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An Independent Law Firm based in Cameroon

**FOCUS ON MEDIATION:
THE MAJOR INNOVATION
OF OHADA LAW
CONCERNING THE
AMICABLE SETTLEMENT
OF DISPUTES**

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The Council of Ministers of the Organization for the Harmonization of African Business Law (“**OHADA**”) adopted, on 23 and 24 November 2017, three new texts of importance for the practice of arbitration and the settlement of disputes in the OHADA zone. Concerning the practice of arbitration, the Uniform Act on Arbitration and the Arbitration Rules of the Common Court of Justice and Arbitration have been amended. The Council has also adopted a brand-new Uniform Act on Mediation (the “**UAM**”), entering into force on 15 March 2018, which will be the only reform examined under this article. We have devoted a special focus on the two reforms related to the practice of arbitration, which are available on our website.

As a preliminary note, it is worth recalling how mediation, as a new Alternative Dispute Resolution (“**ADR**”), is different from arbitration.

Arbitration is a private justice by which the parties appoint one or more arbitrators to settle their dispute; the arbitrator deciding in accordance with the principles of law. His role is similar to that of a State judge in the sense that the award made by him has the authority of *res judicata* and his solution is binding upon the parties.

Mediation, on the other hand, is an informal procedure facilitated by a mediator whose function is to assist the parties to negotiate in the dispute between them, in order to reach an agreement. He makes no decision and the parties are not bound by the proposals made by him during the negotiation.

In a nutshell, the main difference between arbitration and mediation lies in the fact that arbitration leads to a writ of execution in the form of an arbitral award, whereas mediation leads to an agreement between the parties which does not constitute a writ of execution. The execution of the mediation agreement is therefore left to the discretion of the parties; the latter can appeal to the judge to request the apposition of the executory formula on the agreement.

Having made this reminder, the question that arises is to know why the OHADA legislator has adopted a specific text for mediation in addition to those relating to arbitration. To answer this question, we will present below the reform of the UAM in three points:

- the importance of the adoption of the UAM (1),
- the codification of mediation in OHADA law (2),
- and the mediation proceedings in accordance with the provisions of the UAM (3).

1. THE IMPORTANCE OF THE ADOPTION OF THE UAM

Despite the absence of a specific codification by the OHADA legislator, it is clear that mediation had already entered the OHADA zone. Indeed, in recent years, mediation centres have sprung up in many Member States of the OHADA zone, notably:

- the Arbitration, Mediation and Conciliation Centre of Benin;
 - the National Centre for Arbitration, Conciliation and Mediation of the Democratic Republic of Congo;
 - the Ivory Coast Arbitration Centre (“**CACI**”);
 - the Ouagadougou Arbitration, Mediation and Conciliation Centre (“**CAMC-O**”);
 - and the Permanent Centre for Arbitration and Mediation of Cameroon (“**CPAM**”),
- just to mention a few.

According to the statistics published by CAMC-O, it appears that since its creation in 2007 until May 2013, it has received nearly 184 cases within the context of mediation¹. These encouraging figures show that investors are increasingly inclined to resort to mediation in the OHADA zone despite the absence of legislation.

Nevertheless, the absence of codification did not favour the popularisation of mediation in the sense that, in order to make use of it, it was mandatory to be attached to a mediation centre with rules which would serve as a roadmap for the conduct of the procedure. The parties did not have the opportunity to conduct their mediation on an *ad hoc* basis, meaning outside of any mediation centre. In addition, the procedure provided for by the rules of the centres was not necessarily at the convenience of the parties.

The adoption of the UAM by the OHADA legislator fills this gap since this new act allows parties who do not want to be attached to a mediation centre, to be able to conduct their mediation in accordance with the provisions of the UAM. The parties also have the possibility to determine themselves the modalities of the mediation and in particular, the course of proceedings, its duration, the related expenses and the delimitation of the intervention of the mediator. Thus, we can only welcome the initiative of the OHADA legislator, who by codifying mediation has allowed investors to have a more flexible ADR than arbitration, and contributes to the attractiveness of the OHADA zone.

2. THE CODIFICATION OF MEDIATION IN OHADA LAW

It can be assessed in three points: its scope (2.1), the difference between mediation and related notions (2.2), and the different modes of mediation (2.3).

2.1. The scope of mediation

The UAM only applies to areas covered by the OHADA treaty, namely commercial law and company law.

Mediation does not apply to cases in which a judge or arbitrator, during a judicial or arbitral proceeding respectively, attempts to facilitate an amicable settlement directly with the parties².

2.2. The notion of mediation

Mediation is defined as any process, whatever be its appellation, in which the parties request a third party to assist them in reaching an amicable settlement of a dispute, a conflicting relationship or a disagreement arising from a legal relationship, a contractual or anything else or related to such a relationship, involving natural or legal persons, including public entities or States³. This clear definition of mediation distinguishes

¹ <http://revue.ersuma.org/no-4-septembre-2014/doctrine/article/mediation-et-ohada>

² Article 2 of the UAM. ³ Article 1 (a) of the UAM.

it from other related notions. Note that the word “third party” in this definition refers to the mediator who is asked to mediate⁴.

The notions that are close and can be confused with the notion of mediation are numerous. For example, we have the negotiation, which is a process of discussion between parties in order to reach an agreement on a matter. The negotiator is different from the mediator in the sense that he is a party to the negotiation, meanwhile the mediator is an impartial and neutral third party to the mediation.

We also have conciliation that differs from mediation in the sense that mediation requires the intervention of a third party who intervenes more actively in the search for a solution to the dispute. According to Professor Henri Touzard⁵, while the conciliator merely facilitates relations and communications between the parties, the mediator may intervene in the discussion, make suggestions and proposals or even make recommendations in order to reach an agreement. However, as in the context of conciliation, the third party mediator is only a catalyst in the search for a solution to the conflict between the parties. He has no power to settle the dispute or impose a solution on the parties. André-Jean Arnaud perfectly summarised these two distinctive elements when he said that mediation is only a form of conciliation operated by a third party, which is only a form of conciliation *lato sensu*, and that the mediator is only a particularly active conciliator⁶.

Thus, mediation has a well-defined legal regime that should in no way be confused with similar notions despite their close similarity.

2.3. The different modes of mediation

Mediation takes two main forms under the UAM: judicial mediation and conventional mediation.

Judicial mediation is that which occurs at the request or invitation of a State court⁷. In case the UAM does not specify jurisdictional criteria of the State court, there is every reason to believe that all the jurisdictions of the OHADA Member States would be able to request or invite the parties to a dispute to implement a mediation.

Conventional mediation is the one that is implemented directly by the parties.

3. MEDIATION PROCEEDINGS

3.1. The request for mediation

Before the adoption of the UAM, the mediation procedure was conducted according to the terms and conditions set by the rules of each mediation centre. For some, such as CACI and CPAM, the request for mediation is subject to the production of certain documents related to the procedure and the payment of related costs. The UAM provides that the mediation proceedings are triggered by the most diligent party, following the implementation of a mediation agreement written or not, without payment of any fees⁸. In the absence of an agreement, the request for mediation takes the form of a written invitation sent to the other party. In the event of non-acceptance by the other party within 15 days or upon the expiration of any other time specified in the letter of invitation, the requesting party may consider the absence of response as a refusal of the invitation to mediation. In the event of an acceptance, the parties shall meet to proceed with the details of

⁴ Article 1 (b) of the UAM.

⁵ H. TOUZARD, *Propositions visant à améliorer l'efficacité de la médiation dans les conflits du travail*, Dr. social, 1977, p. 87, n° 4.

⁶ A.-J. ARNAUD, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, p. 13.

⁷ Article 1 of the UAM. ⁸ Article 4 of the UAM.

mediation proceedings, including the appointment of the mediator(s), the delimitation of their intervention, the determination of the duration of the procedure and generally the conduct of mediation.

3.2. The appointment of a mediator

The parties freely choose the mediator(s) by mutual agreement. The UAM provides that the parties may be assisted by a “nominating authority”; this authority may be any natural or legal person, including a centre or an institution offering mediation services. The OHADA legislator therefore leaves the parties to freely organize the process of appointing the mediator.

3.2.1.

The mediator’s obligation of independence and impartiality

The mediator must declare in writing his independence and impartiality as well as his availability to ensure the mediation proceedings⁹. These criteria are essential because they ensure that the mediator will objectively lead the mediation.

In the event of new circumstances likely to raise legitimate doubts about his independence and impartiality, the mediator is obliged to inform the parties of their right to oppose the pursuit of his mission. If one of the parties chooses to implement this right of opposition, the mediator’s mission ends.

3.3. The conduct of the mediation proceedings

The mediator and any mediation centre established in a Member State must adhere to the principles guaranteeing the respect of the will of the parties, the moral integrity, the independence and impartiality of the mediator, the confidentiality and the effectiveness of the mediation process¹⁰.

The parties are free to agree, including by reference to the rules of a mediation centre, on the manner in which the mediation is to be conducted, contrarily to the rules of the centres which provide for the procedure to be followed.

In addition, the UAM provides for the suspension of time-limit for an action initiated before a State court or arbitral tribunal, in order to allow the parties to resort to mediation. If the parties reach an agreement, they may withdraw from the original proceedings or, if not, continue the procedure.

In general, the mediator performs his or her duties diligently and, in the conduct of the mediation, gives fair treatment to the parties taking into account the circumstances of the case.

The information provided during the mediation proceedings is confidential and may only be disclosed in the cases provided for by law or for the purposes of implementing or enforcing the agreement resulting from the mediation¹¹.

3.4. The end of the mediation proceedings

After various exchanges and receipt of the report of expertise recommended by the mediator if need be, the mediation ends in the best case by a written agreement signed by all the parties and by the mediator if the

⁹ Article 6 of the UAM. ¹⁰ Article 8 of the UAM. ¹¹ Article 10 of the UAM.

parties so wish. This agreement will have the value of the agreed matter, that is to say that it will produce effects only between the parties as a new contract which obliges them.

In order to guarantee the compulsory execution of the mediation agreement and to confer on it the authority of the matter transacted, the UAM provides that the parties will have the choice between (i) the submission of the agreement in the minutes of a notary public for the authentication of writings and signatures and issuance of an enforceable copy, or (ii) the request for the approval of the agreement or *exequatur* before the competent State jurisdiction¹². The homologation order is issued by the judge, after verifying the authenticity of the mediation agreement and its compliance with public order, within a maximum deadline of 15 working days from the date of the filing of the request; otherwise, the homologation or *exequatur* is deemed to have been acquired (the “**Automatic Homologation**”).

It should be noted that, the rules of certain centres such as the CACI do not send the parties back to the State judge so that the latter confers on the agreement the authority of *res judicata* with compulsory execution. In our view, such an absence of a referral to a State judge does not alert the parties on the necessity to require the apposition of the executory formula on their agreement in order to avail themselves of any right deriving therefrom. Hence, this precision being made under the present UAM is therefore commendable on this point.

Finally, it should also be noted that the parties have two forms of appeals, namely (i) an appeal against the Automatic Homologation before the Common Court of Justice and Arbitration (“**CCJA**”) if one of the parties considers that the agreement to mediation is not in compliance with public policy and (ii) an appeal before the CCJA in case of a refusal of the homologation or the *exequatur* by the judge¹³. The decision of the judge granting homologation or *exequatur* is not subject to any appeal.

The rules of the mediation centres do not provide for the execution procedure of the agreements reached between the parties who must go before the court of competent jurisdiction to have the executory formula apposed on such agreements. In case of an appeal against a mediation agreement, the parties are subject to the rules of ordinary law.

In conclusion, the OHADA legislator has once again improved the business climate in the OHADA zone through the adoption of the UAM as a new ADR, in order to allow economic operators to lead with flexibility and control the management of their disputes.

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¹²Article 16 of the UAM. ¹³ Article 16 of the UAM.

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