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From Port-Louis to Panama and Washington DC: two regional approaches to International Commercial Arbitration

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A. Introduction

Parties, when entering into a contract of significant value, generally want to ensure that any dispute that might arise under the contract in the future will be dealt with efficiently, rapidly, and confidentially.[2] Especially if the parties are from different countries, each of them may prefer disputes to be handled by a neutral body rather than by the national courts of the other party. These are the considerations that have led to the popularity of arbitration in general and arbitration clauses in contracts in particular, especially in international contracts.[3]

Arbitration is an alternative to conventional litigation (alternative dispute resolution), used primarily for disputes of a commercial nature.[4] It is a private mechanism for settlement of disputes, which depends on parties' agreement. Arbitration is preferred in international commercial transactions because it is seen as a fair option, cost efficient, free of unnecessary publicity, neutral, impartial, providing to the parties the expertise of the judges (arbitrators) in a specific field and giving them a certain control over the procedure, which is not the case in national courts. It permits parties involved in international commercial transactions to avoid the potential bias in local courts.[5] There are two sorts of arbitration:

- Institutional arbitration, monitored by organizations having their own sets of arbitration rules. In this type of arbitration, parties choose to submit their dispute to a specific institution, which usually has its own set of rules that parties choose to follow.[6] For example: the London Court of International Arbitration (United Kingdom), the OHADA Common Court of Justice and Arbitration (Africa), the American Arbitration Association (United States), the International Centre for Settlement of Investment Disputes (World Bank) etc.
- Ad hoc arbitration: which is a process in which parties create their own procedures or apply the United Nations Commission on International Trade Law arbitration Model Law (hereinafter UNCITRAL Model Law). This arbitration is reputed to be flexible, cheap,

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[2] See Boris Martor et al., Business Law in Africa : OHADA and the harmonization process, at 16(2nd ed., GMB Publishing Ltd., 2007) (hereinafter Martor et al., Business Law in Africa)., at 259.

[3] See Martor et al., supra.

[4] Thomas E Carbonneau, Arbitration in a nutshell, 2nd edition, (West, 2009) (hereinafter Thomas E. Carboneau, Arbitration in a nutshell) *see also* Emilia Onyema, The doctrine of separability under Nigerian Law, SOAS School of Law Legal Studies Research Paper Series, (Research Paper No 3, 2010) (hereinafter Emilia Onyema, The doctrine of separability under Nigerian Law)

[5] Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1.

[6] See Ralph H. Folsom et al., International Business Transactions in a nutshell, at 327 (West, 2009) (hereinafter Ralph H. Folsom et al., International Business Transactions in a nutshell).

and fast.[7]

In recent decades, international efforts have been made to reform and harmonize the rules governing international arbitration. The most notable examples are the UNCITRAL Model Law on International Commercial Arbitration, prepared and adopted by the United Nations Commission on International Trade Law June 21, 1985[8] and the New York Convention, adopted by diplomatic conference June 10, 1958, which are widely recognized as foundational instruments of international arbitration.[9]Harmonization processes have also been conducted at a regional level and have resulted in the adoption of regional instruments governing commercial arbitration in specific areas, and the creation of common institutions regulating commercial arbitration in different countries of a specific region.

This paper will analyse the arbitration regimes created by Treaty signed at Port-Louis (Mauritius) on October 17, 1973 (hereinafter OHADA Treaty), which created the Organization for Harmonization of Business Law in Africa (OHADA, French for Organisation pour l'Harmonisation en Afrique du Droit des Affaires)[10]; and the Inter-American Convention on International Commercial Arbitration (hereinafter Panama Convention), which was signed at Panama January 30, 1975 by Member States of the Organisation of American States (hereinafter OAS).[11]The two regimes are similar as they were both created by international instruments which provide rules of commercial arbitration applicable within the framework of international organisations (OHADA and OAS).

A particular focus will be on the arbitral institutions that were created within these organisations. The rules of the OHADA Common Court of Justice and Arbitration (hereinafter CCJA) and the Inter-American Commercial Arbitration Commission (hereinafter IACAC) will be comparatively analysed, in order to highlight their particularities, advantages and disadvantages. Particular attention will also be given to the American Arbitration Association (hereinafter AAA), the United States National Section of the IACAC, which is a major arbitration institution in the world.[12]

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[7] Thomas E. Carbonneau, Arbitration in a nutshell, at 10.

[8] http://en.wikipedia.org/wiki/UNCITRAL_Model_Law_on_International_Commercial_Arbitration visited on

[9] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, visited on November 2nd, 2010

[10] Current OHADA Member States include: Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Union of Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo. Source: OHADA, www.ohada.org .

[11] The following countries have deposited their instrument of ratification with the OAS and are parties to the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, USA, Uruguay and Venezuela. Source: Organization of American States, www.oas.org .

[12] *See* Thomas E. Carboneau, Arbitration in a nutshell, at 318-319

B. Historical background: the OHADA and Inter-American arbitration regimes

1. The OHADA arbitration regime

Africa offers immense natural resources and business opportunities for foreign direct investment, which are essential to the world economy.[13] Concurrently, "financial backers often complain about legal and judicial uncertainties in Africa."[14] Foreign investors are traditionally suspicious about African national judicial systems, which have been plagued by corruption, long and costly procedures, and lack of efficient enforcement of the law.[15] Therefore, in the early 1990s, facing a reduction in investment, West and Central African countries decided to combine their efforts to solve the reluctance of investors to come to Africa because of the disparity of and lack of cohesive business laws across borders. These efforts led to the signing in 1993 in Port-Louis, Mauritius, of a Treaty which created the Organization for the Harmonization of Business Law in Africa.[16] The Organization was aimed at harmonizing the business laws of different African countries by establishing common rules that would be simple, modern and adapted to each country's situation. This would allow them to be more competitive in the world economy.[17]

In the past, foreign investors deplored the lack of a reliable arbitration reference in Sub-Saharan Africa and the lack of international arbitration institutions capable of monitoring complex arbitration proceedings with competence, confidentiality and impartiality.[18] Because foreign investors could not rely on African arbitration, other options were used, such as the European or American arbitration forums, or the World Bank arbitration (International Centre for Settlement of Investment Disputes). However, given that those arbitration forums were not always adapted to the African reality and issues, the founders of OHADA decided to create a new international commercial arbitration regime in Africa meant to fill the gap and compete with other major international arbitration regimes in the world.

Two different sets of arbitration rules were adopted to cover ad hoc and institutional arbitration:

- The Uniform Act on Arbitration was enacted March 10, 1999 and implemented June 11, 1999; it is applicable in every OHADA Member State and has become their national law for ad hoc arbitration.
- Title IV of the OHADA Treaty, which gives to the Common Court of Justice and Arbitration the role of a regional arbitration institution, meant to be cheaper, closer to investors and more efficient regarding enforcement of arbitral awards in OHADA Member States.[19]

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[13] See Barthelemy Cousin & Aude-Marie Cartron, OHADA: A common legal system providing a reliable legal and judicial environment in Africa for international investors, at 1(www.ohada.com, Ohadata D-07-27).

[14] Ibid.

[15] See Id, at 3

[16] Current Member States include: Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Union of Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

[17] Mbaye, supra, at 4.

[18] Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1 (ACOMEX, Janvier-Fevrier 2011, n°37).

[19] Title IV of the OHADA Treaty provides the general rules applicable to the institutional arbitration administered

This paper will focus on the institutional arbitration administered by the CCJA. The CCJA arbitration is governed by the provisions of the OHADA Treaty and the CCJA arbitration rules (hereinafter CCJA rules). Title IV of the Treaty is the framework for CCJA arbitration whereas details are given in the CCJA rules.[20]The CCJA has jurisdiction over all OHADA Member States.

2. The Inter-American international commercial arbitration regime

Latin American countries have been traditionally considered hostile towards arbitration.[21] Several reasons could justify that hostility:

- Latin-American countries were reluctant because historically they always lost arbitration proceedings involving foreigners;[22]
- The existence of different internal legal systems may have been a cause for the non-functionality of international arbitration in the area, making it unlikely to reconcile all the legislations and agree on a uniform arbitration forum;[23]
- Because of the bias against arbitration, Latin-American countries wanted to keep arbitration under their national courts' auspices;[24]
- Parties were usually reluctant to arbitrate when the dispute had already arisen and preferred their national courts' forum.[25]
- In Latin-American countries, acceptance of universal arbitration treaties was almost nonexistent. [26]

Several solutions were proposed to solve this problem:

- The unification of arbitration legislation bodies;
- The adoption of international agreements enabling the correction of this problem;[27]
- The creation of a system or special forum which would have competence to harmonize different arbitration laws in the area. Decisions issued by this forum must be binding on the Member States.[28]

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by the CCJA. These provisions are supplemented by the provisions of the CCJA rules on arbitration.

[20] Emilia Onyema, Arbitration under the OHADA Regime, at 10 (International Arbitration Law Review, 2008) (hereinafter Emilia Onyema, Arbitration under the OHADA regime).

[21] *See* Fernando Cantuarias, Problematic of International arbitration in Latin-America, at 3(Florida Journal of International Law, 2008) (hereinafter Fernando Cantuarias, Problematic of International arbitration in Latin-America)

[22] Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 93(Kluwer Law International, 2007) (hereinafter Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems)

[23] Fernando Cantuarias, Problematic of International arbitration in Latin-America, at 6

[24] Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 92

[25] Id, at 93.

[26] Fernando Cantuarias, Problematic of International arbitration in Latin-America, at 4.

[27] Id, at 7.

[28] Id, at 5.

Those are the reasons which led to the adoption, at the Seventh International Conference of American States, of a resolution on an Inter-American arbitration forum, which was approved and turned into a Convention in Panama on January 30th, 1975.

The legal framework of the Inter-American arbitration forum, which culminated in the Panama Convention, was composed of three prior fundamental conventions:

- The Treaty of International Procedural Law of Montevideo (1889)−Recognition and enforcement of foreign judgments;
- The Convention on Private International Law, Bustamante Code (Havana, 1928))−Enforcement of arbitral awards;
- The Treaty of International Procedural Law of Montevideo (1940)−Only ratified by 3 countries;

The New York Convention (1958) can be added to the list, as it was ratified by several countries.[29]

The Panama Convention was aimed at reaching two goals:

- Encourage Latin-American States which were not parties to any convention on arbitration to become more friendly to arbitration;
- Stimulate trade and economic development in Latin America.[30]

The political goal of the Convention was to create a greater solidarity between the United States and Latin-American countries,[31] as the United States trades extensively in the area. Arbitration was presented as a dispute settlement option which was faster, cheaper, confidential and neutral.[32] The Panama Convention was a good idea, as Latin-American countries preferred a regional arbitration process under the Organization of American States (OAS), because it would preserve their needs and legal traditions. That is why it was adopted within the framework of the OAS and is open to signature to all countries of the OAS.[33]

The Panama Convention, which is a regional convention, overrides the New York Convention and promotes a greater uniformity in the area.[34] It provides a regional mechanism for dispute settlement and preserves important regional prerogatives while promoting trade relations between the United States and Latin-American countries.

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[29] Countries, parties to the Panama Convention, which had already ratified the New York Convention: El Salvador, Mexico. Ecuador, U.S, and Trinidad made reservations: they would apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State and would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under their own law.

[30] Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 91

[31] Id, at 92

[32] Id, at 94

[33] Article 7 of the Inter-American Convention on International Commercial Arbitration.

[34] Joseph Jackson Jr., The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems, at 99

The Panama Convention replicates the New York Convention in general, but also provides a mechanism to administer International Commercial Arbitration and rules of procedure.[35]

Article 3 of the Panama Convention recognizes the application of the rules of the Inter-American Commercial Arbitration Commission, which is an international arbitration institution created within the Organization of American States. The IACAC was established in 1934 as a result of Resolution XLI of the Seventh International Conference of American States at its meeting in Montevideo, Uruguay, in December 1933. The Commission is composed of a Delegate and an Alternate Delegate from each of its National Sections who meet at least once every two years. It coordinates the activities of the National Sections, provides administrative services and serves as an appointing authority for arbitrators.[36] It has several National Sections in most countries which are parties to the Panama Convention.[37] National Sections are independent arbitration agencies which can issue their own domestic rules. The National Section in the United States is the American Arbitration Association, a private enterprise located in New York.[38]

The duties of the IACAC are, among others:

- To ensure the establishment of arbitration facilities in every Member State in the form of National Sections, which are responsible for monitoring arbitration, organizing panels of arbitrators and administering the standard Rules of the Commission;
- To support the modernization of national arbitration laws through the Commission's National Sections, in order to facilitate the conduct of arbitrations and ensure the enforcement of arbitration agreements and awards in every Member State;
- To promote arbitration through publicity and correspondence, in order to familiarize importers and exporters in inter-American trade with the arbitration rules and procedure;
- the arbitration or adjustment of differences or controversies, arising in the course of inter-American trade;
- To encourage the ratification by the OAS respective Member States of the Inter-American Convention on International Commercial Arbitration (1975) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958);[39]
- To establish a list of arbitrators proposed by National Sections;
- To maintain relations with other institutions and organizations interested in international commercial arbitration;

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[35] Charles Robert Norberg, Recent Developments in Inter-American Commercial Arbitration, at 89 (Northwestern Journal of International Law and Business, 1991-1992) (hereinafter Charles Robert Norberg, Recent Developments in Inter-American Commercial Arbitration).

[36] The Organization of American State's Foreign Trade Information System, http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp

[37] Charles Robert Norberg, supra.

[38] Rafael Eyzaguirre, Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission, at 289 (International Tax & Business Lawyer, 1986) (hereinafter Rafael Eyzaguirre, Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission).

[39] The Organization of American State's Foreign Trade Information System, http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp

- To adopt all appropriate measures to improve the Inter-American system for commercial conciliation and arbitration.[40]

C. The CCJA and IACAC arbitration rules

1. Scope of application

Arbitration under the CCJA rules is applicable under three conditions:
- The dispute has to be contractual;
- One of the parties must have its domicile or usual residence in an OHADA Member State;
- The contract must have been executed or is to be fully or partially performed in an OHADA Member State.[41]

These conditions make the CCJA a regional rather than an international arbitral institution, as the parties, or the contract, have to be linked to the OHADA area for the CCJA to have jurisdiction over a dispute submitted to its arbitration reference. The provisions do not differentiate whether the arbitration is international or national. The only detail referring to the dispute is that it has to be *contractual.*

The IACAC has adopted a different approach. Article 1 of the IACAC rules provides that these rules apply where parties have agreed to submit their disputes to arbitration under the IACAC Rules of Procedure. This makes the IACAC an international arbitral institution rather than a simple regional institution, as parties from anywhere in the world can choose to be governed by these rules, regardless of their nationality, their domicile or the place where the contract will be performed.[42] The AAA, National Section of the IACAC in the United States, has adopted the same approach.[43]

The AAA goes further and makes an original distinction in the application of its rules. Unless otherwise agreed by parties, cases in which no disclosed claim or counterclaim exceeds $75,000 are administered by the Expedited Procedures[44]; cases where the amount of the disclosed claim or counterclaim is at least $500, 000 shall be administered by the Procedures for Large, Complex Commercial Disputes[45]; all other cases are administered in accordance with

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[40] Rafael Eyzaguirre, supra.

[41] This is the rule set by article 21 of the OHADA Treaty, which is repeated in article 2.1 of the CCJA rules

[42] The scope of application of the IACAC rules is found at article 1 of the IACAC rules. The article provides "where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the IACAC Rules of Procedure, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing and the IACAC may approve." These provisions do not limit the application of the IACAC rules to disputes between parties from OAS Member States or disputes linked to transactions taking place in an OAS Member State.

[43] Similar provisions are found in the AAA rules, section r-1 (a) "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association..."

[44] These rules are found in Sections E-1 through E-10 of the AAA rules.

[45] These rules are found in Section L-1 through L-4 of the AAA rules.

Sections R-1 to R-54 of the AAA rules.[46] This distinction is important because it provides appropriate time frames for different kind of disputes: shorter for cases with a small amount and longer for cases which are more complex.

2. CCJA arbitration framework

When parties opt for the CCJA arbitration rules, different texts are automatically applicable to their arbitration:

- Title IV (articles 21-26) of the OHADA Treaty;
- The CCJA rules;
- The CCJA internal rules and appendices;
- Arbitration costs and rates in force at the moment the arbitration process starts. The fundamental text on this matter is decision 004/CCJA of February 3rd, 1999 governing arbitration costs, approved by the decision of the Council of Ministers March 12th, 1999.[47]

3. Functions of the CCJA, IACAC and AAA

The first role of the CCJA is to act like any other arbitration institution. The Court does not arbitrate itself, but administers the arbitration proceedings and appoints or confirms the arbitrators who will judge the case. This role is similar to the one of the IACAC and the AAA. Section R-2 of the AAA rules provides that when parties choose to be governed by these rules, they thereby authorize the AAA to administer the arbitration. Although it is not provided in any specific article, the same approach is adopted by the IACAC when it provides for example for the composition of the arbitral tribunal and appointment of arbitrators by the IACAC in article 5. The originality of the CCJA is that it also acts as a jurisdiction. In this regard, the CCJA reviews the draft awards before the arbitral tribunal renders its decision[48], and is also competent for recognition and enforcement of the same awards.[49]

4. Arbitration agreement

Parties choose to submit their dispute to arbitration in an arbitration agreement. The arbitration agreement is consensual, and parties may decide on the arbitration process, the scope of the arbitration, the law to apply to their dispute, the procedure to follow, etc.[50] Arbitration depends therefore on parties' autonomy and is not mandatory, but the arbitral award is binding on them. There are two forms of arbitration agreements:

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[46] This distinction is found in Section R-1 points (b) and (c) of the AAA rules.

[47] *See* Joseph Issa-Sayegh et al, OHADA, Traité et actes uniformes commentés et annotés, at 46 (Juriscope, 2008) (hereinafter Joseph Issa-Sayegh et al., OHADA, Traité et actes uniformes commentés et annotés). In an introduction to their comments on the CCJA rules of arbitration, authors list all documents that are applicable to arbitration under the CCJA rules. *See also* Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le deroulement de la procedure arbitrale, at 1.

[48] This role is inspired from article 27 of the International Chamber of Commerce arbitration rules. This provision gives the ICC Court the same role to review draft awards before they are rendered by the arbitral tribunal.

[49] *See* article 2 of the CCJA rules on the mission of the Court. This provision is original before it gives the CCJA the right to monitor a regional recognition of the arbitral awards.

[50] *See* Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 5.

- *Clause compromissoire* or arbitration clause, which is an agreement included in the main contract between parties. Here parties agree to submit future disputes to arbitration before they have arisen;
- *Compromis d'arbitrage* or submission, in which parties agree to submit a dispute to arbitration after it has arisen.[51]

The CCJA rules have provided both forms of arbitration agreement.[52] However, they do not give enough details on the form of the agreement and the way to prove its existence. The IACAC rules provide that the agreement to refer the dispute to arbitration shall be in writing.[53]

5. Kompetenz-Kompetenz

If one party challenges the existence, validity or scope of an arbitration agreement, the CCJA, after confirming the existence of the agreement and if one party requests it, must decide to send the parties to arbitration. This procedure is valid even when the arbitral tribunal has not yet been constituted. Arbitrators are therefore competent to decide on their own jurisdiction.[54] This is called the *Kompetenz-Kompetenz* doctrine. Widely recognized in international arbitration, this principle gives priority to the arbitral tribunal to decide on any matter covered by the arbitration agreement, or on its own competence.[55] The *Kompetenz-Kompetenz* doctrine is found in article 18, para 1 of the IACAC rules. This provision gives the power to the arbitral tribunal to "rule on objections that it has no jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." The same doctrine is found in section R-7 (a) of the AAA rules, which duplicates the IACAC provision, and adds that the arbitral tribunal can also rule on the scope of the arbitration agreement.[56]

6. Separability

Linked to the doctrine of *Kompetenz-Kompetenz*, the doctrine of separability refers to the existence of an arbitration clause independent within the underlying contract. The arbitral tribunal has the right to decide whether a factor affecting the existence or validity of the main contract also affects the arbitration clause.[57] Unless otherwise provided, if the arbitrator considers the arbitration clause valid but deems the main contract null or does not exist, he is

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[51] *See* Boris Martor et al., Le droit uniforme africain issu de l'OHADA, at 253. *See also* Thomas E. Carboneau, Arbitration in a nutshell, at 11

[52] The two forms of arbitration agreement are found in article 2 of the CCJA rules. This provision only mentions that the CCJA can arbitrate a dispute when parties have provided in an arbitration clause or a submission agreement that the CCJA rules will apply. The provision does not give any detail on the form of the arbitration agreement.

[53] Article 1 of the IACAC rules.

[54] The *Kompetenz-Kompetenz* doctrine is found in article 10, para 10.3 of the CCJA rules. However, despite the existence of an arbitration agreement, if none of the parties requests the judge to send them to arbitration, the judge can decide on these matters. This idea is developed in Richard Boivin and Pierre Pic, L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 4.

[55] *See* Thomas E. Carbonneau, Arbitration in a nutshell, at 13.

[56] AAA rules, section R-7 (a) provides "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

[57] *See* Emilia Onyema, The doctrine of separability under Nigerian Law, at 69

allowed to decide on each party's rights and claims. The doctrine of separability is found in article 10, para 10.4 of the CCJA rules. The same doctrine is found in article 18, para b and c of the IACAC rules and section 7 (b) of the AAA rules.

7. Arbitrators

7.1 Appointment

The CCJA rules provide that either one or three arbitrators can be appointed. If parties decide to have one arbitrator, they agree on the appointment, which is subject to confirmation by the Court. If parties fail to agree within thirty days after notification of the request for arbitration by the other party, the Court appoints the arbitrator.

If they decide to have three arbitrators, each party appoints one arbitrator, either in the request for arbitration or in the answering statement. If one party fails to do so, the Court appoints the other arbitrator. The third arbitrator, deemed to be the president of the arbitral tribunal, is appointed by the Court, unless parties have provided that the appointment would be made by the other arbitrators already appointed. In this case, the Court will have to confirm the third arbitrator. A similar appointment procedure is provided in article 5 para 2 to 5 of the IACAC rules and sections R-11 and R-12 of the AAA rules. Both provisions give the IACAC and the AAA the power to appoint arbitrators where the parties have not provided for a specific procedure. If parties did not provide the number of arbitrators, the CCJA appoints one arbitrator, unless it determines the dispute to require three arbitrators. In a multi-party case, with multiple claimants and respondents, if parties cannot agree on the appointment of arbitrators, the Court can appoint the entire arbitration panel.[58]

The IACAC and the AAA have not limited the number of arbitrators and have left it to the parties to decide the number of arbitrators. Where parties have not provided for the number of arbitrators, the IACAC has provided that three arbitrators shall be appointed, and the AAA has provided that one arbitrator will be appointed, unless the AAA, in its discretion, directs that three arbitrators be appointed.[59] This right of parties to appoint more than three arbitrators is important in multi-party cases, as it ensures that all the parties have their rights guaranteed.

7.2 Immunity and privileges of CCJA arbitrators

In the scope of their work, arbitrators designated by the Court and those designated by parties but confirmed by the Court enjoy diplomatic immunity and privileges.[60] The immunity given to those arbitrators is questionable, especially in cases where they make mistakes on purpose without being held accountable.[61]Neither the IACAC nor the AAA have provided such

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[58] The appointment procedure is provided at article 3, para 3.1 of the CCJA rules.

[59] *See* article 5 para 1 of the IACAC rules and section R-15 of the AAA rules.

[60] *See* article 49 of the Treaty, which was revised by the Conference of Head of States and Governments on October 17th, 2008. The revision extended these privileges and immunity to arbitrators designated by parties but confirmed by the Court. The previous version of the article provided such privileges only for arbitrators designated by the Court.

[61] See Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 10. Authors discuss CCJA arbitrators' immunity and find it inappropriate in case arbitrators make a serious mistake

privileges for the arbitrators. This provision of the CCJA rules may have been adapted to the context of OHADA Member States in order to guarantee the arbitrators' independence and freedom while accomplishing their mission.

7.3 Independence

An arbitrator who is considered for appointment, before his/her nomination or confirmation by the CCJA, informs the parties of any fact or circumstance which can, according to them, call into question the arbitrator's independence vis-a-vis the parties. He/she has the same obligation throughout arbitration proceedings, from his/her nomination or confirmation by the court to the notification of the award.[62] A similar rule is provided by the IACAC and the AAA.[63] The AAA gives more details on these circumstances by mentioning "any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives."

7.4 Challenge

An arbitrator can be challenged for lack of independence or any other reason. Under the CCJA rules, parties do not need to go to national courts to challenge an arbitrator and submit their requests to the CCJA, which decides the matter.[64]The procedure for challenge of arbitrators is provided at articles 6, 7, 8 and 9 of the IACAC rules and section R-17 of the AAA rules. Under the AAA rules, arbitrators are allowed to be non-neutral if agreed by parties, in which case such arbitrators need not to be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.[65]

7.5 Replacement

An arbitrator can be replaced due to death, when the Court has confirmed his/her challenge or when his/her resignation has been accepted by the Court. The arbitrator can also be replaced when the Court determines that he/she is prevented *de jure* or *de facto* from fulfilling his/her mission, or that he failed to fulfil his/her mission according to Title IV of the Treaty and the CCJA rules. When an arbitrator's resignation is denied by the CCJA, and the arbitrator refuses to continue his/her work, the Court may replace him/her if he/she is the sole arbitrator or the president of the arbitral tribunal. In any other case, the CCJA considers the evolution of the process and the opinion of the other two arbitrators, and can decide to proceed with the arbitration.[66] Similar rules are found at article 10 of the IACAC rules and section R-19 of the AAA rules.

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intentionally. The same concern is expressed in Boris Martor et al., Le droit uniforme africain issu de l'OHADA, at 265.

[62] See article 4.1 of the CCJA rules.

[63] See article 6 of the IACAC rules and section R-16 of the AAA rules

[64] Eric Teynier et al., Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 3.

[65] Section R-17 (iii) of the AAA rules provides "The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence."

[66] *See* article 4, para 4.3 and 4.4 of the CCJA rules.

8. Commencement of arbitration

Under the CCJA rules, arbitration proceedings start when a party submits its request for arbitration to the CCJA. The interested party submits its request to the Secretary General of the CCJA. Under the IACAC rules, the arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.[67]

9. Arbitration proceedings

9.1 Seat

The seat of arbitration is decided by the arbitration agreement or by a subsequent agreement of the parties. [68] If the parties failed to choose the seat of arbitration, the CCJA, as the administrative body monitoring the arbitration process, may choose the seat before assigning the case to arbitrators. During proceedings, arbitrators may decide to relocate, after consultation with the parties. If parties do not agree to change the seat, the Court decides. If, given certain circumstances, it becomes impossible or difficult to keep the same seat, the Court may, at the request of the parties, decide to relocate.[69] Similar rules are found in article 13 of the IACAC rules and section R-10 0f the AAA rules.[70]

9.2 Confidentiality

According to article 14 of the CCJA rules, arbitration proceedings are confidential. Arbitrators, experts, counsels, any person involved in the arbitration process, and all the work of the Court pertaining to arbitration proceedings are also subject to confidentiality. However, this provision might conflict with article 49 of the Treaty on immunity and privileges. As arbitrators designated by the Court enjoy diplomatic immunity, they would not be punished if they did not respect their obligation of confidentiality.[71]

9.3 Initial meeting

Within sixty days after receiving the case, arbitrators have to organize an initial meeting with parties or their representatives with their counsels. Several points are discussed during this meeting:

- Referral of the case to the arbitral tribunal and list of different claims;
- Any agreement between parties on the seat of arbitration; the language to be used; the law applicable to the arbitration agreement, to the arbitration proceedings and to the dispute matter; confirmation on the existence of an arbitration agreement referring the dispute to the CCJA arbitration; answering statement from the respondent. Parties may

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[67] Article 3 para 2 of the IACAC rules

[68] "Seat of arbitration" is to be construed as the location of the arbitration proceedings.

[69] *See* article 13 of the CCJA rules on the seat of arbitration. on the fixing of the Locale where arbitration is to be held.

[70] These articles provide the rules on the fixing of the Locale where the arbitration is to be held.

[71] *See* Joseph Issa-Sayegh et al., OHADA, Traité et Actes uniformes commentés et annotés, at 176.

also grant arbitrators the right to decide on *amiable compositeur* or equity;

- Rules to apply to the arbitration procedure;
- A tentative schedule of the hearings;

Arbitrators take minutes of the meeting, which have to be signed by either the parties or their representative and the arbitrators.[72] Parties have to make sure the minutes are correctly recorded because arbitral hearings will be based on dispute matters contained in these minutes and the arbitrators mission's conformity will be appreciated based on the same minutes as well.[73]

Similar rules are provided in section R-20 of the AAA rules on a preliminary hearing. This option is however not mandatory and can be organized at the request of any party or at the discretion of the arbitrator or the AAA. The AAA does not provide for the recording of any minutes.

9.5 Applicable law

Parties are free to choose the law they want the arbitrator to apply to their dispute. If parties fail to indicate the applicable law, the arbitrator may apply the law indicated by the appropriate rules of private international law. In doing so, the arbitrator has to take into account the provisions of the contract and commerce usages.[74] If agreed upon by the parties in the arbitration agreement or subsequently, the arbitrator can also use equity or *amiable compositeur* to decide their dispute.[75]

9.6 Hearings

After examining the documents the parties have submitted to support their claims and arguments, the arbitrator hears the parties or their representatives in an adversarial procedure, at one party's request or at the arbitrator's discretion. If one of the parties does not show up although regularly convoked, the arbitrator may, after making sure that the party did receive the convocation and unless the party has good justification, may continue proceedings. The procedure will be deemed adversarial. The minutes of every hearing are submitted to the Secretary-General of the CCJA. The arbitrator may appoint one or several experts, determine their role, receive their report and hear them in front of the parties or their representatives. The arbitrator monitors those hearings, which must be adversarial. Unless otherwise agreed by parties, hearings are not open to third-parties.[76]

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[72] Details on the initial meeting are provided by article 15 of the CCJA rules.

[73] *See* Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 7.

[74] The arbitration procedure is found in article 16 of the CCJA rules.

[75] This is provided by article 17 para 3 of the CCJA rules. Similar provisions are found in article 30 of the IACAC rules.

[76] For provisions on arbitral hearings, see article 19 of the CCJA rules. Similar rules are provided in article 21 to 26 of the IACAC rules and sections R-22 to R-35 of the AAA rules.

9.7 New claims

Parties can submit new claims during the proceedings, unless the new claims are not in the scope of the arbitration agreement and the arbitrator determines that he should not authorize such an extension of his/her mission, in particular because of the delay with which it is submitted which can affect the other party's right to contradictory proceedings.[77]

9.7 Award upon settlement and order for the termination of the proceedings

During proceedings, parties can agree to settle the case. They may request the arbitrator to acknowledge the settlement in a *consent* award.[78] Although this is not a formal award, parties may want to have their agreement enacted in an award in order to benefit from the rules governing recognition and enforcement of awards.[79]

Under the IACAC rules if, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason other than an agreement between the parties, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.[80]

10. Arbitral award

10.1 Draft awards

Draft awards on the arbitral tribunal's jurisdiction and partial and final awards are reviewed by the CCJA before arbitrators can render them. The Court verifies that the awards comply with the arbitration rules and may suggest technical modifications of the awards.[81]This provision is inspired from article 27 of the ICC rules (International Chamber of Commerce arbitration rules 1998). Neither the IACAC nor the AAA have provided for such rules.

10.2 Signature and motivation

Unless otherwise agreed upon by parties and only if that agreement is allowed by the applicable law, awards must be motivated and signed by arbitrators to be valid. If the award is rendered by three arbitrators, it is signed by the majority, otherwise the president of the arbitral tribunal is the only one who renders the award and signs it. If the award is rendered by the majority, the minority arbitrator's failure to sign the award does not affect the validity of the

[77] New claims are treated in article 18 of the CCJA rules. Provisions on new claims are provided in article 17 of the IACAC rules and section R-6 of the AAA rules.

[78] See article 20 of the CCJA rules on consent award. Provisions on consent awards are found in article 31 para 1 of the IACAC rules and section R-44 of the AAA rules.

[79] *See* Joseph Issa-Sayegh et al., OHADA, Traité et Actes uniformes commentés et annotés, at 181.

[80] Article 31 para b of the IACAC rules.

[81] The court's review of the awards is provided in article 23 of the CCJA rules.

award.[82] Awards are reputed rendered at the seat of arbitration, on the date of their signature after the Court's review.[83]

The IACAC rules provide that the arbitral award shall be made in writing and shall be final and binding on the parties and subject to no appeal. The award shall be motivated, unless otherwise agreed upon by parties. The AAA rules have similar provisions but provide that the award will be motivated only if requested by parties prior to appointment of the arbitrator.[84]

10.6 Rectification and interpretation

Parties can request rectification of any technical error or interpretation of the award. They may also request a supplemental award regarding a claim that was submitted to the arbitrator. Similar rules are provided in the IACAC and the AAA rules.[85] The request should be made within forty-five days of the notification of the award to parties. If, for any reason, the Secretary-General of the CCJA cannot submit the request to the same arbitrator, the Court can transfer the request to a new arbitrator.[86]

11. Recognition, execution and recourse against the award

11.1. Recourse against the award

Three recourses are provided against an award based on the CCJA rules: action for nullity, revision, and tierce-opposition.

A. Action for nullity, revision and tierce-opposition

A party opposing enforcement of an award and its binding character may submit a request to the Court to declare the award null. The requesting party notifies the other party. The request has to be submitted within two months of the notification of the award. This recourse is only valid if in the arbitration agreement parties did not waive their right to use it.[87] Grounds for this recourse are the same provided for denial of *exequatur*.[88] If the CCJA denies recognition, it nullifies the award and can decide on the dispute if requested by parties. Otherwise the arbitration process is resumed by the most diligent party.[89]

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[82] *See* article 22, para 22.1 and 22.3 of the CCJA rules.

[83] See article 22, para 22.2 of the CCJA rules.

[84] See article 29 of the IACAC rules and section R-42 of the AAA rules.

[85] See articles 32, 33 and 34 of the IACAC rules and sections R-46 and R-53 of the AAA rules.

[86] This is provided in article 26 of the CCJA rules. However, these rules do not apply to an award based on the CCJA rules which is to be enforced outside an OHADA Member State. In this case, national law or any international convention on recognition and enforcement of foreign arbitral awards will be applied. This idea is developed in Joseph Issa-Sayegh et al., OHADA, Traité et Actes uniformes commentés et annotés, at 189.

[87] This recourse is provided by article 29 of the CCJA rules.

[88] These grounds for denial of recognition are found at article 30, para 30.6.

[89] Article 29, para 29.5. This recourse is similar to the action for nullity found in article 25 of the Uniform Act on Arbitration, as the Court *nullifies* the award if it does not recognize its validity. This idea is developed in Joseph Issa-Sayegh, OHADA, Traité et Actes uniformes commentés et annotés, at 187.

Revision may be requested against an arbitral award or a Court's decision deciding on the dispute as provided in article 29 of the CCJA rules.[90] Revision can only be requested by a party when there is a new fact which was unknown before the award was rendered but which is critical to the decision.[91]

Tierce-opposition is a recourse used by a third-party that was not invited to arbitration proceedings, but whose rights are affected by the award.[92] Like revision, the tierce-opposition can be requested against arbitral awards and Court's decisions when it has decided on the dispute according to article 29, para 29.5.[93]

11.2. Recognition and execution

Request for recognition or *exequatur* of the award can only be submitted to the CCJA and granted by the President of the Court or any other judge who has been assigned that role. The CCJA is the only one to have jurisdiction on recognition of awards rendered under its rules.[94] The award is given a certification for enforcement. This procedure is not contradictory.[95]

Recognition can only be denied on the following grounds:[96]

- There was no arbitration agreement or it was null or expired;
- In making the award, the arbitrator went beyond the powers conferred to him/her[97];
- The adversarial principle was not respected[98];
- The award is against international public policy.[99]

Once recognition is granted for an award, it is valid in every OHADA Member State. It is therefore not required of a party seeking enforcement of the award in any of the Member States to obtain its recognition in that Member State. It does not matter where the seat of arbitration was, as long as the award was made based on the CCJA rules. This is an original procedure

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[90] Article 29, para 29.5 provides that the Court, after denying recognition of an arbitral award, may decide on the dispute if requested by the parties.

[91] Boris Martor et al., Le Droit uniforme des affaires issu de l'OHADA, at 272 (Editions du Juris-classeur, 2004) (hereinafter Martor et al., Le Droit uniforme des affaires issu de l'OHADA).

[92] Joseph Issa-Sayegh et al., OHADA, Traité et Actes uniformes commentés et annotés, at 191.

[93] Article 33 of the CCJA rules.

[94] *See* Decision nº741 of the Cour d'appel d'Abidjan (Court of appeals of Abidjan) July 2nd, 2004. In its decision, the Court of appeals cancels a judgment rendered by the Court of Abidjan granting recognition of an arbitral award rendered under the CCJA rules and refers to article 25 of the OHADA Treaty which provides that the CCJA is the only court to have jurisdiction regarding recognition of awards rendered under its rules.

[95] Article 30, para 30.1 and 30.2.

[96] These grounds are found in article 30, para 30.6 of the CCJA rules.

[97] The arbitrator went beyond the powers that were conferred to him/her by parties in the arbitration agreement or decided on matters that were not covered by the arbitration agreement.

[98] One of the parties was not given the chance to challenge the other party's arguments.

[99] As explained in Winnie Ma (2005) *Public Policy in the judicial enforcement of arbitral awards: lessons for and from Australia*, SJD, ePublications@bond, Faculty of Law, international public policy comprises the fundamental rules of natural law, the principles of universal justice, *jus cogens* (or peremptory norms) in public international law, and the general principles of morality accepted by civilized nations. In this particular case, international public policy may refer to general principles of morality accepted by OHADA Member States.

created by OHADA. By instituting *res judicata* of arbitral awards under the CCJA rules in every Member State, OHADA has established a regional recognition of awards.[100] This is a great advantage for the party seeking enforcement of the award, in case the other party has assets in more than one OHADA Member State.[101]

The Secretary-General of the CCJA delivers to the party that requests it a certified copy of the award with a certification attesting that it has been recognized by the Court. The certification also attests that the award has become final, given that no opposition was filed against the award within fifteen days of its notification to parties, or the Court denied a request for denial of recognition.[102] Competent national courts in any Member State in which execution is sought, given the certification attesting recognition of the award by the CCJA, shall add a certification for execution on the award.[103]

The IACAC rules and the AAA rules do not provide provisions on recognition and execution of arbitral awards. However, countries parties to the Panama Convention apply the rules of the convention governing the recognition and execution of arbitral awards. The provisions of the New York Convention may complement the Panama Convention in countries parties to the New York Convention. Recognition and execution requests are submitted to the competent authority of the country where the award is to be executed. An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.[104]

Under the New York Convention, a party seeking recognition and execution of the award must provide, at the time of the application:

- The duly authenticated original award or a duly certified copy thereof;
- The original agreement or a duly certified copy thereof.
- If the said award or agreement is not made in an official language of the country in which the award is relied upon the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language.[105]

[100] *See* Jacques M'Bosso, Le fonctionnement du Centre d'Arbitrage CCJA et le déroulement de la procédure arbitrale, at 8.
[101] *See* Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 11.
[102] The procedure to obtain recognition of an award is found at article 31, para 31.1.
[103] Article 31, para 31.2. This provision establishes a uniform recognition mechanism for all OHADA Member States, which is monitored by the CCJA.
[104] This provision is found in article 4 of the Panama Convention. In case the award is appealable under the applicable law or procedural law, it acquires the force of a final judicial judgment only after confirmation by the appeal jurisdiction.
[105] This provision is found in article IV of the New York Convention.

The grounds for a denial of recognition under the Panama Convention are as follow:

- The parties to the agreement were subject to some incapacity under the applicable law or the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made;

- The party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his/her defense;

- The decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed;

- The constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place;

- That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

- The subject of the dispute cannot be settled by arbitration under the law of that State;

- The recognition or execution of the decision would be contrary to the public policy ("order public") of that State.[106]

[106] These grounds are provided in article 5 of the Panama Convention. The same provisions are found in article V of the New York Convention.

D. Conclusion

This comparative study of the OHADA CCJA and the IACAC arbitration regimes - both being institutions monitoring commercial arbitration within regional organizations - was aimed at giving an example of arbitration rules produced after harmonisation and reform efforts at a regional level in Africa and America. The specific goal was to identify any advantages provided by either regime, which can help improve regional and international commercial arbitration. This conclusion will focus on the findings of this paper and highlight any advantages that these regimes provide.

1. International vs regional arbitration institution

The scope of application of the CCJA rules is limited to matters connected to the OHADA area and therefore prevents parties located in different parts of the world with no connection with OHADA to benefit from the CCJA rules. This is understandable, as the primary goal of the drafters of the OHADA legislation was to provide investors and business entities with modern and competitive norms within the area. However, after improving its rules and gaining the necessary experience, it will be beneficial for the CCJA to open its arbitration forum to parties from all parts of the world and provide its expertise as an international commercial arbitration institution.

2. The different set of arbitration rules provided by the AAA

The AAA provides with an original distinction between its rules of arbitration. Different sets of rules are provided based on the amount of money claimed by parties. This interesting distinction allows the AAA to provide faster procedures for small amounts and more adjusted procedures for bigger amounts. This distinction could be applied to the CCJA rules as it would accelerate the procedures and provide for shorter time frames for smaller cases.

3. Number of arbitrators

Whereas the CCJA rules have provided that either one or three arbitrators only can be appointed, the IACAC and the AAA have not limited the number of arbitrators and have left it to parties to decide the number of arbitrators. The latter institution have provided for either one or three arbitrators only in case parties did not provide for the number of arbitrators to be appointed. The IACAC and AAA approaches may be useful in cases with multiple claimants and defendants which require more than three arbitrators, which is the limit for the CCJA.

4. Immunity and privileges of CCJA arbitrators

The immunity and privileges of CCJA arbitrators, although it seems inappropriate as it may cause arbitrators to make mistakes on purpose knowing that they are protected by their immunity, may be a very important provision. It may be appropriate given the particular situation of a region where arbitrators may face local and national pressures and need these immunity and privileges to ensure their independence and impartiality.

5. Dual role of the CCJA

Under the CCJA rules the Court has a dual role: it operates as an administrative institution monitoring the arbitration process and also acts as a Court in some instances. As a jurisdiction it may inter alia review the award drafts before the arbitral tribunal renders its decision and verify that the awards comply with the CCJA rules; after the awards are rendered, the Court is also competent for recognition and enforcement of the same awards in OHADA Member States. By conferring this role to the CCJA, OHADA has therefore created a regional recognition of arbitral awards in the area, as parties are not required to seek recognition and enforcement of the awards in each Member State. This is an original procedure instituted by OHADA, which eases the enforcement of arbitral awards.

6. The IACAC structure

The IACAC, with its several National Sections, provides an interesting structure which allows promoting and monitoring of arbitration in the OAS Member States. The meetings of the National Sections at least once every two years allows the Commission to monitor the development of arbitration in each Member State and to take all appropriate measures to improve the Inter-American commercial arbitration system.[107]

This model could benefit the CCJA which could establish a network with arbitral institutions in each OHADA Member State in order to monitor the development of arbitration within the OHADA area. Meetings of delegates from each Member State's main arbitral institution would be a good forum to discuss the application of arbitration rules under the OHADA Uniform Act on Arbitration, the rules and procedures of the national arbitral institutions and any other national or international arbitration rules that apply in each Member State. This would allow the adoption of measures necessary to promote and improve commercial arbitration within the OHADA area. The CCJA could use its dual role as a court and an arbitral institution to ensure a good partnership between national courts and arbitration in order to maintain an efficient arbitration system and smooth recognition and enforcement of arbitral awards within the OHADA area.

[107] Rafael Eyzaguirre, Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission, at 289.