur for enforcement of settlement agreements. In *Société Ciments UNIBECOS S.A c/ Ibrahim Ahmad YOUNES*[16], the CCJA stated that 'except the uniform acts designate the competent court to rule on disputes arising from their application, the determination of the competent court is left for each member state'. In line with this decision, some OHADA member states have enacted laws to designate the competent courts or judges mentioned in the UAA, for instance, Cameroon[17], Côte d'Ivoire[18], Senegal[19], Togo[20] and Burkina Faso[21].

In Cameroon, the competent judge to issue exequatur is the President of the Court of First Instance or the judicial officer designated by him as per section 15(2) of Law nº 2006/015 of 29 December 2006 on Judicial Organisation as amended by Law nº 2011/027 of 14 December 2011. Section 5(2) of Law nº 2003/009 of 10 July 2003 to designate the competent Courts mentioned in the Uniform Act on Arbitration within the framework of OHADA Treaty and to lay down conditions for referring matters to them, provides that 'In case of petition for exequatur, the President of the Court of First Instance shall be seized by an application or by motion ex parte, alongside with documents establishing the existence of the award as outlined in Article 31 of the Uniform Act on Arbitration within the framework of the OHADA Treaty'. Law nº 2007/001 of 19 April 2007 to institute a judge in charge of litigation relating to the execution of judgments and to lay down conditions for the enforcement in Cameroon of foreign court decisions, public acts and arbitral awards, equally points to the court of first instance (section 5).

[16] CCJA, arrêt nº 129/2015, Pourvoi Nº 090/2012/PC du 13/08/2012.
[17] Law nº 2003/009 of 10 July 2003.
[18] Ordinance nº 2021/158 of 9 February 2021.
[19] Decree nº 2016/1192 of 3 August 2016.
[20] Law nº 2016/of 2 December 2016.
[21] Law nº 047-2017/AN of 14 November 2017.

The provisions of the above laws point to the President of the Court of First Instance or a judge delegated by him as the competent judge to grant approval and enforcement of both national and foreign awards and judgments. In the absence of specific legislation aimed at the UAM, it is safe to conclude that the provisions of this law are applicable mutatis mutandis to the UAM. This is especially so given the similarity of the provisions of both laws (Mbide 2022).

4. ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER THE SINGAPORE CONVENTION ON MEDIATION

It is important for the attractiveness of mediation to international investors that the parties be able to enforce the agreement in countries other than the one in which it was made. It is given this that the UN Convention on the International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) was adopted in 2018. It creates a harmonized framework for the effective and prompt enforcement of international mediation settlement agreements and aims to render mediation more efficient and attractive to parties globally, as an alternative to international arbitration and litigation. The Convention fills a missing gap in enforcement options for mediation, as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards successfully did for arbitration (Tzevelekou 2018). The provisions of the Singapore Convention are equally integrated into the UNCITRAL Model Law on Mediation of 2018. The Convention applies only to international mediation (article 1) and imposes an obligation on signatory states to enforce settlement agreements and to allow parties to invoke a settlement agreement as proof that a claim against them has been resolved (article 3). The Singapore Convention lays down the conditions for enforcement as well as grounds on which enforcement may be refused.

4.1. Conditions of enforcement under the Convention

A request for recognition and enforcement under the Singapore Convention must fulfill certain conditions under Article 4, as to the form of the agreement and the nature of the dispute contained in the settlement. As to the form:

- The mediation agreement must be signed by the parties to the mediation;
- The party must provide evidence that the settlement agreement resulted from mediation. Such evidence can be in the form of the mediator's signature on the agreement, a document signed by the mediator attesting that the mediation took place, an attestation from the institution that administered the mediation, or any other evidence that is acceptable to the enforcing authority; and
- The agreement must be translated where it is not in the same language as that of the country where enforcement is sought.

As to the nature of the dispute:

- The settlement agreement should be international. A settlement agreement qualifies as international if: (a) at least two parties to the settlement agreement have their place of business in different states, or (b) the state in which the parties to the settlement agreement have their places of business is different from either: (i) the state in which a substantial part of the obligations under the settlement agreement is performed, or (ii) the state with which the subject matter of the settlement agreement is most closely connected (Niek 2019).
- The settlement agreement should not be concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family, or household purposes, or be related to family, inheritance, or employment law (Article 1(2) (a-b).
- The settlement agreement should not have been approved by a court or concluded in the course of proceedings before a court and is enforceable as a judgment in the state of that court; and have not been recorded and is enforceable as an arbitral award (Article 1(3) i-ii).

4.2 Grounds for refusal of enforcement under the Convention

The grounds for refusal of enforcement under Article 5 of the Singapore Convention are of two categories, that is, those that must be invoked and proved by a party and those that may be taken into account by the competent court on its motion (Feneon 2020). Upon proof of the party against whom enforcement is sought, the competent authority may refuse to grant relief if one of the following six conditions has been fulfilled:

(a) a party was under some incapacity;

(b) the mediated settlement agreement: (i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority; or (ii) is not binding, or is not final, according to its terms; or (iii) has been subsequently modified;

(c) the obligations in the settlement agreement have been performed or are unclear;

(d) granting relief would be contrary to the terms of the settlement agreement;

(e) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) the mediator failed to disclose "to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure, that party would not have entered into the settlement agreement."

The Court seized with the application for approval and enforcement may also refuse such a request *suo moto* where it finds that: (a) doing so would be contrary to the public policy of that State; or (b) the subject matter of the dispute is not capable of settlement by mediation. These grounds are substantially more extensive than those provided for under the Act where the only ground for refusal of approval and enforcement is a breach of public policy.

5. CHALLENGES TO ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

The introduction of mediation into the OHADA ADR framework undoubtedly has many advantages, especially to investors in the OHADA zone due to its less contentious nature. There are, however, many challenges to the effectiveness of OHADA mediation particularly in the settlement of investment disputes. These challenges are related to the specific nature of investment disputes, the inherent characteristics of mediation as well as those inherent in the OHADA system as a whole. They include the absence of a mediation institution, difficulty of forceful execution against public entities, uncertainties relating to competent jurisdiction, and imprecision on predictability.

5.1 The absence of OHADA mediation institution

Institutional support is an important factor in the success and quality of ADR. Institutions can raise awareness about the use of ADR and inform parties about the process. They can support parties when they decide to submit their case and act as a facilitator in case of disagreement on the use of ADR or when they need help finding the best neutral third party (arbitrator, mediator, or conciliator) for their case and, if need be, by finally appointing the neutral. Institutions can supervise the proceedings to ensure their correct and fair conduct (Tumpel 2011).

Pougoue (2000) thinks that arbitration under the CCJA is 'without precedent both in Africa and the world at large', mainly because it brings together all the arbitration operations, from the request for arbitration to the final decisions on the awards. The advantages of CCJA arbitration include '…the fact of having contact with only one authority for both the arbitration phase and the eventual litigation phase and of having at one's disposal a very high-level authority giving the guarantees of integrity and independence' (Bourdin 1999). Comparatively, OHADA mediation doesn't have the same advantages of arbitration abovementioned. While the Act provides for institutional mediation, there is no supra-regional institution like the CCJA which administers and oversees the entire process from initiation to enforcement of the settlement agreement. The jurisdiction of the CCJA is restricted to administering arbitrations within the scope of Article 21 of the OHADA Treaty. The CCJA comes into mediation only when an appeal is made relating to exequatur or homologation.

There are a multitude of mediation centers in the region in different member states, each with their rules and in competition with the other. The absence of a regional mediation institution deprives OHADA mediation of the backing of a credible and independent institution with clear and uniform rules, trained mediators, and scrutiny of the settlement agreement. This goes contrary to OHADA's aim of harmonization and makes OHADA mediation less able to compete with other mediation systems like ICSID. On the whole, the absence of the institutional support of the CCJA deprives OHADA mediation of the prestige attached to the institution which is a necessary leverage to attract investor-state mediations. That is why state parties continue to prioritize international arbitration in their International Investment Agreements (IIA) over OHADA mediation. The new generation of BITs signed by OHADA member states after the adoption of the Act such as Burkina Faso- Turkey BIT (2019), Cote D'Ivoire-Japan BIT (2020), Mali-UAE BIT (2018), Mauritius-China FTA (2019) and the Democratic Republic of Congo- Rwanda BIT (2021), continue to provide for arbitration under UNCITRAL, ICSID and ICC with no reference to OHADA mediation (Bebohi Ebongo 2021).

5.2 Difficulties of forceful execution against the State and public Entities

Since mediation is a consensual process, it might be expected that the parties would voluntarily comply with the resulting settlement agreement which ensues from their mutual assent. Such is not always the case, though, and it is sometimes necessary to resort to forceful execution. The Uniform Act on Simplified Recovery Procedures and Measures of Execution (UASRPME) provides in Article 28 that 'in default of voluntary execution, any creditor may, regardless of the nature of his claim and under the conditions provided for in this Uniform Act, compel the defaulting debtor to honor his obligations against him or take protective measures to secure his rights'.

This is not so easy, however, where such forceful execution is sought against the State or other public entities due to the principle of State immunity from forceful execution enshrined in OHADA law (Vodounon-Djegni, 2022; Sawadogo 2010). In effect, article 30 of the UASRPME provides that *compulsory execution and protective measures shall not apply to persons who enjoy immunity from execution*. This provision which is categorical and emphatic seems to grant absolute immunity to the category of persons mentioned (Chia 2023). It does not, however, indicate the category of persons to whom such immunity applies, although it is accepted that it includes the State, decentralized authorities, public corporations, and public establishments (Nkongho 2019). This discourages investors from engaging in mediation with OHADA member states and other public entities as there is uncertainty as to whether they would be able to enforce the resulting settlement.

Many reasons have been advanced for the immunity of States from forceful execution. These include the belief that the State is never insolvent and is at all times in a position to meet its financial obligations. Another reason is the fact that forceful execution through the seizure

of public property will inevitably paralyze the ability of the State to carry out its public service mission, jeopardize the continuity of the public service, and ultimately cause suffering to the community at large.

The CCJA initially firmly sustained the absolute immunity of the State in *Aziablevi Yoyo et autres c/ Société Togo Telecom*[22], where it upheld the decision of the Court of Appeal annulling a forceful execution ordered against Togo Telecom, a State-owned company. The CCJA in that case ruled that public corporations, whatever their mission, are immune from forceful execution irrespective of any national legislation that provides the contrary. It equally emphasized the superiority of OHADA law over national legislation and the direct applicability of the Uniform Acts under Article 10 of the Treaty and held that the Togolese law which waived the immunity of public companies is contrary to Article 30 of the UASRPME. This decision of the CCJA was taken in disregard of the 2004 UN Convention on jurisdictional immunity of states and their property, according to which immunity from execution of the state or other public corporate bodies disappears when they undertake commercial activities (articles 13, 14, 15, and 16).

Due to hefty criticism, the CCJA has recently sought to restrict the extent of the application of state immunity from execution. Henceforth, the state and other public corporate bodies are not immune concerning the commercial activities they engaged in[23]. Besides, for a Semi-public corporation to benefit from immunity, the State must own the majority of the shares[24]. The mere participation by the State in the capital of the corporation without majority control will not confer immunity from execution. More importantly, the apex court took a remarkable shift in *SOTRA c/ SONAREST Etat de Cote d'Ivoire*[25] where it held that public corporations with majority public participation or even with the State as a sole shareholder but which for their operation have chosen one of the forms of Commercial companies provided for in the Uniform Act on Commercial Companies are subject to the Uniform Act on Simplified Recovery Procedures and their property can be seized without any restriction. This was confirmed in *Les membres du collectif ex personnel de la Société ENERCA S.A c/ La Société Energie Centrafricaine ENERCA S.A*[26] wherein the CCJA held that State corporations, vested with a public service mission, but created in the form of private companies and managed as private companies under the Uniform Act on Commercial Companies are not covered by immunity from execution.

[22] CCJA Arrêt no. 043/2005 du 7 Juillet 2005.
[23] *Mbutu Museso v Grand Hotels du Congo GHC,* CCJA, 3e ch. No 103/2018, 26 avril 2018 ; *Société Ivoirienne de Raffinage (SIR) v Trafigura Beheer BV,* CCJA no 002/2015 du 25 juin 2015 ; *Société Ivoirienne de Concept et de Gestion du Mali (SICOGEM) c/ Banque Malienne de Solidarité BMS,* CCJA no 010/2013 of 3 juillet 2014.
[24] *Gregoire BAKANDEJA WA MPUNGU C/ Société des Grands Hotels du Congo,* CCJA 1ere Ch. Arrêt No 267/2019, 28 novembre 2019.
[25] CCJA, 2eme Chambre, Arrêt No 190/2020 du 28 mai 2020.
[26] CCJA, 2eme chambre, Arrêt No 076/2021 du 29 avril 2021.

Immunity from execution will not be raised if the State or public body corporation or enterprise has waived its immunity. In this light, the CCJA held in *Société de Commercialisation des Produits Alimentaires du Sénégal (SCPA) c/ Société Senegalaise de Raffinage SOR*[27] that SOR had waived its immunity from execution by entering into a contract with SCPA that included a waiver of immunity clause. Thus, SCPA was entitled to seize its assets to satisfy the judgment debt. Despite the evolution in CCJA case law, it is still difficult for an investor to forcefully execute a settlement agreement against the State even after receiving an exequatur. Most often the party seeking enforcement resorts to renegotiation which is time-consuming.

However, a solution has been attempted in the amended Uniform Act on Simplified Recovery Procedures and Enforcement Measures of 2023. As per Section 30(1), any claim evidenced by an enforceable title or arising from an acknowledgment of the debt by a legal entity governed by public law, in particular the State, a local authority, or a public establishment may, after formal notice has been given to the governing body or competent authority in each State Party, which has remained unsuccessful for a period of three months from the date of notification, be automatically entered in the accounts for the financial year and in the budget of the said legal person, as a compulsory expenditure. The registration request, sent to the Minister of Finance, shall be accompanied by supporting documents for the debt and the formal notice. Claims registered following a request for automatic registration shall automatically bear interest at the legal rate in force from the date of formal notice. Even though interesting, this provision can only produce its effects if public entities concerned act in good faith.

5.3 Uncertainty as to the competent jurisdiction to entertain applications for enforcement

Article 16 of the Act provides that *the mediated agreement may also be subject to approval or exequatur by the competent court*. This provision as is customary in OHADA law does not identify the competent court but leaves this task to the member states. In some cases, however, member states have not enacted legislation on the competent court to enforce mediated agreements. In Cameroon for example, no such court exists, unlike the case for arbitral awards. Fortunately, section 15(2) of the law on the judicial organization in Cameroon designates generally, the President of the Court of First Instance or judge designated by him as the competent judge to issue an exequatur.

However, the problem is less acute because the notary public is empowered to issue an exequatur in matters of mediation. At least notaries exist in all the member states of OHADA. The only shortcoming is that they are not empowered to verify the conformity of the settlement

[27] CCJA nº 019/2008 du 22 juin 2012.

agreement with public policy. The uncertainty in the enforcement procedure can lead to loss of confidence in the OHADA mediation system.

5.4 The lack of precision on mediatability

Mediatability determines whether a matter can be settled by mediation or not. It answers the question of whether the subject matter of a claim is or is not reserved to domestic courts under national law. The Act does not define the disputes that can be resolved by mediation under OHADA; it provides simply in Article 2 that it shall apply to mediation. While it is possible to presume that just like arbitration, mediation can be resorted to concerning the rights that the parties can freely dispose of, the absence of precision in the Act gives rise to unnecessary uncertainty (Mbide 2022). This lack of certainty can cause the refusal of enforcement of a settlement agreement under both the Act and the Singapore Convention. Article 5 of the Singapore Convention on its part provides that a state party can refuse to grant recognition and enforcement of a settlement agreement where the subject matter of the dispute is not capable of settlement by mediation under the law of that party.

Like mediatability, arbitrability determines the type of disputes which can be settled through arbitration. If the dispute is not arbitrable or mediatable, the claim must instead be submitted to domestic courts. Arbitrable disputes are those concerning rights that can be disposed of freely. Only rights which are fully under the parties' control and which they can freely alienate and dispose of are subject to arbitration. This category includes the majority of rights enjoyed by parties under civil and commercial law. However, certain domains such as marriage and divorce under family law are not arbitrable (Kenfack 2021). Mediatability like arbitrability can be a matter of public policy. Under Article 5(2)(a) of the New York Convention, recognition and enforcement of an award may be refused if the court where such recognition and enforcement is sought finds that *the subject matter of the difference is not capable of settlement by arbitration under the law of that country*.

According to the Act, non-conformity with public policy is a ground for refusal of approval and enforcement. Thus, the mediatibility of disputes under the Act is determined by public policy. The Act, however, does not define the content or scope of public policy. This could be unfriendly to investors as lack of definition may lead to broad interpretations by the State courts, leading to the refusal of approval of valid settlement agreements. In *Richardson v. Mellish*[28] it was stated that 'public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all but when all points fail'.

[28] 1824-34 All ER, 258.

6. CONCLUSION

Settlement agreements that are not freely respected by the parties will have no effect unless they are forcefully executed. OHADA mediation is attractive because the forceful execution of settlement agreements is recognized and regulated. Enforcement which is done through exequatur is simplified and made rapid. An exequatur may be obtained from a notary public, the court, or may even be automatic if the court fails to rule on an application for exequatur within a specified time. In addition, there are restrictive grounds on which enforcement may be refused, the most important of which is non-conformity with public policy. As interesting and charming as it appears, the procedure of enforcement is plagued with a lot of challenges such as the absence of a regional mediation institution, the difficulty of enforcement against the State and other public entities, imprecision on certain notions, and non-designation of competent courts to enforce mediated agreements. To strengthen confidence and promote the use of mediation within the OHADA framework, it is recommended inter alia that the OHADA legislator should create a regional mediation institution or enact mediation rules to enable it to be conducted under the aegis of the CCJA as is the case with arbitration. This will harmonize the mediation rules of the member states. Electronic communications should also be admissible as evidence of settlements if they are accessible for future reference.

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